



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 918 OF 2011

BETWEEN

SAMUEL AWELLO

OBARA.....CLAIMANT

VERSUS

INSTA PUMPS ENGINEEING LIMITED.....
RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. Omogo instructed by Namada and Company Advocates for the Claimant

Mr. Musyoka instructed by P.K. Njoroge and Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 8th June 2011. The Respondent filed its Statement of Reply on 18th July 2011. The Claimant testified, and closed his case, on 15th November 2011. The Respondent did not call any testimonial evidence, and the Court marked the proceedings as closed on 26th June 2013. The dispute was last mentioned on 26th July 2013 when the Court advised Parties Award would be delivered on notice.
2. The Claimant stated he was employed by the Respondent in May 2008 as a Technician and Welder. He was suspended and eventually dismissed by the Respondent on 13th September 2010, on the allegation that he had stolen company property. He seeks from the Respondent:-
 - One month salary in lieu of notice at Kshs. 11,000;
 - Annual leave pay for two years at Kshs. 22,000;
 - Unpaid overtime for all Sundays worked at Kshs. 76,200;
 - Service pay at Kshs. 13,200; and
 - Compensation the equivalent of 12 months' salary at Kshs. 132,000;

Total..... Kshs. 254,466

He also seeks a declaration that termination was illegal, unlawful, unfair and inhumane. He prays for his certificate of service, costs and interest.

3. He explained in his evidence that he is a Technician, dealing with borehole installation and pumping. He was in charge of the Respondent's Installation Unit. He used to install submersible water pumps. His first salary was Kshs. 10,000, and the last Kshs. 11,000. He was issued a job identification card. He just found a notice on the Board at the place of work, alleging that he and other two Employees Richard Kariuki and Tom Mboya were involved in a conspiracy to steal from their Employer. The other two Employees were returned to work. The Claimant denied any involvement in a crime against his Employer, but was not allowed back to work. He was not given notice before termination. He was not paid terminal benefits. He prays the Court to grant his Claim.

4. Questioned by the Advocate for the Respondent, the Claimant stated he was employed by another company Water Well International, after termination by the Respondent. The Respondent did not give him a letter of employment. He did not have any certificate to back up his claim that he is a Technician. He had practical knowledge acquired from different Sites. It was not true that he was not employed by the Respondent. The letter of termination was pasted on the Notice Board. The other two Employees were reinstated. The Respondent stated that the Claimant was dismissed for theft. He worked daily as the borehole installation was a daily activity. He was initially employed on casual terms, becoming a regular Employee after 3 months. When not involved in installation, the Claimant worked in the Workshop. He stated further on re-examination that he studied up to Standard 7. He trained at a Company called Spa Drilling, based at Ruaraka. It took him 2 years to train. He did not record any statement on the alleged theft.

5. The Respondent denies the Claimant was employed by the Respondent as a Technician/ Welder. He was dismissed for theft and other malpractices that jeopardized Respondent's business. He bore the greatest responsibility in the theft of the Respondent's property. The Respondent investigated the matter and reinstated the other two Employees. The Claimant failed to produce crucial employment contract documents, and the Respondent submits the Court should conclude that the Claim has collapsed.

The Court Finds and Awards:-

6. There is no doubt in the mind of the Court, that the Claimant was employed by the Respondent as its Technician and Welder, heading the Respondent's Installation Unit. He was employed in May 2008, and dismissed on 13th September 2010. Evidence of his employment is shown through the pay slips, particularly the pay slip for the month of March 2010, which gave the Claimant's designation as 'Technician- Installation.' His salary is stated at Kshs. 11,000 on the pay slip, which is the same amount given in the pleadings and testimony of the Claimant. The Notice of Suspension issued by the Respondent buttresses the conclusion that the Claimant was indeed a regular Employee of the Respondent.

7. It was up to the Respondent to show there was valid reason or reasons justifying its decision to terminate the Claimant's contract, and also show that the decision was carried out fairly. These obligations are imposed on the Employer by Section 41, 43 and 45 of the Employment Act 2007.

8. Unfortunately the Respondent failed to call any evidence in discharge of this obligation. The Statement of Reply was a brief two page general denial of the Claimant's averments, and does not contain material that would demonstrate the Respondent made its decision base on valid ground or grounds, and followed a fair procedure. The Respondent filed submissions that did nothing to fill this gap. The submissions merely repeated the denials contained in the Statement of Reply. The Respondent goes on to submit that it should be allowed to offer oral evidence. The Respondent was not prevented from offering such evidence, but failed to do so, the Claimant having testified and closed his case way back on 15th November 2011. The Court finds the Respondent has failed to show that termination was for valid reason or reasons, and failed to show that the decision was carried out fairly.

9. The Claim for **one month salary in lieu of notice at Kshs. 11,000 is allowed**. The Claimant did not go on leave for the period in service. There was no material provided by the custodian of the employment records, the Respondent herein, to show that the Claimant took his leave at any one time, or was compensated in lieu of leave. **The Court grants him 42 days' salary as his leave entitlement for the two years at Kshs. 17,769**. There was no evidence showing that the Claimant worked overtime. It does not seem likely that he would be installing submersible water pumps 7 days in a week, to justify overtime claims for Sundays. He suggested in his evidence that there were times when installation work would be low, and he would be redirected to the Workshop. There was no convincing evidence to support his claim to overtime. The claim for overtime is rejected. There similarly were no grounds in law or fact, to justify the claim for statutory service/gratuity of Kshs. 13,200. The Claimant's pay slips show he was enlisted as a member of the National Social Security Fund [N.S.S.F.] He would not qualify for any form of service pay under Section 35 of the Employment Act 2007. This claim is disallowed. As the Respondent failed to lead any evidence or provide the Court with any material to justify the decision to terminate, the Court finds and declares the termination of the Claimant's contract of employment unfair. **The Respondent shall pay to the Claimant 4 months' salary at Kshs. 44,000 in compensation**. In sum-:

[a] Termination of the Claimant's contract of employment was unfair;

[b] The Respondent shall pay to the Claimant one month salary in lieu of notice at Kshs. 11,000; annual leave entitlement at Kshs. 17,769; and 4 months' salary in compensation at Kshs. 44,000- total Kshs. 72,769;

[c] The total amount of Kshs. 72,769 shall be paid to the Claimant by the Respondent within 30 days of the delivery of this Award;

[d] The Respondent to release the certificate of service to the Claimant forthwith; and,

[e] No order on the costs.

Dated and delivered at Nairobi this 22nd day of January 2014

James Rika

Judge