



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

Cause No. 766 Of 2012

Bernayo Tsiambo Mbayachi.....Claimant

-Versus-

Mukoya Gas Stores Respondent

Claimant in person

Mr. Kwengu for the Respondent

JUDGMENT

1. This matter was brought by way of a statement of claim dated 7th May 2012 seeking various reliefs to wit:
 - i. terminal benefits in the sum of Kshs. 190,000/=;
 - ii. compensation for wrongful dismissal;
 - iii. interest and costs.

The claim is premised on the following facts;

That on or about 4th April 2005, the Respondent employed the Claimant as a salesman earning a monthly salary of Kshs. 10,000/=. He was paid Kshs. 2,500/= per week. He was not registered with National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF).

He was stationed at the Green Field Branch and was living at Tasia in a rented house.

2. On or about the 2nd August 2011, at about 10.45 a.m., the Respondent terminated the services of the Claimant on grounds that his work was not satisfactory.

The Claimant had no notice of the termination and was taken by surprise. On the weekend that followed, the Claimant came back to ask for his terminal dues but the Respondent told him to go to Court.

3. He reported the matter to the Ministry of Labour but when the Respondent was summoned for conciliation, he told the Claimant that he would struggle until his shoes got finished.

The matter was not resolved at the Ministry and the labour officer appeared to openly side with

the Respondent.

4. The Claimant claims salary in lieu of one month notice in the sum of Kshs. 10,000; severance pay at the rate of 15 days salary for each completed year of service in the sum of Kshs. 30,000/=; payment in lieu of leave which he says was not given to him in the entire period of six(6) years in the sum of Kshs. 42,000/=; house allowance at 15% of the basic pay for six years in the sum of Kshs. 108,000/= and maximum compensation for unfair dismissal in the sum of Kshs. 120,000/=.

The Claimant told the Court that following the termination, he was chased from his house. His brothers who worked for the Respondent were also dismissed for housing the Claimant. That he had now gotten a job with another gas shop.

5. The Claimant states that the dismissal was for no reason at all and claims compensation.

He also seeks a certificate of service which the Respondent never provided.

The Claimant was closely, cross examined by the counsel for the Respondent and it was put to him that;

- i. he had several warnings for misconduct;
 - ii. the 10,000 salary was the gross salary per month and he was thus not entitled to a house allowance.
 - iii. he had absconded to work a competitor but was not dismissed.
 - iv. he threw the keys to the Respondent and told him to keep his job.
 - v. he worked on commission for Umbrella Gas, a competitor while still serving the Respondent.
 - vi. he was suspected of a break-in and loss of money at the Respondent's premises.
6. The Claimant denied all these allegations stating that he left the keys with one **Elly Sharma** upon dismissal. He said 17 other employees were dismissed in a similar fashion before him.

He denied involvement in any break-in or theft as alleged by the Respondent or at all and was released by the police when the Respondent caused him to be arrested as a suspect.

7. **Mr. Elisha A. Otieno** testified in support of the Respondent's case. He said he had served the Respondent for 13 years as a gas sales person.

That the Claimant left work on 2/8/2011 upon being asked by the Respondent to go home for a short while as there was no sufficient work for him at the time.

That the witness noticed that the Claimant had a receipt from the competitor's business, Umbrella Gas.

8. The Director of the Respondent also saw the receipt book, and asked the Claimant about it but instead of answering, the Claimant walked out saying "**you can keep your job, and I will continue working.**" He then threw the keys to the Director and left and did not return.

He said that all the employees of the Respondent went on leave and therefore the claim by the Claimant was fictitious.

He produced a sales book to illustrate that the Claimant was not at work during certain periods. This was not the record of leave taken.

He said that they all worked for 6 days from Monday to Saturday. That they reported to work from 8 a.m. to 8 p.m. in the evening but peak hours were 6 p.m. to 8 p.m.

9. He said that the Claimant was away from 24th March 2011; to 2nd April 2011; 17th May 2011 to 24th May 2011; 26th May up to 21st June; 11th January 2010 to 18th January 2010, 23rd March 2010 to 27th March 2010; 29th September 2010 to 25th October 2010 and 22nd November up to 5th December 2010.

He told the Court that they did not fill in leave forms but they went on leave as the sales book shows. That they were entitled to 21 days each per year.

He agreed that the Claimant served for six (6) years. He also confirmed that they were not registered with NHIF and NSSF.

He said that they were paid overtime when they worked in excess of hours and during holidays.

He insisted that the Claimant ran his own business called Umbrella Gas next door and that is why he left the Respondent.

The statement of Response dated 16th November 2012 is in tandem with the allegations made by this witness.

10. Analysis

It is clear that the Claimant had worked for the Respondent for 6 years and was not registered with NSSF. He is entitled to payment of severance pay in terms of *Section 35* of the Employment Act, which the Court pegs at 15 days salary for each completed year of service going by the *Practice and the Guideline* derived from *Section 40 of the Employment Act*. Accordingly the claim for Kshs. 30,000 severance pay is allowed.

11. The Respondent did not produce leave records, which he is bound by the law to keep, but the sales record book which shows that the Claimant did not do sales for the named periods is consistent with his absence during those periods. We will in the circumstances give the Respondent the benefit of doubt and find that the Claimant was granted 21 days leave per annum during the period he worked for the Respondent.

12. The claim for house allowance is not based on any contract or letter of appointment produced by the Claimant and the Court is entitled to find that the Kshs. 10,000 monthly salary was a gross salary and there was no agreement for any further payment.

13. There is no evidence that the Claimant was underpaid during the period he served the Respondent and this claim is also dismissed.

The Claimant's version of events has not been seriously countered by the Respondent regarding the summary dismissal that happened on 10th April, 2005.

14. The allegations that he absconded work by the Respondent is not supported by any letter to that effect.

The evidence of a co-worker to the effect that he overheard the Claimant tell his boss to keep his work and throw the keys is not convincing especially because, the witness also told Court that the boss had already told the Claimant to go home as there was no work for him.

This conduct is inconsistent with the conduct of an employee who had served the Respondent for a period of six (6) years and even had his relatives employed by the Respondent.

15. The Claimant has on a balance of probability established that he was summarily dismissed on the 2nd August 2011 and the Respondent has failed to justify the dismissal in terms of Section 37(5) of the Employment Act.

16. Accordingly the dismissal violated *Section 45(1) and (2) of the Employment Act*, in that it was not for a valid reason and was not done in terms of a fair procedure as no notice nor a hearing preceded it.

17. Accordingly the Claimant is also entitled to payment in lieu of one month notice in the sum of Kshs. 10,000/=.

18. The Respondent had served for a period of six (6) years diligently and the sudden nature of the termination did not prepare him to mitigate its effect. He suffered immensely as a result including being evicted from his house, and having his brothers also dismissed for supporting him. And given that he was not given a certificate of service to enable him get alternative work quickly, the Court awards him 10 months salary as compensation for unfair dismissal in the sum of Kshs. 100,000/=.

19. The total award by the Court to the Claimant against the Respondent is Kshs;

- i. 100,000/= compensation;
- ii. 10,000/= in lieu of notice;
- iii. 30,000/= severance pay.

20. Total 140,000/=.

21. The Respondent is to pay interest at Court rates on the decretal amount from the date of the Judgment to payment in full.

22. The Respondent is to issue a certificate of service to the Claimant within 10 days from date of this judgment.

The Respondent is further to pay the costs of the suit.

Dated and delivered at Nairobi this 21st day of March, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE