



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 396 OF 2013**

**SAMSON MAKAMU LUVUTSE**

**CLAIMANT**

**v**

**NAKURU SPARE HOUSE LTD**

**RESPONDENT**

**JUDGMENT**

1. This is yet another case of a needlessly verbose Memorandum of Claim. Samson Makamu Luvutse (Claimant) filed a Memorandum of Claim against Nakuru Spare House Ltd (Respondent) on 12 November 2013, and he stated the issues in dispute as *discrimination, unlawful dismissal of Claimant from employment and withholding of the Claimant's dues*.
2. The Claimant prays for *one month pay in lieu of notice; underpayments; overtime, public holidays, annual leave and gratuity for years worked; compensation based on section 49(1) (c) of the Employment Act totalling Kshs 446,748/55; costs and interest; certificate of service and a declaration that the Respondent discrimination of the Claimant on account of his health violated his constitutional rights and compensation*.
3. The Respondent filed a Response, Counterclaim and documents to be relied on 19 December 2013.
4. The Claimant filed Reply to Response and Response to Counterclaim on 22 April 2014, and Supplementary List of Documents on 16 June 2014. The Cause was heard on 30 October 2014, 12 November 2014 and 26 November 2014.
5. The Court has considered the pleadings, testimonies of witnesses, documents tendered and submissions (Claimant's submissions were filed on 18 December 2014 while Respondent's submissions were not in file even today morning), and identified the questions arising for determination as, *whether the Claimant was employed by the Respondent on 3 December 2006, whether the Claimant was a Shop Assistant, whether Claimant was underpaid, whether Claimant worked overtime, whether Claimant went on annual leave, whether Claimant was unfairly dismissed or absconded duty, whether Respondent discriminated against the Claimant, whether the Claimant owes the Respondent Kshs 27,260/- and appropriate relief*.
6. Most of the issues arising are questions of fact. The Court will narrate and discuss each party's case under each identified issue.

**Whether Claimant was employed on 3 December 2006**

7. The Claimant pleaded that he was employed by the Respondent on 3 December 2006. He repeated the same in oral testimony.
8. In its Response, the Respondent denied employing the Claimant on 3 December 2006, but did not plead its own date of employment. In cross examination of the Claimant, he was shown a letter of appointment dated 15 May 2008. The Claimant denied knowledge of the letter.
9. The Claimant was also shown muster rolls kept by the Respondent from July 2008 to November

- 2012.
10. The Respondent's director Patel Kakul Kumar testified on its behalf. He stated that he became a director of the Respondent in 2009 and became involved in day to day operations in 2014, prior to that, his uncle had been running the Respondent.
  11. He further stated that according to records, the Claimant started working with the Respondent on 15 May 2008.
  12. Both parties filed documents. The documents were not formally produced. Under section 20 of the Industrial Court Act, the Court was not strictly bound by the rules of evidence (position has since changed with amendments through the Statute Law Miscellaneous Amendment Act, 2014), and therefore the Court will consider the documents.
  13. Among the documents filed by the Claimant was a job application letter dated 3 December 2006. The letter was addressed to the Respondent. The Respondent on its part filed an appointment letter dated 15 May 2008.
  14. Prior to the enactment of the Employment Act, 2007, there was no express statutory obligation upon an employer to issue a written contract.
  15. The Respondent's witness testified based on the records, as he became involved in the Respondent's day to day operations only in 2014. He had been a director from 2009.
  16. Considering the application letter by the Claimant dated 3 December 2006, it is more likely that he started the employment relationship with the Respondent on 3 December 2006, though the relationship was not formalized into writing until 2008.
  17. The Court finds that the Claimant was employed by the Respondent on 3 December 2006.

#### **Whether Claimant was a shop assistant**

18. Closely interlinked to when the employment relationship commenced is the designation or occupation of the Claimant. In both the pleadings and testimony, the Claimant asserted that he was a shop assistant and not a general labourer.
19. Under cross examination, the Claimant stated that he was employed as a salesman and that he used to write cash sales receipts.
20. For the Respondent, its director testified that the Claimant was a general labourer and not a shop assistant or salesman. An appointment letter dated 15 May 2008 was filed.
21. In 2006, there was no statutory requirement to issue a written contract to an employee.
22. With the commencement of the Employment Act, 2007 on 2 June 2008, it became mandatory for employers to issue employees with written contracts under certain circumstances. The written contract should have certain prescribed particulars including the employee's job description.
23. The Claimant did not disclose his day to day duties in any detail. It would have been easy for the Court to ascertain his true occupation with such disclosure.
24. The Claimant disowned the letter of appointment dated 15 May 2008. The demand letter from the Labour office dated 19 November 2012 show the Claimant informed the Labour officer he was a salesman. The demand letter from the Claimant's advocate dated 7 December 2012 also indicated he was a salesman.
25. A salesman and a shop assistant are not the same. In the various Regulation of Wages (General) (Amendment) Orders issued over the years, the two occupations or designations are listed separately, a salesman position attracting much higher minimum wage than that of a shop assistant.
26. The Claimant had benefit of legal counsel and should have been well advised to plead and lead evidence as to his occupation.
27. In light of the disowned appointment letter and inconsistency on the part of the Claimant as to whether he was a shop assistant or salesman and with no disclosure as to his day to day duties in any detail, the Court finds that the Claimant was a general labourer.

#### **Whether Claimant was underpaid**

28. The resolution of this question turns on the finding above, that the Claimant was a general labourer.
29. From 1 May 2006 to 30 April 2007, the prescribed minimum wage for a general labourer was

- Kshs 4,792/- for those outside Nairobi Mombasa and Kisumu, pursuant to Legal Notice No. 38 of 2006. With 15% house allowance factored, the wage was Kshs 5,510/-. The Claimant was earning Kshs 7,000/-.
30. From 1 May 2007 to 30 April 2009, the prescribed minimum wage remained the same.
31. From 1 May 2009 to 30 April 2010, according to Legal Notice No. 70 of 2009, the prescribed minimum wage for general labourers in Nakuru was Kshs 5,655/-. With 15% house allowance, the wage was Kshs 6,503/-. During this period, the Claimant was earning Kshs 7,000/-.
32. The minimum wage from 1 May 2010 to 30 April 2011, pursuant to Legal Notice No. 98 of 2010, inclusive of house allowance for Claimant's occupation was Kshs 7,154/-. The Claimant was earning Kshs 7,000/-. He was thus underpaid during the period by Kshs 1,848/-.
33. From 1 May 2011 to 30 April 2012, pursuant to Legal Notice No. 64 of 2011, the Claimant was entitled to a gross minimum wage inclusive of house allowance of Kshs 8,048/-. He was earning Kshs 8,000/-. He was thus underpaid by Kshs 576/-.
34. Pursuant to Legal Notice No. 71 of 2012, the minimum wage inclusive of house allowance from 1 May 2012 was Kshs 9,102/-. The Claimant was earning Kshs 8,000/-. For the 6 months upto separation, the Claimant was underpaid by Kshs 6,612/-.

### **Whether Claimant worked overtime**

35. The Claimant's pleaded case was that he used to work 10 hours every day, from 8.00 am to 6.00 pm. The Claimant did not lead any evidence on this claim except to state that the muster rolls had been changed.
36. In cross examination, he stated that he worked beyond hours and would report at 8.00am and leave at 6.00pm though he was not working on Sundays.
37. The muster rolls filed by the Respondent from 2008 do not show that the Claimant worked any overtime. He contended that the muster rolls had been changed but gave no further proof.
38. In light of the material before Court, the Court is unable to ascertain whether the Claimant worked overtime during the normal working week or during public holidays.

### **Whether Claimant took annual leave**

39. The Claimant did not lay any evidential foundation for this claim. He did not disclose which years he did not proceed on leave.
40. The Respondent's witness stated that the Claimant used to encash his leave and that he was paid and signed for the leave payments for 2008, 2009, 2010 and 2011.
41. The witness admitted that the Claimant was not paid for 2012 leave because he left before the payments were made.
42. The Court would find that the Claimant is entitled to *pro rata* leave for 11 months he worked in 2012.

### **Unfair dismissal or desertion of duty**

43. The Claimant pleaded he worked until 12 December 2012. He further pleaded that on 8 November 2012, while in hospital he was called by the Respondent's secretary seeking explanations about his whereabouts and he decided to go to the work place but was dismissed and escorted out.
44. In testimony, the Claimant stated that he worked until 5 November 2012, when he woke feeling unwell and went to seek medical attention at the Nakuru Provincial Hospital. After getting treatment he also went to the eye unit and was advised to return the next day.
45. The next day, 8 November 2012, he was checked and told that he would be operated on. While at the hospital, his manager called Keval called him and he explained he was in hospital. Nevertheless he rushed to the work place and met Mr. Kaka who asked him whether he had finished his business in Kakamega. The said Kaka told him to leave because he did not want to see him again and directed him to return on Saturday for his wages.
46. The Claimant stated that he went back to the hospital and was operated on. He annexed to the Memorandum of Claim, hospital discharge summary and other medical records confirming the same.

