



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 2519 OF 2012

BETWEEN

KENNETH KIPKOECH KORIR CLAIMANT

VERSUS

INSPECTORATE [E.A.] LIMITED
RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. Nyabena instructed by Nyabena & Company Advocates for the Claimant

Ms. Ndeto instructed by Mulwa Nduya & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Kenneth Kipkoech Korir filed his Statement of Claim on 18th December 2012. The Respondent filed its Statement of Response on 4th March 2013 and a List of Documents on 30th September 2013. Both Parties were heard and closed their respective cases on 3rd October 2013. The Claimant testified on his own behalf, while the Respondent called its Director of Technical Operations Raphael Kyalo Ilunga.
2. The Respondent is an Independent Commodity Inspection Company. It inspects and determines whether commodities, conform to specifications. The Claimant's position is that the Respondent employed the Claimant on 1st January 2006 as a General Labourer. He was later appointed as an Office Assistant at a basic salary of Kshs. 19,000 per month. It was an oral engagement
3. The Claimant was dismissed on 22nd August 2011 without justification or notice. For the entire period worked, he was not granted annual leave or paid in lieu of leave. He claims he was not availed reasonable housing accommodation, or paid house rent allowance. Upon termination, he was not granted service pay at the rate of 1 month salary for each completed year of service. His certificate of service was not released by the Respondent.

4. Korir prays the Court to grant the following Orders:-

- a. Declare termination of his contract of employment to have been unlawful and unfair;
- b. He is paid 1 month salary in lieu of notice at Kshs. 19,000; salary for the month of August 2011 at Kshs. 19,000; service pay at Kshs. 95,000; annual leave pay for 2008 to 2011 at Kshs. 86,000; 12 months' gross salary at Kshs. 228,000 in compensation; house rent allowance at 15% of the basic salary at Kshs. 193,000 – total Kshs. 650,800;
- c. The Court issues such orders and give such directions as it may deem fit to meet the ends of justice;
- d. The Respondent to pay to the Claimant costs; and
- e. The above sums be paid with interest at Court rates.

5. Korir testified he was employed initially by one of the Company Directors Susan Kyalo, as a House-help and Gardener. There was no letter of employment. He worked up to 23rd August 2011, when the other Director Mr. Kyalo told the Claimant to stop working. There was no warning, or disciplinary process of any form. He had climbed up the ladder to become an Office Assistant as at the date of termination. He took leave for 2006 and 2007 in 2009 and 2011 respectively. He took two annual leaves as shown in the Leave Application Forms.

6. It is not true that he deserted work, as claimed by the Respondent. He was never given a notice of termination and did not see the letter of suspension dated 23rd August 2011. He was paid a pro-rata salary of Kshs. 13,483 from which an amount of Kshs. 10,464 was deducted allegedly under Equity Bank Guarantee. He did not understand the deduction. N.S.S.F deductions were made but not remitted.

7. Cross-examined, the Claimant testified he was first employed as a Gardener and House-help by Mrs. Kyalo in 2006. The Directors of the Company took him into their Company, and he has therefore correctly sued the Company. He started working for the Company in 2008. He could not recall the date. He earned Kshs. 12,000 at the beginning. He had been promised house rent allowance and overtime; these were never paid. He conceded the Leave Application Forms for 2009 and 2010 indicated there was nil balance of leave days. He combined the roles of Tea- Boy, Cleaner and Messenger. He would arrange the Stores and sort out the samples for disposal.

8. Korir recalled on 23rd August 2011, he was on duty at the Stores. He wrote to the Respondent on the same day, saying he was sorry for the inconveniences caused by the missing samples. The letter of suspension was written on the same day, but the Claimant did not see it. The Office Administrator was Alice Kiarie. She did not pass the letter to the Claimant. Korir left the Office on 23rd August 2011 at 3.00 p.m. His salary was pro-rated to 22nd August 2011. He went to the workplace later and asked for terminal benefits. He was chased away by the Respondent. Redirected, the Claimant stated he did not fill the Form on his Leave Balance. He wrote to the Respondent on 23rd August 2011 to explain that he was aware the samples were missing. His apology was in this context, not to be read in the context of any suspension letter. The Respondent retained the Claimant's address, but did not call him for the Certificate of Service. The Claimant prays the Court to allow the Claim.

