



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 117 OF 2016

DAN GITONGA MATHENGE.....CLAIMANT

VERSUS

LAVINGTON SECURITY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd December, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 30.05.2016 through Warutere & Associates. The claimant prayed for judgment against the respondent for:

- a) Unpaid salary increment from 1st November 2013 to February 2016 at Kshs. 8,790.00 X 28 months making Kshs. 246, 120.00.
- b) Disbursements for transport from Karatina to Sagana and back and also attending to Karatina area Safaricom and Airtel Alarms from 1st November 2013 to February 2016 at Kshs. 8,000.00 per month X 28 months making Kshs. 224, 000.00.
- c) Disbursements for airtime from 1st November 2013 to February 2016 at Kshs. 1,000.00 X 28 months making Kshs. 28,000.00.
- d) Unpaid leave for 3 years from 1st November 2013 to February 2016 at Kshs. 17, 580.00 making Kshs. 52, 740.00.
- e) One month's salary in lieu of notice Kshs. 17, 580.00.
- f) Compensation for loss of income at Kshs. 17, 580.00 X 12 months making Kshs. 210, 960.00.
- g) Cost of the suit and interest at court rates.
- h) Any other further relief that the court may deem fit.

The respondent filed the defence and answer to the memorandum of claim on 20.06.2016. The respondent acted in person.

The claimant was employed by the respondent on 01.06.2012. The claimant's monthly salary was Kshs.

6,000.00 as a day guard. In February 2013 the salary increased to Kshs. 8,790.00. The evidence is that the claimant's employment was terminated verbally on telephone when sometimes on 10.02.2016 the respondent's regional supervisor one Francis K. Sinyei conveyed to the claimant that the claimant should leave job. After the termination, the claimant testified that the said Francis K. Sinyei telephoned the respondent's customers and informed them that the claimant's employment with the respondent had been terminated.

The **1st issue** for determination is whether the termination was unfair. The respondent's case is that the claimant deserted duty after about 10.02.2016 and that the claimant's employment was never terminated by the respondent. The claimant's account is that on 10.02.2016 the respondent's regional supervisor telephoned the claimant and conveyed that the claimant had been dismissed. The claimant's account is that the regional supervisor, Francis K. Sinyei, terminated the claimant's employment because the claimant had threatened to report the said Francis K. Sinyei to the respondent's management for selling one of the gear boxes belonging to the respondent. The court has considered the evidence and returns that the claimant was dismissed verbally by the said Francis K. Sinyei on 10.02.2016 when by telephone call it was conveyed to the claimant to leave duty as terminated. There is no reason to doubt the claimant's testimony that after the dismissal the claimant reported on duty on 11.02.2016 but was locked out by the respondent's customers. In any event, if the claimant deserted duty as alleged for the respondent, nothing stopped the respondent from initiating disciplinary proceedings on account of absence without leave or reasonable cause. The court returns that the termination was unfair for want of notice and a hearing under section 41 of the Employment Act, 2007 and for want of a genuine reason under section 43 of the same Act.

While making that finding the court upholds its opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus,

“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.”

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

First, the claimant prayed for unpaid salary increment from 1st November 2013 to February 2016 at Kshs. 8,790.00 X 28 months making Kshs. 246, 120.00. The claim is based on the letter of fulltime employment dated 18.10.2013 signed by the respondent's regional supervisor one Francis K. Sinyei. By that letter the claimant was appointed as the respondent's supervisor at Karatina effective 01.11.2013. The letter then varied the claimant's benefits thus, **“Therefore I have directed the issue to our head office to double your salary, reimbursement every month for transport and airtime to help you to discharge your duties accordingly.”** The claimant's evidence is that he embarked and performed as appointed effective 01.11.2013 but the promised double pay was not paid to him. Thus he claimed and prayed for that pay. The claimant wrote and demanded the pay but the same was not replied or implemented. The claimant's advocates wrote a demand letter on 11.05.2016 and the respondent replied that the matter had been referred before the Labour Officer for conciliation. However the respondent did

not answer the particular claims which were set out in the demand letter. The court finds that indeed the claimant was entitled to double pay as at 01.11.2013. What was the claimant's pay as at 01.11.2013? The claimant did not offer evidence to answer that question and on that account it is impossible for the court to determine the quantum of the double pay that was promised and ought to have been paid. The prayer will therefore fail.

Second, the claimant prayed for disbursements for transport from Karatina to Sagana and back and also attending to Karatina area Safaricom and Airtel Alarms from 1st November 2013 to February 2016 at Kshs. 8,000.00 per month X 28 months making Kshs. 224, 000.00. The claimant failed to provide evidence to justify the quantum of the claim and prayer and the same will fail.

Third, the claimant prayed for disbursements for airtime from 1st November 2013 to February 2016 at Kshs.1, 000.00 X 28 months making Kshs.28, 000.00. The basis for Kshs. 1,000.00 per month was not established and the same will fail.

Fourth, the claimant prayed for unpaid leave for 3 years from 1st November 2013 to February 2016 at Kshs. 17, 580.00 making Kshs. 52, 740.00. The court finds that the claimant served for 3 years and 8 months effective his initial employment on 01.06.2012. His monthly pay per May 2015 pay slip was Kshs. 9,500.00 making **Kshs. 34, 833.30** for pay in lieu of annual leave. The claimant is awarded accordingly.

Fifth, as the termination was unfair and without notice, the claimant is awarded one months' salary in lieu of notice **Kshs. 9,500.00**.

Sixth, the claimant prayed for compensation for loss of income at Kshs. 17, 580.00 X 12 months making Kshs. 210, 960.00. The termination was unfair. The claimant had served for over 3 years and did not contribute to his termination. The court has considered the aggravating factor that the respondent did not pay the promised double pay, the disbursements and the airtime. Accordingly under section 49(1) (c) the claimant is awarded 12 months' gross pay at Kshs. 9, 500.00 per month making **Kshs.114, 000.00** for unfair termination.

As the claimant has substantially succeeded in his claims, he is awarded the cost of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The respondent to pay the claimant **Kshs.158, 333.30** by 15.01.2017 failing interest to be payable at court rates until full payment.
- b) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 2nd December, 2016**.

BYRAM ONGAYA

JUDGE