



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 295 OF 2013

ERIC MUNGATANA.....CLAIMANT

v

RINSE FENNEMA

BLESSED GENERATION CHILDREN CENTRE.....RESPONDENTS

JUDGMENT

1. Eric Mungatana (Claimant) was employed by the Blessed Generation Children Centre (Respondent) in February 2007 on a one year contract as a Safari Manager/ Tour Guide. It appears the contract ended in February 2011 and was renewed for another year from 12 February 2011 upto 12 February 2012 through an undated but signed letter by both parties.
2. The letter indicated that the Claimant would be paid a monthly deductible basic salary of Kshs 17,966/-. The letter had a termination clause which provided for giving of one month notice or pay in lieu of notice.
3. The employment relationship hit the rocks in September/November 2011 and the Claimant ceased working.
4. On 16 September 2013, the Claimant filed a Statement of Claim on the basis that his termination was unfair.
5. The Cause was first placed before the Deputy Registrar on 14 October 2013 and she fixed it for mention on 30 October 2013 before the trial Court. On the mention date, Mr. Muchiri appeared for the Claimant while Mr. Alwenya held brief for Mr. Nyakoe for the Respondent.
6. The parties agreed by consent that the Cause would proceed for hearing on 5 December 2013, and I also directed that the Respondents file their documents and witness statements within ten days, which was on or before 9 November 2013.
7. When the Cause came up for hearing on 5 December 2013, the Respondents had not complied with the directions of the Court to file documents and witness statements and no reasons were given. Mr. Muchiri was present for the Claimant while Ms. Mbulika held brief for Mr. Nyakoe for the Respondent.
8. Ms. Mbulika sought an adjournment on the ground that the parties were negotiating and that Mr. Nyakoe was bereaved.

9. Mr. Muchiri opposed the application for adjournment because he had talked with Mr. Nyakoe the previous day (4 December 2013) and he had not mentioned to him he was bereaved. The Court declined the application for adjournment and ordered the Cause to proceed to hearing.

10. The Cause was called for hearing at 10.35 am after the Court had finished going through the Cause List and Ms. Mbulika was not present, without any explanation.

11. The Court deprecates the conduct of Ms. Mbulika which it finds uncourteous, unethical and unprofessional and unbecoming of an officer of the Court.

12. The Cause therefore proceeded in the absence of the Respondents and their legal representatives, though they had notice/information of the hearing.

Claimant's pleadings and case

13. The Claimant pleaded that the Respondents orchestrated a scheme to frustrate him and did not pay his salaries for September and October 2011, caused his arrest on framed complaints but he was not arraigned in Court, that the police confirmed a formal complaint was never lodged by Respondents, that monies allegedly lost were deposited into Masai Sopa Lodge account with Barclays Bank Ltd, that he made a complaint to the local labour officer and that his Advocate made demands.

14. He further pleaded that he was not granted a hearing before action was taken against him. He seeks compensation, unpaid salaries, pay in lieu of notice and accrued leave.

15. The Claimant testified and stated that his contract was to end in February 2012 but that in September and October 2011 he was not paid his wages and that when he inquired, the Respondents Accountant told him the 1st Respondent had given the Accountant instructions not to remit his wages.

16. He further testified that towards the end of October 2011 he was called by the Respondents' Secretary and when he went to the offices he was arrested by the Police on allegations of not remitting monies due to Sopa Lodges and that the Police took him to his house where he retrieved receipts to show the monies had been banked after which he was released with orders to report to the police daily, which he did for six months.

17. He reported a trade dispute to the Ministry of Labour but the Respondents did not cooperate and that the Labour office wrote to the Police and the police wrote back that the Respondents had refused to turn up to lodge an official complaint.

18. He also testified that his termination was unfair because he was not given a termination letter, his salary was stopped without notice and that he was not given any explanations or hearing. He therefore sought the reliefs set out in the Statement of Claim.

19. The Claimant annexed to the Statement of Claim his employment contract, letters from County Labour Officer to Respondents dated 20 July 2012 and to the OCS, Malindi dated 5 June 2012, the reply by the OCS and pay slips for June, July and August 2011.

Respondents' case

20. The Respondents filed a Response on 14 October 2013 through the firm of Nyakoe Macharia & Co. Advocates, pleading that the Claimant had received monies on behalf of the Respondents which were not remitted/banked and further that the Claimant had deserted duty for three months.

21. The Response was otherwise a mere denial of the pleadings of the Claimant and putting him to strict proof.

Issues for determination

22. From the pleadings and testimony of the Claimant and the pleadings of the Respondent, I consider the issues which arise for determination are whether the Claimant has proved his termination was unfair and appropriate remedies.