9. The Respondent's position is that the Claimant was its Employee. His contract however, was not terminated by the Respondent; the Claimant stormed out of the workplace after being served with a letter of suspension on 23rd August 2011. He caused the Respondent losses after commodity samples he was handling went missing. This occasioned his suspension. He declined to take the letter of suspension, stormed out and never returned to the Company. He has no reason to claim terminal dues after deserting the workplace.

10. Raphael Kyalo Ilunga told the Court he is the Director of Technical Operations of the Respondent.

The Claimant worked as an Assistant Office Administrator, keeping custody of samples. Previously he was a Gardener at Kyalo Ilunga's Office. He was given an opportunity to grow. His salary was Kshs. 10,000. He was given a letter of appointment, whose details Kyalo Ilunga could not remember.

11. A shipment of petroleum arrived at the Port of Mombasa. Samples were drawn and taken to the Respondent. They were stored by the Respondent. When the Client asked for the results, the samples could not be traced. The Claimant was in charge of the store. He was suspended, and wrote on 23rd August 2011, expressing his apology for the loss. He was suspended for 2 weeks pending investigations. He was served the letter of suspension through Alice. He went to Kyalo Ilunga's Office, threw the suspension letter at Ilunga's desk, and stormed out.

12. He was paid for days worked in August 2011. He had guaranteed the Company Driver a Loan with Equity. Kshs. 10,000 was deducted out of his salary for August 2011, and paid to the Bank. He started working in January 2008. He took all leave days in 2009 as shown in the Leave Forms. He did not take leave for 2011, as he deserted work. He was a diligent Employee at the beginning, then started having run-ins with his Workmates and reported to duty late.

13. On cross-examination, Kyalo Ilunga stated he is the Technical and Operations Director of the Respondent. He also serves as the Managing Director. The Claimant started working with Kyalo around 2006. He worked around 3 or 4 days per week at the beginning. He was paid wages for days worked. He was taken in as an Administrative Assistant in January 2008. He was given a letter of appointment. It is not true that he was appointed by word of mouth.

14. In 2006, he was paid about Kshs. 3,000 per month. He was not paid house rent allowance. He had been issued a warning letter. Kyalo did not know why the Claimant walked away of 23rd August 2011. The letter of suspension was real, authentic and issued to the Claimant on 23rd August 2011. It was not a document manufactured to assist the Respondent in resisting the Claim. He was not an Employee of the Respondent while working at Kyalo's house. He was not qualified for leave in 2008. He took leave in 2009, but did not apply in 2011. He was suspended for 2 weeks. The Respondent did not write to him after the suspension. He was not recalled. The letter stated the Company would decide if to reinstate or not. Kyalo retained the Claimant's Mobile Phone Number but never contacted him.

15. Kyalo had interrogated the Claimant over the missing samples before the 23rd August 2011. He had given the Claimant authority to dispose of some samples. The suspension letter did not specify which samples were disposed of without authorization. It is not correct that the Claimant returned to the Workplace and was denied access. The Company does not have Guards at its gate. The May 2011 salary is shown in the pay slip as Kshs. 19,000. This included the housing element. The Respondent has no objection to the Claimant being granted his Certificate of Service. Redirected, the Witness stated that the Claimant initially worked for 3 days in a week at the Kyalo residence. He did not want to be paid daily, and was therefore paid his daily rate at the month end. Samples were detected to be missing after a Client made an inquiry. The Claimant wrote to Kyalo stating he may have disposed of the samples accidentally. Suspension was at the discretion of the Employer. The Respondent urges the Court to dismiss the Claim in its totality.

The Court Finds and Awards:-

16. The Claimant was initially employed by Kyalo Ilunga and his wife Susan, as a General Labourer. He served their residence, and carried out such menial tasks as cleaning, making tea and gardening. This is what he did from January 2006 to the beginning of 2008.

