



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 296 OF 2012

MICHAEL MUNYI CLAIMANT

VERSUS

HOTEL INTERCONTINENTAL NAIROBI

ALIAS INTERCONTINENTAL HOTELS

CORPORATION LIMITED RESPONDENT

Mr. Obwayo for Claimant

Mr. Karungo for Respondent

JUDGMENT

1. The suit was initially filed at the High Court as **Civil Suit No.715 of 2006** but was subsequently transferred to this Court.
2. The plaint dated 23rd June 2006 and filed on 6th July 2006 was later with leave of Court amended vide Amended Plaint dated 16th June 2008.
3. The Respondent filed an Amended Defence on 7th December 2011.
4. **Facts of the case**

The Claimant was employed by the Respondent as a driver on 1st August 1990. He rose through the ranks and was on 16th September 2005 promoted to the position of Purchasing Manager which position he held at the time of his dismissal from employment on 10th January 2006. He had therefore served the Respondent for a continuous period of fifteen (15) years.

5. From the averments in the plaint, documentation produced, and ***viva voce*** evidence, the cause of action arose on 4th January 2006 when the Claimant in his official capacity purchased two (2) Miniset valves from **Jestan Gas Electrical**, a company that was for a long time supplier of the Respondent Hotel.

The items were handed over to the Assistant Chief Engineer who upon inspecting them found them to be defective. The Claimant avers that he would not have detected the defects upon a reasonable physical inspection at the time of purchase but it took a qualified engineer to detect the defects.

6. The Claimant in his testimony told the Court that the receiving clerk, whose duty was to confirm the quantity and quality of items procured was not present on the day and so he had delivered the valves directly to the Assistant Chief Engineer who received them and came back later with the information that the parts were defective.

7. The Claimant called the supplier and informed them that he was to return the valves since they were defective. He explained that it was normal to return parts that were defective or did not meet specifications. The valves had not been paid for yet, as they were bought on credit vide a Local Purchasing Order.

This particular purchase order included other items purchased at the same time. In fact Claimant had ordered five (5) valves but only two (2) were available at the time.

8. The Assistant Engineer returned the valves to the Claimant who kept them with the intention to return them the next day. The Assistant Engineer subsequently collected the valves from the Claimant's office in his absence. The unit cost of each valve was Kshs.9,500/=.

9. The following day, 5th January 2006, the Claimant was summoned by the Human Resource Manager to his office. The two valves were on the table and the Claimant was asked if he was aware of the parts, and he proceeded to explain the circumstances under which he had procured them and had called the supplier with a view to have the same replaced.

The Claimant was told not return the valves and to proceed to the security office to record a statement.

10. On 6th January 2006 he was called by the security to record a further statement. He was asked how much money he received from Jestan Gas and he denied ever receiving money from the supplier.

11. The security alleged that Jestan Gas proprietor had confirmed having given him money so that he could get orders from the Respondent which allegation the Claimant said was false. He was called back to the Human Resource Office.

12. The officer told him that he had committed a very serious crime and he was immediately suspended and was asked to return on 9th January 2006 to collect his letter of dismissal. The officer informed him that the management had resolved to terminate his employment with immediate effect. On 9th January 2006 he received a letter of dismissal.

13. The Claimant told the Court that he was severely aggrieved by the decision of the Respondent since he had honestly and diligently served the Respondent for fifteen (15) years. He had a very good record at work and was shocked by the false allegation made against him all over a sudden.

14. The Claimant went to Jestan Gas to find out if it was true that they had falsely accused him of receiving money from them.

The proprietor told him that on 5th January 2006 he was arrested and taken to a Central Police Station at 1.30 p.m. in the afternoon and was detained until 8.00 p.m. in the evening. He was threatened with further detention if he did not record a statement to the effect that he had given the Claimant money so that he could get orders through him. He told the Claimant that he lied that he had given him a Christmas gift in 2004 and was released.

15. The proprietor agreed to record an affidavit to that effect which affidavit was produced in Court.

16. At the time of dismissal, the Claimant earned a gross salary of Kshs.88,050.40. He was paid nine (9) days salary and allowances on 2nd February 2012.

17. Total amount paid was Kshs.86,858/= which covered items claimed in paragraph 14(ii), (iii), (iv), (v) and (vi) in the further amended plaint dated 30th October 2011 and filed on 4th October 2011, while the matter was still at the High Court.

