



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 567 OF 2015
BETWEEN
CHRISTIAN SAMBA OBATH CLAIMANT
VERSUS
FOSSIL FUELS LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munyao, Muthama & Kashindi Advocates for the Claimant

Federation of Kenya Employers for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 7th August 2015. He states the Respondent is a limited liability Company, dealing in sale and distribution of petroleum products. He was employed by the Respondent as an Assistant, on 4th May 2009, on a monthly salary of Kshs. 25,000. He rose to become Operations Manager, charged with the responsibility of maintaining stocks, and ensuring smooth delivery of products to Respondent's Branches. His contract was terminated on 15th March 2015 after internal audit carried out indicated there were certain discrepancies with regard to Customer Accounts at the Eldoret Branch. The Claimant feels termination was unfair and unlawful, and prays for the following orders against the Respondent:-

- a) A declaration that the Respondent's withholding of the Claimant's salary for the months of March and April 2015 infringes the Claimant's constitutional right to fair remuneration.
- b) Exemplary damages for breach of Claimant's right to fair remuneration.
- c) A declaration that withholding of the said salary amounted to an offence under Section 17 of the Employment Act 2007.
- d) Punitive damages for withholding of the salary.

e) A declaration that termination was unlawful.

f) Terminal dues totaling Kshs. 1,582,367 made up as follows: 1 month salary in lieu of notice [balance] at Kshs. 8,285; 12 months' salary in compensation for unfair termination at Kshs. 762,300; severance pay at 1 month salary for every year completed in service at Kshs. 294,025; accrued annual leave in 2015 at Kshs. 10,992; unpaid house allowance from May 2009 to August 2014 at Kshs. 412,200; reduction in basic salary from September 2014 to May 2015 at Kshs. 74,565; airtime allowance for April 2015 and May 2015 at Kshs. 10,000; and fuel allowance for April and May 2015.

g) Certificate of Service to issue.

h) Costs and Interest.

2. The Respondent filed its Statement of Response on the 16th September 2015. It concedes to have employed the Claimant as an Assistant, and later as the Operations Manager. He was charged with ensuring delivery of products to the Respondent's Branches in Nairobi and Eldoret. On or about 15th March 2015, it was revealed in an audit carried out for the Respondent, that some Customers at the Eldoret Branch had discrepancies in their accounts with the Respondent, to the tune of Kshs. 1,465,000. The Claimant was asked to show cause why disciplinary action should not be taken against him. He made his explanation; he was taken through a disciplinary hearing; and in the end had his contract terminated. He received notice pay. Termination was on valid ground and carried out fairly. The Claim for compensation is without merit. There was no redundancy; severance pay is not claimable. The Claimant took all his annual leave days. Salary paid was gross, which comprised the housing element. The salary paid was over and above the statutory minimum, and the Claimant cannot claim his salary was reduced. Airtime allowance was paid as and when airtime was used. It was not an entitlement. Fuel allowance was paid upon presentation of receipt of fuel consumed. It was not an entitlement. The Respondent prays the Court to dismiss the Claim, with costs to the Respondent.

3. Parties recorded a consent order on the 16th March 2016, that the Claim be considered and the decision of the Court made on the strength of their Pleadings, Documents, Witness Statements and Submissions. They confirmed the filing of the Submissions on the 28th July 2016, when the Judgment of the Court was reserved for 18th November 2016.

CLAIMANT'S POSITION

4. The Claimant states he was called by the Financial Controller and asked to explain the discrepancies found at Eldoret. The Claimant was perplexed as he was not the Accountant. The Financial Controller told the Claimant one of the Accounts in the name KOILEL AGROVET, had a debt of Kshs. 800,000. No cash deposit had been made on this Account for the whole of the year 2004. The Supervisor at Eldoret was not able to explain the debt.

5. The Claimant was instructed by Management to fly to Eldoret and investigate. While there, he was called by his Wife on 27th March 2015, and told by his Wife that she had been refused by the Respondent's Management, to remove the Claimant's personal car from where it was parked at the workplace. The Claimant called the Managing Director who confirmed he had given instructions that the Claimant's car should not be removed from the workplace, until the Claimant recovered all the money that was unaccounted for at Eldoret.