17. In January 2008, he was moved into the Couples' Business, Inspectorate [E.A.] Limited, where he worked as an Administrative Assistant, at a monthly salary of Kshs. 19,000. The Respondent Company is the business vehicle for the Kyalos, and is involved in the independent inspection of commodities shipped into the country through the Port of Mombasa. The Couple are Directors of the Respondent.

18. The first finding the Court makes is that the Claimant was in continuous employment from January

2006, and his Employers legally were the Kyalos and their Business the Respondent herein. It is common to find Families who employ Domestic Servants and extend their services to their Businesses outside the domestic set up. The Business set –up becomes a continuation of the Domestic set-up in a case such as the present one. The Claimant is therefore correct in his statement that he worked from 2006 to 2011, for the legal separateness between the Kyalos and their Inspectorate Business, in relation to the employment of the Claimant, is fictitious. Section 2 of the Employment Act 2007, makes the Husband, the Wife, their Household, the Directors and the Company all liable as Employers of Mr. Kenneth Korir.

19. Once he was absorbed into the Kyalos' Business, the Claimant ought to have adequately learnt his trade of storing and sorting out samples for disposal, and completely, shift his mindset from the domestic chores where the requirement to perform his duty carefully and properly, may not have conformed to the higher standards required in sorting out of samples. He appears not to have been attentive to details in the incident leading to his suspension.

20. He was entrusted the responsibility of storing samples from different commodities brought into the Country by various Traders. After sampling was done, he would store the samples. The Clients would collect the samples and the respective results later. In the incident subject matter, the Respondent was contracted to sample Petroleum that had arrived at the Port of Mombasa. This was done, but when the Client came to collect the results, the sample could not be traced.

21. The Claimant assumed responsibility for the missing sample. He wrote on 23rd August 2011 to Kyalo Ilunga, explaining he may have disposed of the sample by accident, for which he was apologetic. But the harm had been done, and the sample could not be traced, which must have cost the Respondent dearly in terms of business reputation and redress to the Client, and probably similarly led to additional costs for the concerned Client. The Claimant had worked on the job for 3 years, and although straight from a domestic setting, cannot complain that he had not adequately been trained in storing and sorting out of the various samples. In the view of the Court, it was the Claimant's duty to perform his work carefully and properly, under Section 44 [4] [c] of the Employment Act 2007. The Respondent had valid ground to terminate the Claimant's contract of employment, as the Claimant performed his work carelessly and improperly, an act amounting to gross misconduct under the above law.

22. The Respondent did not even terminate that contract. The Claimant was suspended on 23rd August 2011 for 2 weeks. He wrote the letter of apology on the same day. He testified he did not receive the letter of suspension. On this, the Court was inclined to believe the evidence of Kyalo Ilunga, who testified that the suspension letter was delivered to the Claimant by the Office Administrator Alice. The Claimant then went to Kyalo's Office and characteristic of a Domestic Servant who has acquired familiarity with his Employer, took the liberty to throw the letter at Kyalo Ilunga and walk away. He did not return to work. The very act of throwing a letter of suspension at the Employer compounded the act of gross misconduct discussed above.

23. The Claimant deserted duty. The Respondent had valid reason to terminate the contract, but did not terminate. The Claimant deserted after rejecting the letter of suspension, in his righteous wrath. He initiated termination. He did not accept the letter of suspension, and it would be asking of the Respondent too much, to expect the Respondent to call the Claimant after the 2 weeks, to advise if suspension would be lifted and he is allowed to continue working. Having failed to submit to the suspension, the Claimant denied himself the benefit of having the Respondent consider whether he should continue working. He could only blame himself for throwing tantrums and the letter of suspension at Kyalo, and for refusing to submit to the suspension and investigatory process initiated by the Respondent.

