



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI

PETITION NO. 890 OF 2013

ROBERT BARAZA MALO.....PETITIONER

VERSUS

ONE WAY CLEANING SERVICES LIMITED.....RESPONDENT

Mrs Macharia for Claimant

Mr Njoroge for Respondent

JUDGMENT

1. The Claimant was employed by the Respondent on 6th April 2002 as a cleaner. He worked continuously until his employment was terminated on 5th March 2013.
2. The Claimant seeks twelve (12) months compensation for the alleged unlawful and unfair termination of employment and payment of terminal benefits to wit;
 - i. one month salary in lieu of notice in the sum of Kshs.13,000.00;
 - ii. salary for the month of February in the sum of Kshs.13,000,00;
 - iii. annual leave in respect of two years in the sum of Kshs.26,000.00;
 - iv. service gratuity for eleven (11) completed years of service calculated at 15% of the annual salary in the sum of Kshs.286,000.00.
3. According to the statement of Claim the Claimant at the time of termination of employment had been promoted to the position of Zone Manager vide a letter of appointment dated 4th August 2012 – attached thereto.
4. In terms thereof his gross salary was reviewed to Kshs.11,000.00 and a travelling allowance of Kshs.3000.00 paid in cash. The Claimant was also given a mobile phone with postpaid airtime of Kshs.3,000.00 per month.
5. The letter provided for one month's notice or payment in lieu to terminate the contract. The work performance was to be evaluated quarterly.

6. The Claimant states that he was not given any sufficient cause or explanation for the termination.
7. In his oral testimony, the Claimant stated that he was registered with NSSF and NHIF and produced a payslip which shows a gross salary of Kshs.11,800.00.
8. The Claimant also contributed to a pension scheme Kshs.650.00 per month. This money was not refunded to him upon termination.
9. The termination was done by Mr. Kuria the owner of the cleaning company on 5th March 2013. That on 25th February 2013, the Claimant was called to the office of Mr. Johnson Obwoga, Operations Manager. He was unable to attend the meeting. The Claimant had hit a pedestrian with a mountain bicycle. The Claimant met Mr. Johnson Obwoga later and explained to him why he was unable to attend the meeting. The Claimant was informed that he would meet Mr. Kuria on 5th March 2013. While awaiting to attend the meeting, Mrs. Kuria came out of Mr. Kuria's office and told the Claimant to leave employment immediately and go home. She told the Claimant that he could go whenever he wanted to report. The Claimant was not given any termination letter.
10. Earlier on 23rd January 2012, the Claimant had been suspended from employment without pay for forty two (42) days. He was accused of harassing employees and job seekers in the Nakuru region where he was stationed. He was accused specifically of sexual harassment and seeking bribes. He was to return on 6th April 2012.
11. Upon his return, the Claimant was transferred to Stima Sacco and was warned in the letter of transfer dated 6th April 2012, not to repeat the bad conduct experienced at the Rift Valley Provincial Hospital. He was told to take his work seriously, have a positive attitude and cooperate with colleagues. The transfer letter was done by Mrs. Khadijah Kuria.
12. Previously the Claimant had received warning letters dated 8th May 2006, for loitering while supposed to be at work, on 28th January 2008, for poor work performance in that the standard of cleanliness at his station was low and losing control of staff he supervised. He was given last warning.
13. On 27th July 2011, the Claimant received another warning letter for retaining part of the money given to him to pay for lawn mower services. He paid in instalments contrary to instructions from management. The Claimant also presented fake receipts for petrol purchase. He got away with serious warning. He was also to repay Kshs.1,035.00 for petrol sold in the month of July 2011.
14. The Claimant denies all these allegations stating that he had a good record with no warning letters and seeks an award of the Court as claimed.

15. Response

The Respondent called RW1 Johnson Obwoga Onyango for the Respondent who told the Court that he was the Operations Manager for the Respondent from 2009 to October 30th 2013. He was presently in the Marketing Department. He told the Court that the Claimant was employed in 2002. He was a supervisor at Kiambu District Hospital at the time of termination of employment. That the Claimant was transferred from Kiambu to Nairobi on 25th February 2013. He was to be stationed at the Nairobi Pentecostal Church (NPC) with effect from 26th February 2012. He reported to work on 26th February 2013 and then sought permission for the day. The Claimant did not return to work on 27th and 28th February 2012.

16. The Respondent wrote to the Claimant on 28th February 2013 for absconding from duty. The Claimant was asked to report to work by 1st March 2013. He came to the head office and was asked to report to work. The Claimant left and he never came back to work. On 5th March 2013, the Respondent

had a meeting with him in which they begged the Claimant to return to work but he declined.

