



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 266 OF 2013
(Originally Mombasa High Court Civil Case No. 892 of 1991)

CHARLES KAKAI

CLAIMANT

v

TRANSAMI (KENYA) LIMITED

RESPONDENT

JUDGMENT

1. If there is a case which will serve as a bad blot on the judiciary, then the instant case must take its place on the high table. I state so because Mr. Charles Kakai (Claimant) initially commenced legal proceedings against Transami (Kenya) Limited (Respondent) on 18 November 1991, and the determination of the suit is now coming up on 28 March 2014, over 23 years after the filing of the suit. This must be highly regretted.
2. For purposes of record though, the Court must note that Kasango J. made an order on 19 August 2013 transferring the suit from the High Court to the Industrial Court. The matter therefore is being determined after being in the Industrial Court for about 5 months.
3. The Claimant was employed by the Respondent as an Accounts Clerk, after the merger of Transitra (Kenya) Ltd and AMI International Ltd to form Transami (Kenya) Ltd through a letter dated 1 January 1984 (the letter acknowledged the employment was with effect from 1 September 1982).
4. Through a letter dated 25 October 1990, the Respondent transferred the Claimant from Mombasa office to Malaba-Kenya with effect from 5 November 1990. The letter of transfer informed the Claimant that he would be paid Kshs 850/- disturbance allowance and that in addition, the Respondent would be responsible for his and family members travelling costs, together with personal effects.
5. On 5 February 1991, the Respondent wrote to the Claimant informing him that it had been decided to summarily dismiss him from employment under section 17 of the Employment Act (now repealed) with effect from 3 December 1990. The letter made reference to a previous letter dated 15 January 1991 and investigations which had been carried out which established that the Claimant had deserted duty after expiry of his leave.
6. The Claimant in his pleading stated that the dismissal was unlawful and without justification, and further that the dismissal was against the terms of his letter of employment. Consequently he suffered loss and damages and seeks the judgment in terms of paragraphs 9 and 10 of the Pleint.
7. The Respondent filed a Defence on 23 December 1991, and it admitted having summarily dismissed the Claimant for desertion of duty and that the dismissal was lawful because it was in accordance with the Employment Act (repealed).
8. On 9 September 2013, the Claimant appeared before me and requested for a hearing date. I fixed

- the hearing for 16 October 2013 and directed him to serve a hearing notice upon the Respondent. On 16 October 2013 the Claimant in person and a Kariuki holding brief for Ms. Kayatta for the Respondent appeared before the Deputy Registrar (I was not sitting due to other official engagements) and had the hearing fixed for 9 December 2013.
9. On 9 December 2013, only the Claimant appeared. Because the hearing date had been given in the presence of the Respondent, I directed that the Cause proceeds to hearing. The Claimant opted to make oral submissions (Respondent's legal representative appeared in Court at conclusion of submissions).
 - 10.Regarding the circumstances surrounding his dismissal, the Claimant submitted that he was transferred to Malaba through letter dated 25 October 1990 (see List of Documents) and that he was only paid a disturbance allowance of Kshs 850/- but not transport costs for family and personal effects.
 - 11.The Claimant also submitted that he reported to Malaba but the officer there Mr. Olindo told him he was not aware of his transfer and he therefore called Respondent's head office but was told to await further instructions. The Claimant run out of money while waiting for the further instructions in Malaba. He was also not sent money and the Respondent's Chief Accountant advised him to apply for leave which he did. (see Approved Leave application form in list of Documents). According to the form the Claimant was to resume duty on 3 December 1990.
 - 12.After the approval of the leave, the Claimant submitted that he travelled to the Nairobi office of the Respondent and was instructed to go to Mombasa for further instructions but was not paid his December 1990 salary and therefore he travelled to Nairobi to see the Respondent's Executive Director.
 - 13.The Claimant continued that on 15 January 1991 he received a suspension letter and a dismissal letter on 5 February 1991. He then sought legal assistance.
 - 14.The Claimant further submitted his employment letter did not have a termination clause and that he seeks salary for December 1990, salary for January 1991, 5 days wages for February 1991, 6 months' salary in lieu of notice, accrued leave for 5 months, service pay and damages for wrongful dismissal.
 - 15.Under the legal regime applicable at the time of the dismissal of the Claimant, an employer could dismiss an employee for no reason, a good reason or a bad reason provided he paid damages measured by the period of notice agreed in the employment contract or the equivalent of a reasonable notice.
 - 16.However, the Respondent opted to summarily dismiss the Claimant and cited section 17 of the Employment Act (repealed). The Respondent purportedly dismissed the Claimant for desertion of duty. Absence from duty without leave or lawful cause was one of the grounds for summary dismissal under the repealed Act aforesaid. An employee was free however to challenge whether the grounds for dismissal was justifiable or lawful.
 - 17.Having looked at the pleadings and documents filed by the Claimant, the Court is of the view that the summary dismissal of the Claimant was not justifiable. The Respondent did not copy the Claimant's transfer letter to officer in charge of its Malaba office and therefore it is possible the officer did not know about the transfer. In any case the Respondent legal counsel appeared in Court after the Claimant had closed his case and therefore did not challenge the Claimant or elaborate on its case.

Appropriate relief

Unpaid salaries for December 1990, January 1991 and 5 days February 1991

- 18.The Claimant filed a letter dated 22 December 1989 indicating that his salary had been reviewed to a basic of Kshs 3030/- and Kshs 600/- house allowance per month.
- 19.The Claimant is therefore entitled to Kshs 7,865/- as wages due upto time of dismissal.

Six months salary in lieu of notice

- 20.The Claimant sought Kshs 19,780/- being six months' salary in lieu of notice. It is correct as submitted by the Claimant that his letter of employment did not have a termination/notice period

clause.

21.The Court is therefore enjoined by previous authority to award what would be reasonable. Considering the time the Claimant was dismissed and the time the Cause is being determined and inflation, six months' salary in lieu of notice as sought by the Claimant would be reasonable.

Earned leave

22.According to the approved leave application form filed by the Claimant, he had a balance of 24 leave days as of 1 September 1990. He was dismissed in February 1991. I would award him Kshs 1,210/- sought as accrued leave for 5 months.

Service pay

23.No contractual or statutory basis was laid for this head of relief and it is dismissed.

Expenses on accommodation/subsistence

24.The Claimant sought Kshs 9,300/-spent on subsistence and accommodation while in Malaba. Receipts were filed with the List of Documents. I would award the Claimant the amount claimed in the sum of Kshs 9,300/-

Costs

25.The Claimant has been successful. The Claim has been pending for over 23 years. I would award the Claimant costs. Considering that the Claimant acted in person and allowing the issue to taxing costs would only delay the Claimant further, I order the Respondent to pay him costs of Kshs 20,000/-.

Conclusion and Orders

26.In conclusion, the Court finds that the dismissal of the Claimant was not justifiable and awards him

a. Salaries for December 1990-5 February 1991	Kshs 7,865/-
b. 6 months salary in lieu of Notice	Kshs 19,780/-
c. Accrued leave	Kshs 1,210/-
d. Accommodation/subsistence reimbursement	Kshs 9,300/-
e. Costs	Kshs 20,000/-
f. TOTAL	Kshs 58,155/-

27.The Claim for service pay is dismissed.

Delivered, dated and signed in open court in Mombasa on this 28th day of March 2014.

Radido Stephen

Judge

Appearances

Charles Kakai

Claimant in person

Mr. Wafula instructed by

Cootow & Associates, Advocates

for Respondent