47. The Claimant stated he made a report to the Labour office on 12 November 2012, and agreement was reached he be paid.
48. In cross examination, the Claimant stated that he was dismissed on 5 November 2012, though the date is pleaded as 12 December 2012, and that a manager called him and told him he had been dismissed. He was not given a termination letter.
49. The Claimant stated that he was absent because of eye problems and that the Respondent knew of his medical status. He did not abscond from work.
50. The Respondent's case on the dismissal issue is that the Claimant deserted work without giving notice with effect from 5 November 2012.
51. Its witness stated that the Claimant was not dismissed, not even because of his health status but that the Claimant decided to leave without informing the Respondent. The Claimant left to work with Swami Auto Spares Ltd.
52. The onus placed on both employees and employers in complaints of unfair termination or wrongful dismissal is found in section 47(5) of the Employment Act, 2007. The section provides that

*For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

53. The first point to consider is whether the Claimant has discharged the statutory burden placed on employees before calling upon the Respondent.
54. The Claimant's testimony that he went to hospital on 5 November 2012 has not been controverted. His evidence that a manager of the Respondent called him on 8 November 2012 seeking to know about his whereabouts has not been challenged. His evidence that after the call he went to the workplace and met with a Mr. Kaka who told him to leave and come collect his wages on the Saturday equally was not challenged.
55. Based on the Claimant's narration, the Court is satisfied that the Claimant has met the test required of employees by section 47(5) of the Employment Act, 2007.
56. Pursuant to section 41 of the Employment Act, 2007, an employee is entitled to a hearing before termination of services.
57. The Respondent did not even remotely suggest that it granted the Claimant a hearing.
58. Further, the Respondent's only line of defence on the dismissal issue was that the Claimant deserted work. The question therefore is whether the Respondent has proved that the Claimant deserted work.
59. Under section 44(4) (a) of the Employment Act, 2007, absence from duty without permission or lawful cause is one of the grounds upon which an employer may summarily dismiss an employee.
60. In my view, dismissal on this ground is also subject to procedural fairness as demanded by section 41 of the Act because absence without permission or lawful cause falls under species of *misconduct*.
61. Because the Respondent had the contacts of the Claimant, it should have informed him that it was contemplating dismissing him because of desertion of duty without explanation or lawful cause. Different legal considerations may apply where an employee cannot be reached, but an employer may have to demonstrate it made reasonable attempts to contact the absent employee.
62. In this regard, the Respondent has failed to discharge the burden imposed on employers by section 41 of the Employment Act.
63. The Respondent also did not attempt to discharge the burden placed upon employers by section 43 of the Employment Act, 2007 to prove the reason (desertion) for dismissal or by section 45 of the Act to prove that the reasons (desertion) was valid and fair reason.
64. Further, section 35 of the Act requires written notice of termination of services unless the case merits summary dismissal. The Respondent did not give the Claimant any notice of termination of services on ground of desertion.
65. The Court reaches the conclusion that the Claimant did not desert duty but was verbally terminated and the same was both procedurally and substantively unfair.

## **Whether Respondent discriminated against the Claimant**

66. The Claimant contended that the Respondent was aware of his medical status but went ahead to discriminate against him. The resolution of this question will turn on firstly, whether the Respondent was aware of the Claimant's medical status, when the Respondent became aware and whether and how the Respondent treated the Claimant differently.
67. The Claimant pleaded that Mr. Kaka and Mr. Kakul knew of his medical status sometime in the year 2011 when he reported to work late and he gave his card to Mr. Kakul. He further pleaded that the said Mr. Kakul saw the drugs he was taking and thereafter stopped him from cooking tea.
68. The Claimant also pleaded that he informed Mr. Keval on 8 November 2012 that he was in hospital and that on the same day he explained his condition to the Respondent's director called Moffat Kaka and showed him his medical documents whereupon the said director told him he was not needed.
69. In testimony, the Claimant stated that on 8 November 2012 when the Respondent's manager called him, he informed him he was in hospital. Thereafter he rushed to the work place and met Mr. Keval and Mr. Kaka.
70. He also stated that the Respondent knew he was HIV positive because he used to give his medical card in order to get permission to go to hospital. He further stated Mr. Kakul remained with his medical card and refused him from drinking tea.
71. He stated that he was never stopped from going to hospital but was stopped from drinking tea.
72. On cross examination, the Claimant stated that the Respondent knew his medical condition and that he was attending clinic monthly.
73. He also stated that he was stopped from preparing tea for fellow employees and the bosses. He could not remember the time when this happened.
74. He further stated that he showed Mr. Kakul his medical card on 8 November 2012 and the said Kakul took the card and thus he had to get a new card from the hospital.
75. The Respondent's witness denied that he was aware of the Claimant's medical condition because he was not present on 8 November 2012.
76. The Claimant's testimony on the discrimination on health status issue was incoherent. On the one hand, he talked of being stopped from drinking tea and on the other he talked of being stopped from preparing tea for other employees and his bosses.
77. It was a to and fro type of disclosure. From the testimony, it is apparent that the Respondent must have become aware of his particular medical status and not general ill health on 8 November 2012. And the Court cannot see the nexus with the preparation of tea narration.
78. This is around the time he was dismissed. He could have been dismissed because of the knowledge of his status but the way the Claimant's case was prosecuted, the Court is unable to make a positive finding that he was dismissed or discriminated on the basis of his medical status.

