



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NYERI**

**CAUSE NO. 40 OF 2012**

**(Nairobi Cause No. 1577 of 2012)**

THOMAS NJOROGE WAIGURU.....CLAIMANT

VERSUS

KANYENYAINI TEA FACTORY LIMITED.....RESPONDENT

**JUDGMENT**

1. The claimant in this suit avers that the respondent by conduct terminated his services by failing to recall him back to work after suspending him.
2. By his memorandum of claim filed on 6th September, 2012 he claims that he was appointed by the respondent on 30th August, 2010 as a Logistic Assistant at a monthly salary of Kshs.22,278.
3. Prior to the appointment, he claimed that being a Motor Vehicle Mechanic Student at Murang'a College of Technology he did his industrial attachment with the respondent and after graduation he was employed by the respondent as a driver from November, 2004 to August, 2010 at a monthly wage of Kshs.12,000. The claimant therefore contended that by the time of termination he had worked for the respondent for 6 years.
4. On 27th September, 2010 the claimant avers that the respondent suspended him for allegedly handling a vehicle without authority of the manager on duty thereby causing an accident in which the vehicle and the perimeter wall were damaged.
5. According to him, he received a letter from Field Services Co-ordinator demanding a written explanation on the accident and to show cause why he should not be surcharged for the costs of repairing the vehicle to which he responded and yet the respondent still suspended him.
6. The claimant contends that from the time of his suspension, the respondent has refused and or failed to lift the suspension and or inform him of the fate of his employment despite several visits making him conclude he had been unfairly dismissed.
7. He therefore averred that despite dismissal the respondent has failed to pay him his terminal dues and further that the respondent has also failed to remit his NSSF dues regularly.
8. The claimant therefore seeks from the court:
  9. a) *a declaration that he was employed on terms and conditions under contract of service or permanent employment and was therefore unfairly terminated.*
  - 10.b) *an order that the respondent pay him half salary from the time of suspension to the date of filing this suit which he quantified as Kshs.267,336.*
  - 11.c) *payment in lieu of notice at Kshs.66,834.*
  - 12.d) *General damages for unfair termination and or services pay.*
13. The respondent in its memorandum of defence filed on 30th October, 2012 admit the facts leading to the suspension of the claimant but avers that the suspension was justified as he handled the motor vehicle in issue without authority.
14. According to the respondent, if indeed the vehicle was hindering some of the employees from

- going about their duties, the claimant should have informed the person in charge of the said motor vehicle or the factory manager instead of taking matters in his own hands. According to the respondent, the claimant was not suspended and even if that was the case it was as a result of his handling the motor vehicle in issue without authority.
15. The respondent denied that the claimant had been its employee prior to August, 2010 and further that it failed to remit the claimant's NSSF dues. It further averred that it accorded the claimant an opportunity to defend himself and the defence was found not convincing and thereafter suspended the claimant.
  16. On 14th November, 2013 when the matter came up for hearing, only the claimant gave evidence and called no other witness while the respondent called two witnesses.
  17. The claimant in his testimony reiterated the averments in the memorandum of claim.
  18. It was his evidence that he undertook industrial attachment with the respondent for 3 months and was hired thereafter in 2004 as a driver. It was further his evidence that he was a seasonal employee working on and off. His salary then varied between 8,000 and 12,000 per month
  19. He testified that in August, 2010 interviews were done and he was absorbed by the respondent and issued with a letter of appointment.
  20. He confirmed that on the material day he was asked by colleagues to remove a vehicle that was left by its driver as it was obstructing them. When he tried to remove it the vehicle hit the wall. He was injured in the process.
  21. He was thereafter summoned by the Head of Department to explain what happened after which he was asked to go and rest.
  22. On 27/9/2010 he received a letter of suspension and decided to find out why but was asked to proceed on suspension and would be called. He was in the meantime asked to write a letter explaining what happened. According to him the suspension had no time line so when he went to make enquiries, he would be told to just wait. By the time he was giving his evidence he had not received any salary from the date of suspension.
  23. In January 2011 the production manager finally told him there was no vacancy for him.
  24. In cross-examination he stated that he had worked for the respondent since 2004 but prior to August 2010 he was a seasonal worker. He admitted that he read his letter of appointment and understood the meaning of probation and that his probation was to last 3 months. He admitted that the accident took place during the 1st month of probation. He further admitted that he was placed under the supervision of one Paul Njatha. He stated that he was allocated motor vehicle registration number KAU and that it was not the same vehicle as the one that got involved in the accident. He stated that as a driver he could drive any vehicle in that he was not restricted to a particular vehicle. He denied absconding duty.
  25. The defendant on its part called its first witness Mr. Jasper Muriithi who stated that he joined the respondent's services in 2010 as Field Services Co-ordinator and came to learn of the claimant's case from the office records. He stated in cross-examination that he took over from a Mr. Mburu who had since retired. He further stated that there was no letter asking the claimant why he had absconded duty. There was also no letter terminating the claimant's services.
  26. DW2 Mr. Paul Njagi on his part testified that he worked with the claimant as his supervisor during his probation. He was the one who used to show the claimant routes for collecting tea. According to him the claimant was not supposed to drive a vehicle not assigned to him.
  27. Having reviewed the averments in the pleadings and testimony of witnesses the court is of the opinion that the issues for determination are the following:
  - 28.
  - 29.1) *Was the claimant employed by the respondent in 2004 or 2010 when he received his letter of appointment?*
  - 30.
  - 31.2) *If he was an employee of the respondent prior to 2010, what was the legal nature of his engagement?*
  - 3) *Was the claimant suspended or dismissed?*