24. This is not to say that because he walked away, he should not have been paid his terminal benefits when he was next available. The Court does not find the Respondent to have terminated the Claimant's contract unlawfully, unfairly or at all. The Claimant is not entitled to the declaration that termination was unlawful and unfair. He is not entitled to 1 month salary in lieu of notice or 12 month salary in compensation for unfair termination. He was paid the correct salary for August 2011. These claims are rejected. Terminal benefits however, should have been considered.

25. From January 2008 to August 2011, there is an indication the Claimant was subscribed to the N.S.S.F and therefore ineligible for service pay under Section 35 [6] of the Employment Act 2007. He nonetheless was not shown to have been subscribed to the Fund prior to 2008, when the Kyalos considered him a Domestic Servant. **He would therefore be entitled to service pay which at the rate of 15 days' salary at Kshs. 3,000 per month for 2 years, the Court grants at Kshs. 3,461.**

26. The claims for annual leave pay, cover the years 2008 to 2011. The Claimant testified he utilized his leave days for 2006 and 2007 in 2009 and 2010. He did not take any other leave from 2008 to 2011. He claims leave for 2008, 2009, 2010 and 2011 therefore. According to Kyalo, the Claimant was not an Employee of the Respondent until 2008. He was not qualified for leave in 2008. He took leave in 2009 and 2010. He did not apply for leave in 2011.

27. In the view of the Court the Claimant was employed by the Respondent and its Owners in 2006. He would have been entitled to annual leave in 2007, 2008, 2009, 2010 and pro-rata leave for 2011. He was not qualified for leave in 2006. He took leave for 2 years, which would entitle him to leave for the balance of 2 years and the pro-rata period of 8 months worked in 2011. 21 days of annual leave would be worth Kshs.15,346. The 2 remaining full years result in a total of Kshs.30,692. 14 days of annual leave due in 2011 would earn the Claimant Kshs.10,230. **In total, the Court allows the Claimant Kshs.40,922 as annual leave pay.**

28. The Claimant's pay slip for May 2011 shows his basic pay at Kshs. 19,000. Section 31 of the Employment Act 2007, requires the Employer to provide the Employee with reasonable housing accommodation at or near the place of work, or in addition to the wages or salary of the Employee, pay to Employee sufficient sum as rent. This law does not apply to an Employee whose contract has a provision which consolidates basic pay with house rent allowance, or an Employee whose contract is subject to a Collective Bargaining Agreement providing for such consolidation. Section 10 of the Act requires the Employer to give the Employee a written contract of employment detailing the terms and conditions of employment, which must include such details as the consolidation of basic pay and house rent allowance.

29. The Respondent did not provide the Claimant with reasonable housing accommodation, or make provision for house rent allowance. There is no contract authored by the Respondent indicating that Kshs. 19,000 was consolidated pay. The pay slips describe the rate as basic pay. The Claimant is entitled to house rent allowance which the Court assesses at 15% of the basic pay in accordance with the Wage Orders and Regulations. The Claimant seeks this for a period of 68 months. For the period 2006 -2007 [24 months], the Court grants house rent allowance at 15% of the basic monthly salary of Kshs. 3,000, computed at Kshs. 10,800. For the 44 months beginning January 2008 and ending August 2011, the Claimant is granted house rent allowance at the rate of 15% of Kshs. 19,000, adding up o Kshs. 125,400. **In total the Claimant is granted arrears of house rent allowance at Kshs. 136,200.** The Certificate of Service is a right for every Employee whose contract is terminated, regardless of the manner of termination. Whether voluntary, involuntary or consensual termination, Section 51 of the Employment Act 2007, requires the Certificate of Service be issued The Respondent shall release the Certificate of Service to the Claimant forthwith. No order on the costs and interest. In sum:-

[a] The Claimant left employment of his own volition;

[b] The Respondent shall pay to him service pay at Kshs. 3,461; annual leave pay at Kshs. 40,922; and arrears of house rent allowance at Kshs. 136,200- total Kshs. 180,583 - to be paid within 30 days of the delivery of this Award;

[c] The Respondent to avail to the Claimant his Certificate of Service forthwith; and

[d] No order on the costs and interest.

Dated and delivered at Nairobi this 4th day of April 2014

James Rika

Judge