6. The Claimant was instructed to extend his stay at Eldoret, to enable him complete investigations and prepare a comprehensive report. He found that 2 Employees who were Branch In-charge L.P.G Sales and Records, and the Branch Accountant had colluded to steal Kshs. 1,465,000 from the Respondent. The Claimant prepared his report and returned to Mombasa where he met the Managing Director.

7. The Managing Director insisted the Claimant must recover all the money which was lost. The Financial

Controller was instructed by the Managing Director to withhold the Claimant's March 2015 salary. The Claimant continued to report to work, but was not assigned any duty. The implicated Employees were summoned to Mombasa and handed over to the Criminal Investigation Department. Subsequently the 2 Employees gave a written undertaking to pay back to the Respondent what was lost. They made an initial bank deposit of Kshs. 300,000 in favour of the Respondent on 20th April 2015. The Respondent continued to withhold the Respondent's salary. His salary for April 2015 was withheld.

8. The Claimant instructed his Advocates to demand for payment of his March and April 2015. The Respondent issued the Claimant with the letter to show cause after this demand. He replied to the letter to show cause. A disciplinary hearing followed. Despite the Claimant having shown he was not involved in the stealing of his Employer's money at Eldoret, the Employer decided to terminate his contract of employment.

Claimant's Submissions

9. The Claimant submits his salary was withheld as a form of disciplinary sanction against him. When this is done, it adds on to the gravity of procedural irregularity, as concluded by the Court in the cases of **David Wanjau Muhoro v. Ol Pejeta Ranching Limited [2014] e-KLR** and **Peterson Ndung'u & 5 Others v. Kenya Power and Lighting Company Limited [2014] e-KLR**.

10. The Managing Director prejudged the Claimant. Even as the Claimant was being sent to Eldoret, the Claimant's personal vehicle was unreasonably detained by the Employer. The Claimant was denied his salary, and stripped of his duties, and would reasonably construe Respondent's behaviour as resulting in constructive dismissal.

11. The notice to show cause issued only after the Claimant had made a demand for arrears of salary. He was required to answer the notice in the space of 1 day. The reasons given in justifying dismissal did not fall within his job description, and the decision was therefore faulty, as held in **Industrial Court at Mombasa Cause Number 321 of 2012 between Kenya Plantations and Agricultural Workers Union v. Kilifi Plantations Limited**. An Employee cannot be held liable for failure of a function which was not part of his job description.

12. Article 41 [1] and [2] [a] of the Constitution entitles an Employee to fair remuneration. Section 17 [10] [a] and [b] of the Employment Act 2007 makes it an offence for a person to willfully fail to make payment or tender the wages earned or payable to an Employee. Such an Employer commits an offence and is liable on conviction to pay a fine not exceeding Kshs. 100,000 or to imprisonment for a term not exceeding 2 years, or both. The Claimant therefore prays the Court to grant the declaratory orders on withholding of salary. The Claimant submits the Managing Director of the Respondent should be sentenced to 2 years in prison, and be fined Kshs. 100,000. The Court is invited to make a precedent on this sanction.

13. Compensation for unfair termination is merited under Section 49 of the Employment Act. Notice pay was granted on the basis of net, rather than gross pay. The Claimant submits he merits the balance of notice pay. House allowance was not shown to be consolidated under Section 31 of the Employment Act. The salary of an Employee cannot be reduced to his detriment as held in **Fredrick Ouma v. Spetre International Limited [2013] e-KLR**. The Claimant submits he is entitled to the arrears of salary occasioned through the irregular pay cut. Certificate of Service is granted to him by virtue of Section 51 of the Employment Act 2007.

RESPONDENT'S POSITION

14. The Respondent's position is that in answering the notice to show cause why disciplinary action should not issue against him, the Claimant conceded he had overall responsibility to ensure smooth business operations. This role included overseeing sale of products. He did not perform his role diligently. He was invited to a disciplinary hearing. Upon being heard, the Claimant was found guilty and his contract terminated. He was paid his salary up to 15th May 2015; salary in lieu of notice; and annual leave

days.

