



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1437 OF 2011

JAMES ONDUKO.....CLAIMANT

VERSUS

COMPUTER FOR SCHOOL KENYA..... RESPONDENT

JUDGMENT

The Claimant herein JAMES ONDUKO by Memorandum of Claim dated 4th August and filed in court on 23rd August 2011 alleges that he was employed by the Respondent as a receptionist at a monthly salary of shs.23,595 on 1st April 2008 and his employment was unlawfully and wrongfully terminated on 29th September 2008.

He further alleges that he had been working for the Respondent from 2004. He alleges the termination of his employment was unprocedural and unfair.

He seeks payment of the following;

- i. NSSF deductions kshs.400.00
- ii. NHIF deductions KSHS.960.00
- iii. SACCO deductions for October 2008 Kshs.4,716.00
- iv. Lunch deductions Kshs.1,500.00
- v. Leave pay for 1 year Kshs.16,516.50
- vi. Compensation for wrongful dismissal at 12 months' salary Kshs.283,140
- vii. Costs, Interest and any other relieve the court may deem just.

The Respondent filed its Memorandum of Reply dated and filed on 7th December 2011. It denied that the Claimant's employment was terminated unfairly and aver that the termination was in accordance with clauses of the employment contract dated 1st April 2008, and that the Respondent was entitled to terminate the contract due to the unacceptable performance of the Claimant. The Respondent denies owing the Claimant NSSF, NHIF, SACCO deductions and lunch deductions. The Respondent avers that NSSF and NHIF are not payable to the Claimant, that SACCO deductions were remitted to the SACCO as the Claimant did not instruct the Respondent to stop the deductions and that the lunch deduction was for lunch already consumed by the Claimant in September 2008. The Respondent further avers that the Claimant was paid in lieu of notice, that the Claimant was given warnings and conceded that his work was poor and his performance unacceptable. The Respondent also avers that the Claimant was given a hearing both before and after termination of his employment. The Respondent prayed that the claim be dismissed with costs.

The case was heard on 6th May, 19th June and 23rd September 2013. Parties thereafter filed written submissions. The Claimant appeared in person and testified on his own behalf. The Respondent was represented by the firm of J.K. Kibicho & Co. Advocates and called one witness MIRIAM NTHULE NDAVI, the Respondent's Human Resources and Administration Manager.

In his testimony the Claimant made many allegations some of which were not pleaded and are not relevant to the determination of this claim. Of relevance is that he started working with the Respondent as an intern in 2002 while still a student at Starehe Boys Centre. Initially as an intern he worked without pay. He was later paid fare and other basic needs up to 2005 when he was formally employed as a technician in maintenance department. His duties were maintenance of computers, installation of software and field work. In 2007 he was awarded a long service award as a committed employee. In the middle of his contract as a technician he was transferred to the reception to work as a receptionist, a position he had not training in. His first contract was in August 2007. The contract was renewed in April 2008. On 30th September 2008 he received a letter terminating his employment through his immediate supervisor as he was taking lunch at 12.30 pm. On receipt of the letter he assumed it was a promotion but was shocked when he opened it and found that it was terminating his employment with immediate effect. The letter directed him to clear immediately and hand over to one Joyce Wambura, a new recruit. The letter was signed by the Deputy Director. He immediately went to the Deputy Director who told him the director was away and he should organize one day to go back to appeal. After two days he wrote a letter seeking clarification from the Deputy Director as he was the one who had terminated the Claimant's employment and the Claimant did not understand the basis of termination. He was not given time to discuss.

He went back in mid-November 2008 when he met the director who sought to know where he had been. He informed the director that his contract had been terminated. The director told him not to worry but to write a letter stating the areas that he should improve his performance on so that he could be re-instated and the Claimant complied. He was then advised to report back to work the following Monday, but at the Kayole recycling department. He worked in Kayole for part of November and December 2008 and January 2009. In February 2009 he was issued a letter indicating that he had been employed as a technical intern and his salary was less than half of his last salary as a receptionist. On 3rd March 2009 he received a letter sending him on compulsory unpaid leave with effect from 9th March 2009 until further notice. He was required to sign the letter confirming his acceptance of the contents of the letter which he declined. When he sought an explanation he was informed that he could not be given further information as he had declined to sign the compulsory leave letter. He thereafter sought assistance from the Ministry of Labour and Kituo Cha Sheria. Kituo Cha Sheria wrote a demand letter to the Respondent who did not respond, forcing the Claimant to file the claim herein.

His salary was shs.6,000 per month from 3rd January 2005, Kshs.19,500 from March 2006, Kshs.21,450 from March 2007 and Kshs.23,595 from April 2008. Lunch and SACCO were deducted from his pay in lieu of notice.

Under cross examination the Claimant stated that he took 5 days leave. That he had previously received a warning letter but not pertaining to his work as a receptionist. He denied having discussion with the Deputy Director before receiving the letter terminating his employment. He admitted signing the clearance form before being paid salary in lieu of notice.

