



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 85 OF 2015

KIRIMI MOSES NGARI.....CLAIMANT

VERSUS

MOBICOM (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 11th December, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 13.05.2015 through M/S F.K Gitonga & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the respondent's action to summarily dismiss the claimant from employment was unlawful, unfair and inhuman.
- b. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c. The respondent to pay the claimant his due terminal benefits and compensatory damages totaling to Kshs.184,000.00.
- d. Interest on (c) above from the date of filing of the suit till payment in full.
- e. Costs of this suit plus interest thereon.

The respondent filed the statement of defence and counterclaim on 28.05.2015 through Kiboi & Company Advocates. The respondent prayed that the claimant pays Kshs.19,540.00 being acknowledged shortages, costs of the suit, any other relief the honourable court may incline to give, and the court to dismiss the claimant's suit with costs.

There is no dispute that the respondent employed the claimant as a sales assistant at Kshs.11,500.00 per month. The claimant testified that he was dismissed by email on 6.01.2015. The email was showed to him by the respondent's regional manager called Janet when she summoned him to her office 6.01.2015 on account of alleged misappropriating of the respondent's property. The email from the respondent's head office was that the claimant be terminated immediately. The termination was without a notice or a hearing as per section 41 of the Employment Act, 2007 and the claimant's case was that it was therefore unfair, unlawful and inhuman because he lost employment suddenly.

The claimant further testified that there was stock taking on 01.01.2015 and it was said it revealed that the claimant had a shortage of Kshs.19, 540.00 and he signed on 02.01.2015 acknowledging receipt of the invoice on understanding that the issue would be reconciled later. After 02.01.2015 he continued to work until 06.01.2015 when Janet the regional human resource manager handed him the email Janet had received terminating the claimant. The claimant denied ever incurring a shortage of Kshs. 19, 540.00 as alleged by the respondent because books balanced up to 02.01.2015 with respect to the cards and

revenues from sales of the cards. It was his case that if he failed to acknowledge receipt of the invoice as was presented then the rules were that he would not be assigned any further duties to sell the cards. He denied that he was shown any discrepancy in his records.

The respondent's witness was Benson Gathua Wandeto (RW), the respondent's deputy sales department manager. He did not recall the date he visited the Meru branch where the claimant was deployed. The invoice was given to a staff where the staff failed to account for cash or cards. The report on claimant's case was not filed in court. RW admitted that there was no material to show that the claimant had incurred the shortage as no such material had been filed in court.

The court has considered the pleadings, the evidence and the submissions. The main issue for determination is whether the parties are entitled to the remedies as prayed for. The court makes findings as follows.

There is no reason to doubt the account by the claimant that on 06.01.2015 Janet showed the claimant the email of 02.01.2015 requiring the claimant to leave employment in view of the alleged shortage of Kshs. 19, 540.00. The claimant's employment was terminated by the said email and it was without a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. The respondent has not established the valid reason for that termination as envisaged in section 43 of the Act. The claimant was not showed the basis of the alleged shortage and the same was not shown to the court. First, the court returns that the termination was unfair and second, the respondent has failed to establish the counterclaim. The documents and reconciliations establishing the alleged shortage were not filed in court or explained to the court or the claimant before the termination. The claimant did not contribute to his termination. He was keen to continue in employment. He is awarded **Kshs.138,000.00** being 12 months' gross salaries and further one month pay in lieu of the termination notice making **Kshs.11, 500.00** under section 35(1) (c) of the Act as 3 months pay in that regard was not justified.

In conclusion, judgment is entered for the claimant for:

- a. The declaration that the termination of the claimant's employment by the respondent was unlawful, unfair and inhuman.
- b. The respondent to pay the claimant **Kshs.149,000.00** by 01.02.2016 failing interest at court rates to be paid thereon from the date of the judgment till full payment.
- c. The dismissal of the counterclaim with costs.
- d. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 11th December, 2015.**

BYRAM ONGAYA

JUDGE