15. He is not entitled to further payment of notice pay. Compensation is not payable as the Respondent had valid reason in terminating, and followed fair procedure. Severance pay based on 6 years of service is misconceived, termination having not been by way of redundancy. The Claimant utilized his annual leave days in 2015. Salary paid to him included house allowance. He was paid over and above the statutory minimum requirement and cannot claim his salary was reduced. Airtime was payable when incurred. Fuel allowance was paid upon presentation of receipts.

Respondent's Submissions

16. The Respondent submits that the Claimant was responsible in ensuring staff in Respondent's Branches discharged their roles as expected. He was asked to explain the audit discrepancies discovered at Eldoret Branch. The buck stopped with him. He was vicariously liable for the actions of his juniors. The Respondent had valid reason to terminate the Claimant's contract. The Claimant attempted to shift blame to the Accounts Department. The buck stopped with him. He was heard and a decision made to terminate. The Respondent submits the prayers sought have no merit. The declaratory prayer on unpaid March and May salary 2015 was introduced in the Claimant's Submissions. It was not in the Statement of Claim; the Respondent prays the Court to disregard the new prayer and dismiss the whole Claim with costs to the Respondent.

The Court Finds:-

17. It is accepted the Claimant was employed by the Respondent on 4th May 2009, initially as an Assistant, on a monthly salary of Kshs. 25,000. He was elevated to become the Operations Manager earning Kshs. 63,525 on exit. His contract was terminated by the Respondent on 16th May 2015.

18. The Respondent issued the Claimant with a letter to show cause why disciplinary action should not issue against him. The following accusations were leveled against the Claimant:-

- i. Failing to follow up on LPG sales in Eldoret, occasioning the Respondent huge losses through misappropriation of funds by Employees under the supervision of the Claimant.
- ii. Failing to ensure accountability of the salesperson under the Claimant's supervision on account of monies received from Customers at LPG in Eldoret.
- iii. Failing to notify the Managing Director on non-remittance of funds by salesperson on account of the sales of LPG released from the stores.

19. The Claimant wrote on the 14th May 2015 explaining that:-

- i. He had never received a warning regarding his performance from the Respondent
- ii. His role as Operations Manager involved sales, procurement and storage of products to the extent of timely supplies and stocks management of product to the Customer. He ensured there were adequate stocks at all times. His docket did not include follow-up of payments at Eldoret.
- iii. The mandate of sale and remitting of all payments at Eldoret rested with the LPG Supervisor and the Regional Salesperson.
- iv. Accountants at the Head Office had the responsibility to ensure deliveries from Eldoret were received and all Customers' payments posted. It was for the Internal Auditor and the Finance Controller to advise the Managing Director on any non-payments.
- v. Lastly, the Eldoret LPG Supervisor and Head of Accounts had been identified as the Officers who misappropriated the Respondent's money; they had accepted to pay back the money; they had

paid back an initial deposit of Kshs. 300,000; they had been reported to the CID Office in Mombasa for criminal investigation; and had written statements clearing the Claimant's name.

20. The explanation was not accepted. It seems the Respondent was convinced the Claimant should face a disciplinary hearing even before he had given a reply to the letter to show cause. This is shown through the letter to show cause, which is dated 13th May 2015. It required the Claimant to show cause, and attend a disciplinary hearing on the following day, 14th May 2015.

21. Disciplinary hearing took place on 14th May 2015. The Claimant in main repeated what he had said in his reply to the letter to show Cause. No fresh evidence is recorded in the minutes as having been adduced at the hearing. It is indicated that the Members questioned the Claimant. The record does not show which Member asked what question. In the end the Committee headed by Human Resource Manager Salim Joha, concluded that misappropriation at Eldoret took place, and was perpetrated by Eldoret Supervisor Ms. Margaret Bazungu. The Claimant failed to notify the Managing Director about the non-payment of funds. Though the Claimant was employed as the Operations Manager, he had a duty to follow up on payments. He failed to do so. He was the main contact person in Eldoret. Recommendation: *'Mr. Samba be terminated and all his dues be paid as stipulated under his employment contract.'*

22. On 16th May 2015, the Claimant's contract was terminated. He was offered salary up to 15th May 2015; 1 month salary in lieu of notice; 4 days of pending annual leave- all less tax and any monies owed to the Respondent.

23. Did the Respondent show valid reasons in terminating the Claimant's contract, and was the decision arrived at fairly?

24. To have a fair answer to the first question, involves examining the Claimant's role in relation to the affairs of the Eldoret Outlet. He was the Operations Manager. He stated throughout in explaining and defending himself, that his job description did not involve pursuit of payments on sales, at Eldoret. He stated this role was exercised by the Supervisor at Eldoret, in conjunction with the Accounts Office at Eldoret and at the Head Office. The Accounts Office at the Head Office would report to the Financial Controller. The Financial Controller would in turn report to the Managing Director.

25. The Respondent did not avail to the Court Claimant's job description. It is not shown in his contract as the Operations Manager. It is not captured in any organogram, made available to the Court. The Disciplinary Committee appears to have conceded there was no express job description placing the financial oversight role of the Eldoret Outlet on the shoulder of the Claimant. Finding under bullet 2, was that: *though Mr. Samba was employed as Operations Manager in charge of daily operations... he had a duty to follow up on payments.* The use of the word 'though' in this finding suggests the Disciplinary Panel was in doubt, as to correctness of attributing the finance role at Eldoret to the Claimant. It was not shown from which employment instrument, the duty to follow up on payments, flowed from. The Court accepts the decision in ***Kenya Plantations and Agricultural Workers Union v. Kilifi Plantations Limited*** cited above, that in the absence of a clearly given job description, an Employee cannot be held liable for failure of a function which was not shown to comprise his job description.

26. The Respondent sent the Claimant to Eldoret to unearth the anatomy of the sleaze at Eldoret. The Managing Director appeared to think the Claimant was involved in loss of the Respondent's money. The Claimant's car was detained even as the Claimant was on the flight to Eldoret to carry out investigation. The Managing Director, strangely, denied Claimant's wife access to the Claimant's car parked at the workplace. The Managing Director caused the withholding of the Claimant's salary of 2 months, even as the Claimant was working in Eldoret and at the Head Office, preparing reports and taking statements from the Officers at Eldoret. This approach against the Claimant and his family was beyond the pale.

27. The Claimant obtained confessions from Margaret Bazungu In-Charge of LPG Sales at Eldoret, Accountant Rophas Ngwai, conceding they misappropriated Respondent's money. They offered to repay, and even made bank deposits to that end. They were reported to the CID for criminal action. The Court has not found any evidence connecting the 2 Officers at Eldoret to the Claimant, in their fraudulent

activities against the Respondent. There is similarly no evidence which would suggest the Claimant was in supervisory role over the staff at Eldoret. It was not shown the activities complained of, fell directly within his operations docket overall. It was not clear to the Court why the Respondent would send the Claimant to Eldoret to investigate an employment offence against the Respondent, and then hold the Claimant responsible alongside the real culprits, of this employment offence.

28. The Court is satisfied the accusations against the Claimant, contained in the letter to show cause, assuming these were the same accusations the Claimant was faced with on disciplinary hearing, were not established. They were not valid termination grounds. Termination was not based on valid reason as required under Section 43 and 45 of the Employment Act 2007.

29. The procedure was faulty. The letter to show cause as seen above, issued complete with a date for the disciplinary hearing. There was no room for the Respondent to consider the explanation given by the Claimant in answer to the letter to show cause. The Claimant was prejudged. The hearing which took place was not objective, but a rerun of the show-cause process. The Claimant was asked to repeat his explanation and a decision promptly made. Notice to show cause is a procedure that must be taken seriously and looked at by the Employer independently of the process of disciplinary hearing. The need for proceeding with the disciplinary hearing must be weighed carefully and objectively, in light of the response made to the letter to show cause. These processes are not mere formalities, one following the other; there must be some justification in rejecting reply given to the letter to show cause. The setting down the matter for hearing, even before the Employee has shown cause, raises doubt on the seriousness of the Employer in considering what the Employee has said, in showing cause. In this case, the Court finds procedure was faulty and unfair.