1. With regard to actual date of engagement, the claimant testified that upon completion of his studies, he joined the respondent for industrial attachment for three months and thereafter

- continued as a “seasonal worker”. What he meant by a seasonal worker was that he could work on and off. According to him, he was being paid monthly salary of between Kshs. 8,000 and Kshs.12,000. He continued as a seasonal worker until August, 2010 when he was given a letter of appointment.
2. The respondent however refuted this allegation and maintained that it hired the claimant for the first time in 2010 when he was issued with a letter of appointment.
  3. The claimant attached a bank statement to show that he was receiving payments from the respondent from way back in 2005 which meant he was an employee before 2010. It was his evidence, which was never disputed by the respondent, that the item “KTF SALARY” in his bank statement referred to money deposited in his account by the respondent.
  4. From the analysis of the bank statement, the respondent paid the claimant Kshs.5,381.60 in December, 2005; Kshs.5,181.60 on 4th April, 2006; Kshs.4,447.50 on 3rd June, 2006. There is no record of payment between July 2006 and November, 2009 when the next payment of Kshs.15,053.10 described as October salary was made. Thereafter the respondent consistently paid the claimant every month albeit varying amounts.
  5. This observation partly confirms or corroborates the claimant's assertion that he was a seasonal employee paid monthly and partly that at some point he was consistently in the employment of the respondent prior to August, 2010 when he was issued with a letter of appointment to his new position as “Logistics Assistant”.
  6. Section 35 of the Employment Act, 2007 provides that:
    7. 35(I) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be
    8. (a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice.
    9. (b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing or,
    10. 1. (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.
  11. Section 42 (4) provides as follows:
  - 12.
  13. (4) A party to a contract for a probationary period may terminate the contract by giving not less than seven day's notice of termination of the contract, or by payment by the employer to the employee, of seven day's wages in lieu of notice.
1. The implication of the foregoing provisions of the law is that if as the court has found, the claimant was an employee of the respondent from month to month with effect from October, 2009, his contract for service was terminable by giving at least 28 days notice or salary equivalent in lieu thereof.
  2. The claimant was however appointed to a new post on 30th August, 2010 and placed on probation for three months during which his contract could be terminated by giving 7 days notice or payment in lieu thereof. What this implied was that the claimant's prior month to month engagement became subsumed by the new appointment since no person may reasonably keep two parallel jobs in the same organization.
  3. The claimant was accused of driving the respondent's motor vehicle without authority and causing an accident with it with consequential damage to the vehicle. His explanation and justification for driving the vehicle was rejected by the respondent who by a letter 27th September, 2010 suspended him from driving duties. This implies that the respondent, despite the loss and damage caused to the vehicle through acts of the claimant, preferred not invoke the termination clause in the appointment letter but suspend him from driving duties instead. The import of the suspension letter is that the claimant had other duties apart from driving, from which he was not suspended. This observation tallies with the evidence of DW1 who stated that the claimant was free to come for allocation of other duties like buying leaf which was part of his duties as logistics assistant.
  4. Whereas, counsel for the claimant rightly objected to the introduction of the issue of absconding

- from duty during the hearing since it was not pleaded, it is also noteworthy that apart from the demand letter dated 7th February, 2012 there appears to be no communication from the claimant regarding his fate as an employee of the respondent. Besides, the demand letter asks for payment of dues and wages from October, 2010 to February, 2012 without any allegation that the claimant worked and the respondent refused to pay him. The claimant in his own testimony stated that he kept going to the respondent premises to enquire about the fate of his suspension but was told to keep waiting he would be called. This testimony if true, meant the claimant was never at work.
5. From the foregoing, it is reasonably deducible that the claimant misread his suspension letter to mean suspension from all duties hence ceased to report to work. This perhaps explains why DW1 on being questioned by counsel for the claimant on why they have not paid the claimant while on suspension stated that the respondent could not pay for work not done.
  6. This is a classical case where both an employer and an employee have omitted to exercise their rights under the Employment Act with the consequence that there is confusion on the status of employee – employer relationship between them. However, a bigger responsibility rests on the employer on whom the law places the duty to draw and regulate the terms and conditions of the contract of employment. Besides in this case, it is the respondent who triggered the confusion by suspending the claimant from driving duties without specifying which other duties he was not suspended from and which he ought to have continued to perform. Further, if the issue of absconding duty were to be taken seriously, the respondent ought to have had evidence on what efforts it took to procure the claimant's return to work.
  7. As a result, the court having found that the claimant was in continuous employment of the respondent from October, 2009 his services ought, in the absence of contract to the contrary, to have been terminated by issuing one month's notice in lieu of pay.
  8. To keep the claimant in limbo over the status of his employment relationship with the respondent to the extent that the claimant deemed it terminated amounted to unfair termination of employment within the meaning of section 45(2)(c) of the Employment Act.
  9. In conclusion the court therefore awards the claimant as follows:
    - 10.a) **One month's salary in lieu of notice being Kshs.22,278.**
    - 11.b) **Three months salary as compensation for unfair termination of employment being Kshs.66,834.**
  - c) **Costs of the suit.**

1. It is so ordered.

*Dated at Nyeri this 14th day of February, 2014.*

1. **ABUODHA N. J**
2. **JUDGE**
3. **Delivered in open Court in the presence of Mr. Mwaniki for the Claimant and in the presence of Wachira for the Respondent.**

**ABUODHA N. J**

**JUDGE**