17. RW1 told the Court that the Respondent does not pay gratuity since employees are registered with NSSF. RW1 added that it is the Claimant who should pay the Respondent in lieu of notice since he absconded from work.

18. RW1 recalled the warning letters given to the Claimant on 8th May 2006 by Mrs Khadijah Kuria, the General Manager for misconduct. RW1 also told the Court that the Claimant was warned on 27th July 2011 and was suspended for forty two (42) days on 23rd January 2012 for misconduct. RW1 denied that the Claimant had a clean record at work.

19. According to RW1 the Claimant was not comfortable to work in a church. He had been transferred on 25th February 2013, to NPC Woodley from Kiambu. This led to his absconding from work.

He denied that the letter dated 26th February 2013 was manufactured to answer this case. He also denied that the warning letters were manufactured to suit the case of the Respondent.

20. RW1 said that the Claimant was called via telephone to attend a disciplinary hearing. The meeting was attended by himself, the General Manager and the Human Resource Manager. RW1 stated that they did not keep the minutes of the meeting. RW1 reiterated that the Claimant absconded from work and his employment was not terminated.

21. RW1 withstood very close cross examination.

22. **Determination**

- i. Did the Claimant abscond from duty or was his employment verbally terminated by the Respondent?
- ii. What remedies if any are available to the Claimant.

Issue I

23. The testimony by the Claimant *vis a vis* that by the RW1 as to whether the Claimant's employment was verbally terminated or the Claimant absconded from duty is mutually destructive.

24. The Claimant told the Court that he had a clean record at work and had no previous warnings and therefore had no reason to abscond from work.

25. RW1 on the other hand produced three warning letters given to the Claimant for misconduct including a forty two (42) days suspension meted on the Claimant without pay for sexual harassment and bribery while he was stationed in Rift Valley General Hospital.

26. The Claimant would have the Court to believe that the employer manufactured these letters to augment its defence in this case.

27. The Court has carefully considered the pleadings by the parties, the oral testimony and the documentary evidence presented before Court and has arrived at the following conclusions of facts:

28. This suit was filed on 18th June 2013 and a Response to the Claim was filed on 18th July 2013. On 5th August 2013, the Respondent filed a long list of documents, including witness statements and employment records. RW1 made a witness statement, where he outlined the history of misconduct by the Claimant culminating in his absconding. The statement shows that the Respondent was overly patient with the Claimant and even offered him promotions and salary increments inspite of the alleged misconduct.

29. RW1 also denied that the Claimant was owed any leave days or payment in lieu thereof, various leave application forms were produced in support of the Respondent's case.

30. It is clear that the Respondent kept the employment records of its employees including the Respondent. The Court does not believe that any of these documents were manufactured by the Respondent for purposes of this case.

31. To the contrary, the Claimant was evasive in his testimony and was not candid about his history of misconduct at the work place. The testimony by the Claimant was not credible in many respects.

32. The Court believes that the Claimant had no clean record at the work place, was involved in corrupt practices and was unhappy when he was posted to a church where he had little opportunity to seek bribes and harass customers.

33. The evidence by the Respondent that the Claimant absconded from work is credible and believable and the Court finds that the employment of the Claimant was not terminated by the Respondent but he absconded from work.

34. The Claim for compensation is therefore dismissed.

35. The Claim for gratuity is not based on any evidence. No letter of appointment was produced with such a term of employment. The Claimant was registered with NSSF and the employer contributed to the fund on his behalf, this Claim is also dismissed.

36. The Claimant having absconded from duty is not entitled to payment in lieu of notice. The Respondent did not counterclaim payment in lieu of notice. This claim is also dismissed.

37. The documentation produced by the Respondent regarding leave days, did not sufficiently rebut the claim in respect of leave days not taken for two (2) years. The Court is satisfied that, though the Claimant had taken leave and off days in the past he was still owed leave days as claimed.

38. The Court awards the Claimant Kshs.26,000.00 in lieu of leave days not taken.

39. The Respondent did not answer the Claim for the Kshs.22,038.92 contribution to a pension fund by the Claimant.

40. The Court finds the Claim as sufficiently proven and awards the Claimant Kshs.22,038.92 being refund for contributions made to the Respondent by the Claimant.

41. The total Award to the Claimant is therefore Kshs.48,038.92.

42. The Award is payable with interest at Court rates from date of Judgment till payment in full.

43. The Claimant is partially successful with his Claim and is entitled to the costs of the suit.

Dated and Delivered at Nairobi this 3rd day of July, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE