



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1721 OF 2011

ONGERE CHARLES OKOTH CLAIMANT

VERSUS

PRESSMASTERS LIMITED RESPONDENT

Mrs Betty Rashid for the Claimant

Mrs Kamau for the Respondent

JUDGMENT

1. The Claimant prays for the following remedies;
 - i. Payment of 1 month salary in lieu of notice in the sum of Ksh.12,906/=;
 - ii. Service pay for five (5) years in the sum of Kshs.64,830/=;
 - iii. Payment of Transport Allowance for the year 2000 to 2011 (Kshs.250 x 12 months x 5 years in the sum of Kshs.15,000/= and
 - iv. 12 months salary being compensation for unlawful termination.

2. The Respondent has opposed the claim via a memorandum of Reply and submissions dated 25th November 2011 and filed on 30th November 2011.

3. **Undisputed facts**

It is common cause that the Claimant was registered with the National Social Security Fund (NSSF) and the Respondent had made contributions in terms thereof.

This being the case, and in terms of *Section 35(5)* as read with *35(6)(d)* of the *Employment Act, 2007*, the claim for payment of service pay for 5 years in the sum of Kshs.64,830/= has no basis and the same is dismissed.

4. The Claimant admitted in his testimony before Court that he was paid Kshs.7,700/= in lieu of notice upon termination. He received a total of Kshs.10,416/= terminal benefits. However he told the Court that he should instead have been paid Kshs.12,966/= which was his gross pay at the

time of termination. The pay-slip submitted for December 2010 shows that the Claimant earned a basic salary of Kshs.7,700/= and house allowance of Kshs.2,000/=, total Kshs.9,700/=. This is the gross salary of the Claimant which is not disputed.

5. The Court awards the Claimant the difference of Kshs.2,000 in lieu of notice.

The claim for transport allowance in the sum of Kshs.250/= per month was not supported by any tangible evidence and the same is dismissed by the Court.

6. Compensation

The only issue in dispute is whether the termination of the employment of the Claimant was for a valid reason and if the same was done in terms of a fair procedure.

Though the Claimant initially stated that the termination was for alleged theft it came out in evidence that the termination was for late coming.

Indeed the letter of termination dated 8th January 2011 indicates that the termination was for continued late coming inspite of several warnings from the management and internal memos posted on the notice Boards indicating the Respondent's normal working hours.

7. In particular, the Claimant was alleged to have between 3rd January 2011 to 8th January 2011, reported for work late and left work before the regulated time.

On 8th January 2011, which was a Saturday, he is said to have switched off the machine earlier than the set time by a few minutes.

8. The clocking sheet for the Claimant was produced by the Respondent for the period 12th October, 2010; 18th November 2010; 22nd November 2010 and 23rd November 2010 which sheet showed that the Claimant was supposed to clock in at 8 a.m. but had arrived on 12th October at 8.02; on 18th November, at 8.07; on 22nd November 2010, at 8.00 a.m. and on 23rd November at 8.01.

9. This was not the relevant period in respect of which the employment of the Claimant was terminated.

In any event, the Claimant made a reasonable explanation to the Court that, the Respondent had many employees and at times, one would arrive before time, but due to the long queue of employees awaiting to clock-in one would find himself clocking in a few minutes late or sometimes earlier.

10. No warning letter was produced by the Respondent in Court regarding the conduct by the Claimant and it was apparent that no opportunity in terms of *Section 41 of the Employment Act, 2007* was availed to the Claimant to explain his case and or to be represented by an employee of choice.

11. **Mr. Thephilus Munene**, the officer who testified on behalf of the Respondent confirmed that the Respondent had 350 employees and the reporting time was 8 a.m. That each employee has a clocking number and the Respondent used an electronic clocking system.

He had joined the Respondent after the Claimant had left and had no first-hand knowledge of the facts of this case.

The clocking records he relied on did not correspond to the periods the Claimant was alleged to have reported late and left early in the letter of termination.

12. In any event the Court was satisfied with the explanation by the Claimant that there would be at times a few minutes difference in the clocking time in the negative or positive depending on the length of the queue. This did not necessarily mean that an employee reported late at work.

No evidence was led to show any inordinate lateness or leaving early by the Claimant to warrant the termination of his employment.

13. The Claimant appears to have had a good record at work for the five (5) years he served the Respondent as a machine operator. The Court is satisfied that there was no valid reason to terminate his employment. This contravened *Section 45(1) and 45(2)(a)* of the *Employment Act*. Furthermore the Court is also satisfied that the Claimant was simply locked out of the gate and handed a termination letter without any due process.

14. The termination was therefore contrary to *Section 41* of the *Employment Act 2007* as read with *Section 42(2)(c)* in that it was not in accordance with a fair procedure.

15. The Court awards the Claimant ten (10) months salary for the unlawful and unfair termination in the sum of Kshs.(9,700 x 10) 97,000/=.

Total award is as follows:-

- i. balance payment in lieu of notice – Kshs.2,000/=
- ii. compensation - Kshs.97,000/=
- iii. total Kshs.99,000/=.
- iv. the Respondent to pay the costs of the suit.

Dated and Delivered at Nairobi this 25th day of April, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE