



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1262 OF 2012

BETWEEN

COSMAS MUTUA KIMATU

.....CLAIMANT

VERSUS

WEMA TECHNICAL SERVICES LIMITED

..... RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. Maingi instructed by Musili Mbiti & Associates, Advocates for the Claimant

Mr. Kamotho instructed by N.K. Mugo & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 25th July 2012. The Respondent filed its Statement of Reply on 16th November 2012. The Claimant gave evidence and called one Witness Daniel Musyoki Mutua on 3rd December 2012 when the Claimant's case closed. The Respondent did not call any testimonial evidence. The dispute was last mentioned in Court on 23rd July 2013 when the Parties confirmed filing their Final Arguments, and were advised by the Court Award would be delivered on notice.

2. The Claimant told the Court he was employed by the Respondent in January 2007 as a Turn Boy, at a monthly salary of Kshs. 7,500. He worked well but on 9th June 2012, the Respondent terminated his contract of employment without notice or reason. He was not given an opportunity to be heard as he expected under Section 41 of the Employment Act 2007. He claims -:

- One month salary in lieu of notice at Kshs. 7,500;
- Severance pay from 2007-2012 at Kshs. 18,750;
- Annual leave pay from 2007-2012 at Kshs. 26,250;
- 12 months' salary in compensation at Kshs. 90,000

TotalKshs. 142,500

He also prays for the Certificate of Service; Costs; Interest; and any other relief the Court may deem suitable to grant.

3. The Claimant testified that the Respondent was engaged in the business of installing tanks. Raphael Kamau was the owner on the Respondent Business. He would pay the Claimant through the M-Pesa mobile phone money service. The Claimant left employment on 9th June 2012. He was advised by the Respondent there was not much work at the Business left. There was no notice or notice pay; he did not go on leave and was not compensated in lieu of leave; and was not paid service for the years worked. He was not a casual employee, and was paid at the end on each month. On cross-examination, he maintained he was employed around June 2007. He did not have any document to show he was so employed. The M-Pesa Statements show he was an employee of the Respondent. Raphael Kamau was the Proprietor of the Business. Kshs. 220 sent to the Claimant via M-Pesa was for financing errands. He was not merely offloading tanks for the Respondent; he used to run errands for Raphael. He was paid at the end of the month via M-Pesa. He was only able to get the M-Pesa Statements from April 2012.

4. Daniel Musyoki Mutua testified he worked as a Driver for the Respondent from 1998. The Claimant was his Turn Boy from 2007 to 2012. The Respondent used to pay its employees through the Co-operative Bank, and later through M-Pesa or Cash. The owner of the Business is Raphael Wachogo. The Witness was not aware of any employees who served on written contracts. On cross-examination, the Witness testified he did not have anything to show that Raphael owned the Business, or that the Claimant was an employee of the Respondent.

Submissions

5. The Claimant submits that he was entitled to be heard in accordance with Section 41 of the Employment Act 2007. He was entitled to be heard and accompanied at the hearing by another employee of his choice. He was entitled to have reason for the termination. The Claimant urges the Court to adopt two decisions of the ***Industrial Court in Joseph Okelo Odhiambo & Another v. Y.J. Elmi & 2 Others [2013] e-KLR and Harrison Meshack Lusimbo v. Mareba Enterprise Limited [2013 e-KLR,*** in finding termination unfair and in awarding the prayers sought. The Respondent submits it is for the Claimant to prove his case to the required standard. He failed to show that he was an employee of the Respondent. He was not able to explain the inconsistent sums of money paid to him through M-Pesa. He only produced the M-Pesa Statements for three months. He was engaged part-time to offload Respondent's merchandise, and was not paid monthly; he was a casual employee. He is not entitled to the prayers sought.

The Court Finds and Awards:-

6. From the evidence adduced by the Claimant and his Witness, the Court is persuaded the Claimant was employed by the Respondent as a Turn Boy in 2007. He also served the Business as a General Labourer, running errands for the Business Owner Mr. Raphael Wachogo. There were M-Pesa Statements showing money flowing from Raphael to the Claimant. The Claimant's Witness explained that the Respondent initially used to pay its Employees through the Cooperative Bank, then M-Pesa or Cash Payments. The Claimant would not be expected to have M-Pesa Statements from 2007 showing how his salaries were paid. This was not an exclusive mode of payment. The three months sampled were sufficient to link the Claimant and the Respondent in an employment relationship. The inconsistencies in the amounts paid through M-Pesa were explained by the Claimant adequately; the Respondent would send him money for running errands, and did not pay the full salaries at one time. The Respondent offered no evidence to contradict the Claimant on the nature or purpose of the M-Pesa transactions. The Court is satisfied the Claimant was a regular employee of the Respondent.

7. The Respondent did not demonstrate valid reason or reasons why it opted to terminate the Claimant's contract after 5 years of service. The Claimant testified he was advised by the Respondent that the volume of work at the Business had diminished. In the view of the Court, and in the absence of any other explanation, the Claimant's contract ended through redundancy. He is therefore right in **claiming**

severance pay, which the Court grants him at 15 days' salary for 5 years = Kshs. 21,634. The claim for **one month salary in lieu of notice at Kshs. 7,500 has good ground in both law and fact, and is allowed.** The respondent did not avail to the Court any leave records showing the Claimant to have taken or sold his leave days. **The Claimant is allowed Kshs. 26,250 in annual leave entitlement as claimed.** Lastly the Respondent did not carry out the process of redundancy in accordance with Section 40, 43 and 45 of the Employment Act 2007. Fair termination procedure was disregarded. The Claimant is entitled **to compensation, which the Court grants at 4 months' salary, totaled Kshs. 30,000.** The Court in sum Orders-:

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

[b] The Respondent shall pay to the Claimant severance pay of Kshs 21,634; one month salary in notice pay at Kshs. 7,500; 4 months' salary in compensation at Kshs.30,000; and annual leave pay at Kshs. 26,250- total Kshs.85,384;

[c] The total amount of Kshs.85,384 shall be paid by the Respondent to the Claimant within 30 days of the delivery of this Award.

[d] The Respondent to release the Certificate of Service to the Claimant forthwith.

[e] No order on the costs.

Dated and delivered at Nairobi this 21st day of January 2014

James Rika

Judge