30. Besides, the Claimant was not given adequate time to prepare for the hearing. The letter to show cause is dated 13th May 2015. He was to respond by 14th May 2015. Hearing was set for the same day at 10.30 a.m. The Court again agrees with the submission of the Claimant that a fair disciplinary hearing must afford the Employee a reasonable time to prepare, as held in ***David Wanjau Muhoro v. Ol Pejeta Ranching Limited***. The time given to the Claimant was clearly inadequate. It is not lost on the Court that the Claimant's salary was withheld and his car detained by the Employer, in the period the disciplinary process unfolded. The Court has in the past held that withholding of an Employee's salary during disciplinary processes, is punitive, and creates a fertile seedbed for unfair termination. The process and the outcome were rushed and seem to have been predetermined. Termination was unfair on account of both procedural and substantive grounds.

31. *The Respondent shall pay to the Claimant, the equivalent of 12 months' salary in compensation for unfair termination, at Kshs. 762,300.*

32. The Claimant acknowledges he received 1 month basic salary in lieu of notice. His grouse is that he ought to have been paid notice based on the gross salary, not the basic. He claims the balance of 8,285.

33. His contract of employment did not address the issue of notice pay. Section 36 of the Employment Act refers to notice pay as '*remuneration which would have been earned, by that other Party.*' Section 2 of the Employment Act defines '*remuneration*' to mean '*the total value of all payments in money or kind, made or owing to an Employee, arising from the employment of that Employee.*' Notice pay due to the Claimant should therefore have been pegged on the remuneration payable to him in a month, which would include basic pay and other invariable allowances. It should have been based on the gross salary as claimed, representing the monthly remuneration as intended under Section 36 of the Employment Act. There was no reason why the Respondent opted to pay the Claimant 1 month basic salary as notice pay. ***The Claimant is granted the balance of notice pay at Kshs. 8,285.***

34. There was no material placed before the Court, to support the prayer for severance pay of Kshs. 294,025. Severance pay as submitted by the Respondent is paid on redundancy, under Section 40 of the Employment Act. The Claimant did not leave employment on redundancy.

35. The Claimant's pay slip for the months of May 2015, tagged appendix 6 in the Claimant's Bundle of

Documents, shows he was paid Kshs. 6,353 in annual leave pay. The Claimant prays for pay for pending annual leave days for the year 2015. He did not refer to annual leave pay, in his Closing Submissions. The Court finds the prayer for annual leave pay to have no merit.

36. Claimant's pay slip did not specifically include house allowance. The pay slip for August 2014 shows the basic salary at Kshs. 63,525. From September 2014 on, basic salary is shown as Kshs. 55, 240. The difference of Kshs. 8,285 is shown to be the house allowance. The Claimant submits he was denied house allowance for the period it is not indicated on the pay slips. His basic salary was reduced for the period house allowance was introduced to his pay slips. The Respondent submits the Claimant was paid a consolidated salary, which comprised the housing element.

37. The Court addressed the law relating to house allowance, in the *Joshua Lihanda v. Outdoor Occasions Limited [2014] e-KLR* and *KUVEACO v. NPC-CITAM [2015] e-KLR* [both cited in the Claimant's Submissions]. It was held that Section 31 of the Employment Act requires the Employer to at all times, at his own expense, provide his Employee with reasonable housing accommodation, at or near the place of work. Alternatively, the Employer shall pay to the Employee sufficient sum as rent, in addition to the wages or salary of the Employee. This does not apply to an Employee, whose contract of employment contains a provision which consolidates as part of the basic wage or salary on the Employee, an element intended to be used by the Employee as rent. It does not apply to an Employee who is covered by a Collective Agreement which consolidates an Employee's wage or salary.

38. It was for the Respondent to show to the Court that the amount of Kshs. 63,525 was at all times, a consolidated salary. This was not shown. There was no provision in the Claimant's contract of employment, showing this amount included the housing element. The pay slips prior to September 2014, clearly gave the sum of Kshs. 63,525 as the basic salary. Basic salary is what is paid to an Employee without any allowances.

