



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1158 OF 2011

JOHN NDUNGA MUTUA.....CLAIMANT

VS

CORRUGATED SHEETS LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by a Memorandum of Claim dated 11th July and filed in Court on 12th July 2011 is for wrongful termination of employment and failure to pay terminal dues. The Respondent filed a Memorandum of Reply on 19th April 2012 and the matter was heard between 22nd May 2013 and 25th November 2013. The Claimant testified on his own behalf and then called Lawrence Kinyanjui Kimani and Titus Muia Mwangi. Alphonse Mutinda Sila and Yakoob Ebrahim Haji Khamsa Bacha testified for the Respondent. Both parties then filed written submissions.

The Claimant's Case

2. According to the Claimant, he was employed by the Respondent as a driver in June 1994. He worked as such until 2nd June 2011 when his employment was terminated on allegations of theft of company items. It was the Claimant's case that there was no valid reason for the termination of his employment and that he was not accorded a fair hearing. The Claimant further pleaded that on 4th June 2011, he was forced and intimidated in the presence of an armed police officer, to write an apology letter in which he admitted the allegations made against him.

3. The Claimant claims the following:

- a. 3 months' salary in lieu of notice.....Kshs 65,700
- b. Salary for the month of May 2011.....21,900
- c. Severance pay at the rate of 15 days' pay per year.....186,150
- d. Leave pay for 10 years.....219,000
- e. Unremitted NSSF contributions for 17 years.....40,800
- f. Unremitted NHIF contributions for 17 years.....65,280
- g. Gratuity
- h. Compensation for wrongful dismissal
- i. Punitive damages
- j. Certificate of service
- k. Costs
- l. Any other relief the Court may deem just to grant

The Respondent's Case

4. In its Memorandum of Reply, the Respondent stated that the Claimant was dismissed upon his admission of attempted theft of 3 bags of nails, the property of the Respondent. According to the Respondent, the Claimant was accorded a fair hearing and was paid and acknowledged receipt of all his final dues thus discharging the Respondent from any further liability.

Findings and Determination

5. Before determining the major issue on the substance and procedure of the termination of the Claimant's employment, I need to dispense with two collateral matters. The first has to do with the effect of the document dated 2nd June 2011 in which the Claimant acknowledged receipt of Kshs. 67,482 being full and final dues. It was the Respondent's case that by signing this document and confirming that he had no further claims to make against the Respondent, the Claimant's right to legal redress had in effect been spent.

6. In the case of *Simon Muguku Gichigi Vs Taifa Sacco Society Ltd (Industrial Court Cause No 681 of 2012)* this Court stated that an employer cannot circumvent their obligation to an employee by simply producing a form of discharge executed by the employee as no form of discharge can cure a legal irregularity. I will therefore examine the Claimant's case in this light.

7. The second collateral issue relates to the effective date of the Claimant's employment by the Respondent and his salary as at the time he left employment. The Claimant stated that he was employed in June 1994. However, in the provisional NSSF statements of account produced by the Claimant, the date of the Claimant's employment is consistently reflected as 1st August 2005. The Court has therefore adopted this date as the effective date of the Claimant's employment by the Respondent.

8. With regard to the issue of salary, the latest pay slip produced by the Claimant is for the month of February 2011 and shows a gross salary of Kshs. 18,900 which the Court has adopted as the Claimant's salary for purposes of this claim.

9. I will now deal with the question whether the termination of the Claimant's employment was substantively justifiable and procedurally fair. Section 43 of the Employment Act, 2007 provides that:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

10. According to the Respondent, the Claimant's employment was terminated following an attempted theft of 3 bags of nails; an offence which the Claimant and his 2 colleagues admitted. The Claimant, while denying any involvement in the alleged offence, stated that he was forced to sign the letter of apology exhibited as Appendix 1 in the Respondent's Memorandum of Reply.

11. In the case of *Wenslaus Oduki Odinga Vs Kenyatta National Hospital (Industrial Court Cause No 1975 of 2011)* this Court held that an employee who alleges duress or inducement to sign a document in a non custodial environment must provide details of such duress or inducement. It was the Claimant's testimony that he and his colleagues were coerced into writing apology letters in the presence of an armed police officer and the Claimant's witness, Lawrence Kinyanjui Kimani, who himself was alleged to have been involved in the theft sought to corroborate the Claimant's evidence in this regard.

12. Conversely, the Respondent's witnesses Alphonse Mutinda Sila and Yakoob Ebrahim Haji Khamsa Bacha testified that they were within the vicinity of the office where the Claimant and his colleagues were being questioned and did not see any police officers.

13. A police officer pointing a firearm at an employee at the work place is not a normal occurrence and if indeed such an incident took place as alleged by the Claimant and his witness, this would have drawn the attention of the other workers present, including Sila and Bacha. On a balance of probability, therefore, the Court finds that the allegations of coercion by the Claimant were not supported by independent evidence. Consequently, I find that the Respondent had a valid reason for termination of the Claimant's employment.

14. I will now examine the procedure adopted by the Respondent in effecting the termination of the Claimant's employment. Section 41 of the Employment Act, establishes the procedure for handling cases of misconduct as follows:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

15. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

16. No internal disciplinary rules were brought to the attention of the Court and the Claimant's case therefore falls within the four corners of Section 41. From the record, there was no evidence that the Claimant was subjected to the disciplinary procedure contemplated under Section 41 and the Court therefore finds the termination of his employment unfair for want of due process and awards him the equivalent of 5 months' salary in compensation.

17. The Respondent alleged that the Claimant was paid notice pay and salary for May 2011 but did not produce any supporting evidence during the trial. I therefore award the Claimant one month's salary in lieu of notice as well as his salary for May 2011. That dispenses with the claim for 3 months' salary in lieu of notice which was not supported. The claims for severance pay, leave pay, gratuity and punitive damages were not proved and are dismissed.

18. I therefore make an award in favour of the Claimant in the following terms:

a. 5 months' salary in compensation.....	Kshs. 94,500
b. 1 month's salary in lieu of notice.....	18,900
c. Salary for May 2011.....	18,900
Total.....	<u>Ksh.132,300</u>

The Claimant is also entitled to a certificate of service.

I further award the Claimant the costs of this case.

This award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

On the claims for unremitted NSSF and NHIF contributions, I direct the Respondent to obtain and submit to the Claimant up to date statements of account within the next 30 days from the date of this award

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF
FEBRUARY 2014**

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*