## **Whether Claimant owes the Respondent Kshs 27,260/-**

79. This issue deals with the Counterclaim. The sum counterclaimed consisted of Kshs 8,000/- being the equivalent of one month pay in lieu of notice and Kshs 19,260/- advanced as a loan.
80. The Court has found the Claimant did not desert and the first limb of the counterclaim fails on that basis.
81. On the loan of Kshs 19,260/-, the Respondent's pleaded case was that the Claimant took from it a loan and salary advance amounting to the claimed sum.
82. The Respondent's witness stated that the Claimant took a loan but had not repaid the same.
83. The Claimant in cross examination admitted taking loans from the Respondent which were recovered from his wages but stated that by the time he left, he had no outstanding loan.
84. He admitted the vouchers indicating he had taken loans totalling Kshs 19,260/-.
85. The vouchers filed in Court show a loan of Kshs 500/- taken on 23 December 2009, Kshs 10,000/- taken on 14 October 2010, Kshs 10,000/- taken on 14 January 2012, Kshs 10,000/- taken on 12 January 2012 and Kshs 15,000/- taken on 28 January (year not clear).
86. The Respondent did not rebut the Claimant's assertions that the loans would be recovered from his wages. If this was the case, the Respondent should have done a little but more to produce documents showing recoveries as it is the one who would have been responsible for making

deductions at source. This head of counterclaim also fails.

### **Appropriate relief**

#### ***One month pay in lieu of notice***

87. Pursuant to section 35(1)(c) and 36 of the Employment Act, 2007, the Claimant was entitled to at least one month written notice or pay in lieu of notice.

88. The Court awards him Kshs 7,915/- as one month pay in lieu of notice (this was the prescribed minimum wage for a general labourer).

#### ***Underpayments***

89. The Court has found the Claimant was underpaid in 2010/2011 by Kshs 1,848/-, 2011/2012 by Kshs 576/- and from 1 May 2012 by Kshs 6,612/- making a total of Kshs 9036/-. The Court awards him Kshs 9,036/-.

#### ***Overtime***

90. This head of claim was not proved and is dismissed.

#### ***Annual leave***

91. The Court found the Claimant was entitled to *pro rata* leave. Because the figure was not specified, the Court would factor this under compensation pursuant to section 49(4) (i) of the Employment Act, 2007.

#### ***Gratuity***

92. The Claimant did not lay any contractual or statutory basis for this head of claim.

93. If by gratuity the Claimant meant service pay under section 35(5) of the Employment Act, 2007, he would not be entitled to an award because the documents produced show he was a contributor to the National Social Security Fund.

#### ***Compensation***

94. The Court has found the Claimant was unfairly dismissed. One of the primary remedies for unfair termination is an award equivalent to not more than 12 months gross wages. The remedy is discretionary, the discretion being fettered by the factors set out in section 49(4) of the Employment Act, 2007.

95. The Claimant served the Respondent for about 7 years. Considering the length of service, the Court awards him the equivalent of 7 months gross wages based on the prescribed minimum wage in 2012 of Kshs 9,102/-. The compensation is assessed at Kshs 63,714/-.

#### ***Certificate of service***

96. This is a statutory right and the Respondent should issue one to the Claimant forthwith.

### **Costs**

97. Costs do not follow the event in the Employment and Labour Relations Court. This is not a fit case to award costs.

### **Conclusion and Orders**

98. The Court finds and holds that the Claimant was a general labourer, the Claimant's services were

unfairly terminated, and awards him and orders the Respondent to pay him

- a. One month wage in lieu of notice      Kshs 7,915/-
- b. Underpayments                              Kshs 9,036/-
- c. 7 months wages compensation      Kshs 63,714/-

TOTAL    **Kshs 80,665/-**

99. Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 6<sup>th</sup> day of February 2015.**

**Radido Stephen**

**Judge**

**Appearances**

Mr. Ngamate instructed by

Maritim Omondi & Co. Advocates for Claimant

Mr. Wachira instructed by

Wachira Mbuthia & Co. Advocates                              for Respondent