39. Essentially what the Respondent did was to reduce the Claimant's basic salary from September 2014, and adopt the sum reduced as the house allowance. The Respondent changed the remuneration of the Claimant without notice, and without consulting the Claimant contrary to Section 13 of the Employment Act. This reduction in the Claimant's salary cannot be justified on the ground that he was in any case, receiving the statutory minimum wage. It was a fundamental change in the Claimant's contract, conceived and implemented by the Respondent unilaterally, and contrary to the law.

40. Regulation 4 of the Regulation of Wages [General] Orders sets house allowance at a minimum of 15% of the basic salary payable to an Employee. His basic salary is shown in the pay slips for the various years worked as follows:

- a) From May 2009- Kshs 25,000.
- b) From March 2010- Kshs. 40,000.
- c) From April 2011- Kshs. 50,000.
- d) From January 2012- Kshs. 55,000.
- e) From January 2013- Kshs. 60,500.
- f) From March 2014 to August 2014 [as pleaded] -Kshs. 63,525.

41. House allowance based on the above figures should have been as follows:-

- a) 15% of Kshs. 25,000 = Kshs. 3,750 x 10 months = 37,500.
- b) 15% of Kshs. 40,000 = Kshs. 6,000 x 13 = Kshs. 78,000.

- c) 15% of Kshs. 50,000 = Kshs. 7,500 x 9 = Kshs. 67,500.
- d) 15% of Kshs. 55,000 = Kshs. 8,250 x 12 = Kshs. 99,000
- e) 15% of Kshs. 60,500 = Kshs. 9,075 x 13= Kshs. 117, 975.
- f) 15% of Kshs 63,525 = Kshs. 9,528 x 5 = Kshs. 47,640

The Respondent shall pay to the Claimant the total sum of Kshs. 447,615 in arrears of house allowance.

42. There was a reduction in the Claimant's salary from September 2014 to the date of termination by a sum of Kshs. 8,285, as discussed above. This covered a period of 8.5 months. ***He is allowed the prayer for reduced basic salary at Kshs. 8,285 x 8.5 months = Kshs. 70,422.***

43. The prayers for airtime and fuel allowance for April and May 2015 are not supported by the pay slips placed before the Court. They are not captured in the Claimant's contract of employment. He did not produce any workplace instrument which invariably granted him airtime and fuel allowance, irrespective of whether he had expended airtime and fuel. The Court finds no fault with the Respondent's explanation that these were not invariable benefits available to the Claimant. The items are rejected.

44. In granting compensation for unfair termination, based on the equivalent of the maximum 12 months allowed by the law, the Court has taken into account the Claimant's grievance about his withheld salary. It is not therefore proper that he should be granted exemplary or punitive damages for breach of his right to fair remuneration and for withholding of salary.

45. The Respondent may well have engaged in a wage offence under Section 17 of the Employment Act, as submitted by the Claimant. There is a platform for pursuing wage offences. The proceedings herein are not criminal in nature. Courts have constitutional delineation. It is wrong to submit that the Court should set precedent by imposing a criminal sanction on the Respondent. Such a measure would be an illegal precedent, outraging the rule of law, and would be held by lawyers in utter derision, rather than being celebrated in the eyes of the legal profession as an illuminating beacon, in our growing thesaurus of industrial jurisprudence. The Respondent would have been condemned without the benefit of a fair criminal trial. The Court declines the invitation to create such a precedent.

46. ***Certificate of Service is allowed under Section 51 of the Employment Act 2007.***

47. The circumstances leading to termination of the Claimant's employment persuade the Court to grant him the prayers for ***costs, and interest payable from the date of delivery of this Judgment.***

48. In sum, the Court allows the following prayers:-

a) It is declared termination was unlawful and unfair.

b) The Respondent shall pay to the Claimant 12 months' salary in compensation for unfair termination at Kshs. 762,300; balance of notice pay at Kshs. 8,285; arrears of house allowance at Kshs. 447,615; and arrears of salary at Kshs. 70,422- total Kshs. 1,288,622.

c) Certificate of Service to issue.

d) Costs to the Claimant.

e) Interest to the Claimant payable at 14% per annum from the date of Judgment.

Dated and delivered at Mombasa this 18th day of November, 2016

James Rika

Judge