



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NO. 264 OF 2014

BETWEEN

GEORGE MUTHOKA KIOKO..... CLAIMANT

VERSUS

MULTIPLE ICD [K] LTD..... RESPONDENT

Rika J.

Court Assistant: Benjamin Kombe

Mr. Wachira Advocate, instructed by Wachira King'ang'ai Advocates for the Claimant.

No appearance for the Respondent

AWARD

(Rule 27(1) (a) of the Industrial Court (Procedure) Rules 2010)

1. The Claimant filed his Statement of Claim on 13th June 2014. The Respondent filed its Response and Counterclaim on the 26th June 2014, which were followed by a Reply to the Response and Counterclaim filed by Claimant on 26th June 2014, bringing the pleadings to a close.
2. Hearing was scheduled by the respective Parties' Advocates for 4th November 2014. On this date the hearing was adjourned on the application of the Respondent's Advocate, and rescheduled by consent, to 9th March 2015.
3. The Respondent did not attend Court during the hearing on 9th March 2015. There was no communication to the Claimant or the Court, on the Respondent's absence.
4. The Claimant testified he was employed as an Information Technology Technician by the Mombasa Container Terminal on 27th May 2013.
5. He resigned from Mombasa Container Terminal on 8th March 2014. He had been promised a New Job by a Mr. Shabir, who himself had left Mombasa Container Terminal for Multiple ICD [K] Limited, the Respondent herein.
6. He applied for the position of Documentation Clerk with the new company. He was interviewed, was

successful, and employed on 8th March 2014. His new salary was Kshs. 56,274, which was double the amount he was paid at his previous Employer.

7. The Claimant was offered a written contract, which he accepted and signed on the 8th March 2014. He was to report for duty on 1st April 2014.

8. When he reported, the Human Resource Manager advised him to return on 14th April 2014 because the premises were not ready. On 14th April 2014, the Human Resource Manager was away on leave.

9. He saw the General Manager, who advised the Claimant that the Claimant had been fired. The Claimant reverted to the Human Resource Manager. There were subsequent consultations during which the General Manager confirmed the Claimant had been fired.

10. The Claimant consulted his Advocates. A demand letter was written to the Respondent by the Claimant's Advocates, before the filing of this Claim in which the Claimant seeks against the Respondent, the following orders:-

- a) *1 month salary in lieu of notice at Kshs.56,274*
- b) *12 months' salary as damages for wrongful termination at Kshs. 675,288.*
- c) *Damages for breach of contract at Kshs. 13,164,600.*
- d) *Costs and interests.*

11. He testified he would not have resigned from his previous Employer, were it not for the superior offer made by the Respondent. He was 28 years when he resigned and would have worked until he was 65 years. He claims Kshs.13,164,600 as the lost earnings he could have had for 37 years, had he not been enticed into resignation. He has not found another job to-date.

12. He submits his contract was terminated by the Respondent before he started off. He was not heard. He merits the prayers sought. The Respondent should be prosecuted and pay the Claimant what he should have earned. The Respondent is a big company, with the ability to pay.

The Court Finds:-

13. It is not necessary to go into the Pleadings filed by the Respondent. There was really nothing counterclaimed by the Respondent; the Respondent merely extended its argument in responding to the Claim.

14. The question which must be asked is whether the Claimant, even without the participation of the Respondent, has established a case capable of placing in his hands over Kshs. 13 million claimed as damages, compensation and notice pay.

15. He was employed by Mombasa Container Terminal on 27th May 2013 as an IT Technician, earning a monthly salary of Kshs.26,650.

16. He was enticed into resigning from his previous Employer by a Mr. Shabir, himself a former Employee of Mombasa Container Terminal. The Claimant voluntarily resigned and was cleared by his previous Employer, to pursue the superior prospects offered by the Respondent.

17. He was offered a written contract, appointing him as a Documentation Clerk, at a salary of Kshs. 56,274 per month, which contract he signed on 8th March 2014.

18. He never got to work. He was to report on 1st April 2014. He did so, and was told the premises were not ready. He reported again on 14th April 2014. The Human Resources Manager moved him in circles.

The General Manager informed the Claimant his contract had been terminated.

19. The Claimant's contract of employment dated 8th March 2014, had a probation clause. He would work for 3 months. There was no provision for termination of the contract during probation or after confirmation within the contract document.

20. The Parties would have to fall back on the Employment Act 2007, in determining the terms of their dis-engagement.

21. Section 42(4) of the Employment Act requires the Employer only to give, an Employee on probation 7 days' notice of termination, or 7 days' salary in lieu of such notice. There is no additional obligation on the part of the Employer.

(See Industrial Court at Nairobi Cause Number 1068 of 2012 between Danish Jalang'o & Another v Amicabre Travel Services Limited).

22. The Claimant states termination occurred even before he started working. This would be within the probation period, and his remedy is in the probation provisions.

23. He is entitled to, and is granted 7 days' salary at Kshs. 15,150 as notice pay.

24. His claim for compensation for unfair termination the equivalent of 12 month's salary has no justification. Section 42[1] of the Employment Act 2007 does not require an Employer to hear the Employee or justify termination during probation.

The claim for 12 months' salary is rejected.

25. Equally unmerited is the prayer for loss of earnings. The Claimant made a voluntary decision to resign from his previous Employer. He dispossessed himself of the anticipated earnings. He ought to have given greater thought to the effect of his resignation decision, and assessed the promises made by Mr. Shabir with greater lucidity.

26. The Court does not punish an Employer for not confirming in employment, an Employee who is on probation. It does not give orders for Employers to pay Employees compensation, simply because the Employers are large enterprises, with the ability to pay.

27. The Court is satisfied the Claimant's contract with the Respondent entitled him 7 days' salary in lieu of termination notice and no more.

28. The Claimant shall have the costs of the Claim, given that the Respondent boycotted the proceedings.

IT IS ORDERED:-

a) The Respondent shall, within 21 days of this Award pay to the Claimant 7 days' salary in lieu of notice at Kshs.15,150.

b) Costs to the Claimant.

Dated and delivered at Mombasa this 29th day of May 2015

James Rika

Judge