Whether the termination was unfair

23. The Claimant was not issued with a termination letter or reasons for the dismissal and therefore the Court must look at the circumstances surrounding the separation between the Claimant and the Respondents as a whole.

24. The Claimant pleaded and testified that he was not paid his wages for September and October 2011. The Respondents admitted as much in the paragraph 9 of the Response, but with the explanation that it was to make him come back to the office to explain.

25. The Respondents did not deny that the Claimant worked for September and October 2011. Sections 17 and 18 of the Employment Act are explicit on payment of wages due.

26. The payment of wages is one of the *essentials* of a contract of services/employment. Payment of wages is a fundamental term of the contract. The Respondents conduct of not paying the Claimant his wages for September and October 2011 was a significant breach going to the root of the employment contract and it indicated that the Respondents were no longer intending to be bound by an essential term of the contract. The Claimant was therefore entitled to consider himself dismissed and to leave.

27. The Claimant was constructively dismissed, and I would find the legal principles discussed in *Western Excavating (ECC) Ltd v Sharp* (1978) IRLR 27 and *Adams v Charles Zub Associates Ltd* (1978) IRLR 551 that an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, and that failure to pay salary on the due date may amount to conduct constituting breach going to the root of the contract, as applicable and equally sound in law under the Kenyan framework and applicable to the present case.

28. Sections 43, 45 and 47 of the Employment Act, 2007 require an employer to prove the reasons for termination, that the reasons are valid and fair and further to justify the grounds for termination.

29. Considering the burden placed upon employers by the provisions cited in the preceding paragraph, the Response filed on behalf of the Respondents, it is the view of the Court that the Respondents did not meet the required legal standard.

30. In employment disputes an employer seeking to rely on mere denials and putting a claimant to strict proof is treading on slippery legal ground given the obligations placed upon employers by the Employment Act.

31. The Respondents have failed to prove that the Claimant deserted work or received and did not remit monies. The particulars could have easily been outlined in the Response or documentation.

32. In any case even an employee who deserts is entitled to a hearing and the Respondents did not suggest in their Response how and whether they gave the Claimant a hearing. The termination was unfair.

Appropriate relief

Twelve months compensation

33. The Claimant sought the maximum compensation of twelve months which he quantified at Kshs 221,820/-. Section 49(1)(c) of the Employment Act has given compensation upto a maximum of the equivalent of twelve months gross wages as one of the primary remedies for unfair termination/wrongful dismissal.

34. The Claimant's pay slip for August 2011 show the gross pay was Kshs 20,282/-.

35. Section 49(4) of the Act enjoins the Court to consider any, some or all the thirteen factors set out therein.

36. The Claimant was in a fixed term contract which had some six or so months to run. Renewal was not automatic. Putting this factor into consideration, I would award the Claimant the equivalent of six months gross wages as compensation, which I assess in the sum of Kshs 121,692/-.

Unpaid salaries for September and October 2011

37. The Claimant testified and the same was unchallenged that he was not paid his wages for September and October 2011. He is entitled to Kshs 40,564/- under this head and not the sum of Kshs 36,970/- claimed.

Pay in lieu of Notice

38. The employment contract between the Claimant and Respondents had a provision for termination by the giving of one month notice or payment of one month wages in lieu of notice, and the termination has been found unfair.

39. Based on the contract and section 35 of the Employment Act, the Claimant is entitled to Kshs 18,485/- as one month pay in lieu of notice being the equivalent of his basic pay.

Outstanding leave for 2010/2011

o The employment contract did not have provision for annual leave. In the circumstances section 28 of the Employment Act becomes implicated. By virtue of this section and section 10(3) and (7) of the same Act and the fact that employees do not ordinarily keep records, I would find the Claimant entitled to Kshs 36,970/-.

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o The conduct of the Respondents legal advisers was deplorable. The Respondents also did not cooperate with the County Labour Officer in the conciliation process and did not make any submissions towards the resolution of the dispute before him.

o In the circumstances I would award the Claimant costs which I assess at Kshs 20,000/-

Conclusion and Orders

43. In conclusion, I do find and hold that the Claimant was constructively dismissed and the termination was unfair and I award him

a.	Six months compensation	Kshs 121,692/-
b.	Unpaid wages for September/October 2011	Kshs 40,564/-
c.	One month pay in lieu of Notice	Kshs 18,485/-
d.	Outstanding leave	Kshs 36,970/-
e.	Costs	Kshs 20,000/-
	TOTAL	Kshs 227,711/-

Delivered, dated and signed in open Court in Mombasa on this 14th day of March 2014.

Radido Stephen

Judge

Appearances

Mr. Muchiri instructed by

Jackson Muchiri & Associates Advocates for Claimant

Nyakoe Macharia & Co Advocates for Respondents