



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2008 OF 2011

HARRISON EPHANTUS MUCOYA.....CLAIMANT

VS

BEVEVA PARTS & ACCESSORIES LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by way of Memorandum of Claim dated 21st November and filed in Court on 28th November 2011 seeks compensation for unfair termination of employment as well as payment of terminal dues. The Respondent filed a Statement of Defence and Counterclaim on 11th May 2012 pursuant to which the Claimant filed a Reply on 31st May 2012. The Claimant testified on her own behalf and the Respondent called its Director and Shareholder, Alfred Gatiaga Thuku.

The Claimant's Case

2. The Claimant states that he was employed by the Respondent in January 2002 initially on casual basis at a daily rate of Kshs. 250. From 2004, the Claimant earned a monthly salary of Kshs. 12,000 which was increased to 25,000 effective 2008.

3. The Claimant further states that the Respondent terminated his employment verbally on 16th April 2011 following allegations of loss of Kshs. 200,000 from the Respondent's premises. It is the Claimant's case that the termination of his employment was without any lawful cause and that the Respondent declined to pay him his terminal dues.

4. The Claimant therefore claims the following:

- a) Salary arrears.....Kshs. 24,992
- b) Service pay for 9 years and 3 months.....Kshs. 115,625
- c) 3 months' notice pay.....Kshs. 75,000
- d) Leave pay for 9 years.....Kshs.135,000
- e) Damages for unfair termination

f) Costs and interest

The Respondent's Case

5. In its Statement of Defence and Counterclaim, the Respondent states that between 2002 and November 2004, the Claimant was employed on casual basis at a daily rate of Kshs. 250. From December 2004 to December 2005 he was paid a monthly salary of Kshs. 10,000 which was progressively increased to Kshs. 25,000 as at the time the Claimant left the Respondent's employment.

6. According to the Respondent, the Claimant absconded duty on 16th April 2011, following theft of Kshs. 200,000 from the Respondent's premises on 13th April 2011. On 5th September 2011, the Respondent deposited the Claimant's terminal dues amounting to Kshs. 12,067 plus an ex-gratia payment of Kshs. 10,000 with the District Labour Office, Industrial Area.

7. By way of Counterclaim, the Respondent claims the sum of Kshs. 73,226 being overpayment of salary made to the Claimant between 2002 and 2011.

Findings and Determination

8. From the pleadings and submissions filed by the parties coupled with the evidence adduced before the Court, the following issues emerge for determination:

- a) Whether the Claimant deserted duty or was terminated;
- b) Whether the Claimant's claim or part thereof is statute barred;
- c) Whether the Claimant is entitled to the reliefs sought;
- d) Whether the Respondent has made out a proper counterclaim against the Claimant.

The Termination

9. The Claimant told the Court that following an alleged loss of Kshs. 200,000 from the Respondent's premises, he was asked by Alfred Gatiaga Thuku who was a director and shareholder of the Respondent Company to stay away from work pending investigations into the loss. The Claimant was not allowed back to work and he therefore reported a trade dispute at the District Labour Office, Industrial Area. Thuku on the other hand testified that the Claimant and his colleagues deserted duty soon after the loss of Kshs. 200,000.

10. Section 44(4)(a) of the Employment Act, 2007 allows an employer to summarily dismiss an employee who absents himself from his place of work without lawful cause. In my view, an employer who seeks to rely on this provision to justify the dismissal of an employee must demonstrate efforts made to trace the whereabouts of the employee before action is taken. It is not enough to simply say that the employee failed to show up for work and was therefore dismissed.

11. In the case before the Court, the Respondent's witness testified that the Claimant and his colleagues disappeared after the loss of Kshs. 200,000. The Court found it difficult to believe that an employer would lose such a large sum of money and allow employees who were suspects in the theft to simply walk away.

12. In the absence of further evidence by the Respondent on the circumstances leading to the termination of the Claimant's employment, the Court adopted the Claimant's version that his employment was terminated verbally following the alleged loss of money from the Respondent's premises. This amounts to unfair termination within the meaning of Section 45 of the Employment Act, 2007 and the Claimant is entitled to compensation.

Is the Claimant's Claim Statute Barred?

13. In the submissions filed on behalf of the Respondent, it was submitted that the Claimant's claims for service and leave pay for the period before 2008 are statute barred by dint of Section 90 of the Employment Act, 2007 which provides that disputes arising from a contract of service must be instituted within three years of the cause of action or within twelve months for continuing wrongs. Having examined the specific claims made by the Claimant in the light of this law, the Court reached the conclusion that the claims for service and leave pay fall within the category of continuing wrongs and that time did not begin to run until the date of termination of the Claimant's employment being 16th April 2011.

14. The Claimant's claim filed on 28th November 2011 was therefore well within time. Moreover, there is now firm jurisprudence in this Court that where a matter is referred to conciliation, time does not begin to run until the conciliation process is concluded (see **Wasilwa J** in **Kenya Scientific Research International Technical and Allied Workers Union Vs Rainald Schumera [2012] EKLR** and **Abuodha J** in **Kenya Plantation and Agricultural Workers Union Vs Mununga Leaf Base [2013] EKLR**). It follows therefore that time did not begin to run against the Claimant until a decision was taken at the District Labour Office.

15. The Respondent also submits that because the Claimant's claim was dealt with at the Labour Office, then his claim is not properly before the Court. I respectfully disagree. As held by this Court in **Leonida Makokha & 3 Others Vs Munene Estate Limited [2014] eKLR** referral of a trade dispute to conciliation does not bar a party from seeking justice before this Court. At any rate, the Claimant told the Court that he was dissatisfied with the decision taken at the District Labour Office. In view of the foregoing the Court finds that the Claimant's claim is properly before the Court.

Reliefs

16. Having found that the Claimant's employment was unfairly terminated I award him 8 months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in effecting the termination with specific focus on failure to pay the Claimant his full terminal dues. I also award the Claimant one month's salary in lieu of notice.

17. Thuku told the Court that the Respondent remitted the Claimant's National Social Security Fund (NSSF) dues for only two years. Service pay is therefore due for the rest of the employment period. The Respondent challenged the claim for leave pay but did not produce any leave records as required under Sections 10 and 74 of the Employment Act, 2007. I therefore invoke Section 10(7) of the Act and allow the Claimant's claim on this score. The claim for salary arrears was not proved and is dismissed.

Counterclaim

18. In its counterclaim against the Claimant, the Respondent claims the sum of Kshs. 73,226 being overpayment of salary. However no documentary evidence was rendered in support of the counterclaim. The same was therefore not proved and is dismissed.

Final Orders

19. In the final analysis I make an award in favour of the Claimant in the following terms:

- a. 8 months' salary in compensation for
unfair termination.....Kshs. 200,000
- b. 1 month's salary in lieu of notice.....Kshs. 25,000
- c. Service pay for 6 years (25,000/30x15x6).....Kshs. 75,000

d. Leave pay for 8 years (25,000/30x21x8).....Kshs. 140,000

e. Prorata leave for 2011 (25,000/30x1.75x3).....Kshs. 4,375

Total.....Kshs. 444,375

20. The Respondent will meet the costs of this case.

21. The award amount will attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF MARCH 2015

LINNET NDOLO

JUDGE

Appearance:

Mrs. Njiru for the Claimant

Mr. Muhia for the Respondent