RW1 MIRIAM NTHULE NDAVI testified that she started working with the Respondent as a Human Resources and Administration Officer from March 2011 and therefore never met the Claimant. She became familiar with the Claimants case from documents which came into her possession by virtue of her work. From the records she learnt that the Claimant was employed on 1st April 2008 at a salary of shs.23,595 on one year's contract expiring on 1st April 2009. The Claimant's employment was terminated on 29th March 2008 due to poor performance and the way he was conducting himself. That according to the letter of termination the Claimant's conduct was hurting the image of the Respondent for which he had been warned previously. That the Claimant was given a hearing before termination, that he had met with the deputy director in a disciplinary meeting where he was asked to improve his

performance and warned that if he does not improve his employment would be terminated. She further testified that warning letters were issued to the Claimant. After termination the Claimant wrote to the director stating that he was willing to improve in areas which he did not perform well in and seeking re-employment. The Claimant was advised to appeal against termination and did so on 24th November 2008, that the appeal was not successful, that the Claimant was paid 1 month's salary in lieu of notice, that he signed the clearance form stating he had no outstanding claim. She testified that deductions made to NSSF, NHIF and SACCO cannot be refunded by the Respondent. Kshs.1500.00 was deducted for lunch consumed by the Claimant in September 2008. On annual leave claim RW1 stated that the Claimant had already taken 10 days leave and having worked for about 6 months was not owed any further leave by the Respondent. She testified that the Respondent was entitled to terminate the Claimant's employment and that the Claimant was not wrongfully dismissed.

I have read the pleadings and the documents attached thereto, carefully considered the evidence on record and the relevant law. In my opinion the issues for determination are the following.

1. When was the Claimant employed by the Respondent.
2. Was the termination of the Claimant's employment unfair.
3. Is the Claimant entitled to the prayers sought.

1. When was the Claimant employed by the Respondent.

The Claimant alleges that he first started working for the Respondent as an intern in 2002. Internship is by law regarded as employment. The definition of an employee in Section 2 of the Employment Act is as follows;

“employee means a person employed for wages or a salary and includes an apprentice and indentured learner”

An intern, being either an apprentice or indentured learner, is by definition an employee. The Claimant was therefore an employee from the time he started earning wages or salary. The Claimant's employment contract of 1st April 2008 attached to both the Claimants Memorandum of Claim and the Respondents Memorandum of Reply attest to the existence of previous employment relationship. The preamble and paragraph 3 read as follows;

Preamble

“We are pleased to inform you that following the expiry of your previous contract and your application for renewal for the same, the management of computers for school Kenya is offering you renewed employment.”

Paragraph 3

The gross salary attached to your position is Kshs.23,595.00 payable monthly in arrears representing 10% increment over your previous pay award due to the diligence you have shown in the course of executing your duties.

I therefore find the Respondent's averment that the Claimant was employed in 2008 to be untrue. The Respondent having not stated any other position held the Claimant's uncontroverted position that he started working in 2002, I find that is the correct position according to the evidence on record. I therefore hold that the claimant was employed in 2002.

2. Whether the termination of the Claimant's employment was unfair.

I find that the termination of the Claimants employment was unfair as he was not given a hearing in terms of the provisions of section 41 of the Employment Act.

3. Is the Claimant entitled to the prayers sought.

The Claimant prayed for the following remedies.

1. NSSF Deductions

The NSSF statement attached to the Memorandum of Claim shows that the deductions for NSSF were not made for the months of November and December 2009. The Employment Act Section 19(6) provides that where an employer deducts but fails to remit statutory deductions he must use his own funds to pay such remittance and at the same time refund the money deducted from the employee.

I therefore order that the Respondent refunds the sum of Shs.400/= to the Claimant and at the same time pay Shs.800 to NSSF being NSSF contributions for November and December 2009..

2. NHIF Deductions

The Claimant did not prove that any deductions of NHIF were made from his salary and not remitted to NHIF. The claim is therefore dismissed.

3. SACCO Deductions

The Claimant did not prove that SACCO deductions were made from his salary and not remitted to the SACCO. He is therefore directed to seek refund from the SACCO. The claim against the Respondent is dismissed.

4. Lunch Deductions

The Respondent admitted making deductions from the Claimants salary but did not prove that such deductions were for food already consumed by the Claimant.

I therefore order that the sum of Kshs.1,500 deducted from the Claimants salary be refunded to the Claimant.

5. Leave Pay For 1 Year

The Respondent did not submit any records to show that the Claimant took leave for the whole of the period that he worked for the Respondent. I therefore find that the Claimant is entitled to kshs.16,516.50 as prayed being one year's leave.

6. Compensation

I have already found above that the Claimant was unfairly terminated from employment. He had worked for a period of about 6 years most of which he was treated as an intern and denied basic rights of employment. I find in the circumstance that it is fair to grant him full compensation of 12 months' salary. I therefore award the Claimant Kshs.283,140 being 12 months' salary as compensation.

Orders accordingly.

Delivered and signed in open court on 3rd day of February 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

ONDUKO

Claimant in person

NO APPEARANCE

for Respondent