18. The claims for nine (9) days salary in the sum of Kshs.13,500/=, house allowance for nine (9) days in the sum of Kshs.5,856, travel allowance of Kshs.5,019/=; twenty two (22) days in lieu of leave in the sum of Kshs.59,583.33 and leave and travel allowance in the sum of Kshs.2,900/= are therefore spent.

19. The claims that are outstanding include:

(i) Kshs.243,750/= being three (3) months salary in lieu of notice;

(vii) overtime pay from 1994 in the sum of Kshs.1.5 million;

(viii) and twelve (12) months salary being maximum compensation for the unlawful dismissal.

19. It is the Claimant's case that the dismissal was based on pure falsehood and in his view was actuated by malice and calculated move to prevent him from assuming the position of purchasing manager because his immediate supervisor was on the verge of retirement.

20. He testified that his supervisor was not informed at all of the allegations made against him and only came to know about the matter when the Claimant had already been dismissed.

21. He further told the Court that the dismissal violated his right to a fair hearing and was therefore unprocedural and unfair, taking all the circumstances of the case into account.

22. He produced several documents showing various accolades the Respondent had awarded him due to his good service.

These include;

(i) employee of the month winner on 13th October 1992;

(ii) runner-up employee of the year 1993;

(iii) distinguished service award 1993;

(iv) distinguished service award 1995;

(v) 2nd prize winner 1997;

(vi) distinguished service award 1999;

(vii) employee of the month June 2000;

(viii) long service award, August 2000 upon attaining 10 years service;

(ix) employee of the month July 2001 (certificate of excellence);

(x) Promotion to purchasing officer 2009 (Grade 9) 14/5/2001 and confirmed on 28th June 2002;

(xi) employee of the month January 2003;

(xii) nominated as the finalist in the Employee of the year 2003, by a letter dated 15th December 2003;

(xiii) Promotion to the position of Assistant Purchasing Manager by a letter dated 30th May 2005 and confirmed to the position on 16th September 2005 earning a basic salary of Kshs.45,000/=, house allowance 19,520/= and travel allowance of Kshs.16,730/=, total Kshs.81,250/=.

23. I have found it useful to reproduce all these accolades which are indicative of a growing star performer at the workplace in all respects. Most of the awards received were competitive and were dependent on votes from fellow employees.

24. The promotions followed him throughout until the bolt from the blue came calling leading to the sudden dismissal. The last pay-slip presented to Court was for the month of December 2005 showing a basic salary of Kshs.45,000/=, house allowance f Kshs.19,500/= and mileage allowance Kshs.16,730/=.

25. Other documents produced by the Claimant include the purchase order dated 13th June 2005 through which eight (8) miniset valves at the cost of Kshs.9,500/= per unit among other items ordered.

26. The detention of one **John Gitonga Thuo**, the proprietor of Jesta Gas is evidenced by a police Bond document dated 5th January 2005 indicating that the said person had been charged with the offence of obtaining money by issuing defective goods, an offence which to the Court's knowledge is unknown in our law.

This document fully collaborates the testimony by the Claimant that he was falsely implicated by Mr. John Gitonga after he had been put in police custody with a view to extract the false testimony from him. He was immediately released upon making the false statement incriminating the Claimant and the statement was used to convince management to summarily dismiss the Claimant the following day.

27. The statement by the Claimant during the interrogation by the Respondent's security which is exculpatory in nature was also produced as evidence in this matter and serves to show the consistency and veracity of his testimony before Court.

Furthermore, the alleged false statement by Mr. John Gitonga Thuo dated 8th January 2006, was also produced.

28. Overtime

The Claimant told the Court that he had never received a verbal or written warning regarding prior performance or misconduct at the work place.

The sudden turn of events was completely out of character and the Court should find that the allegations were false.

29. He told the Court that he worked for eight (8) hours a day, which translated to 48 hours a week excluding one off day per week. However, from 1994, he worked ten (10) hours, a day from 8 a.m. to 6 p.m. in the evening with one (1) hour lunch break. This followed management directive and a memo was distributed to that effect. He was not paid overtime together with his colleagues. They used to clock in and out and the Respondent has those records. This was kept by the time keeper.

30. A notice to produce was filed on 13th May 2011 and same was served on the Respondent but has not produced the same.

The Claimant urged the Court to make an adverse interference against the Respondent in this respect and uphold his claim for payment of overtime.

31. **Notice**

The Claimant conceded that he did not get a fresh letter of appointment upon promotion to the position of Assistant Purchasing Manager. He said he was due for promotion to the position of Purchasing Manager when his supervisor retired in December 2007. He believes that this was the reason for his victimization.

32. He agreed that he would not be entitled to overtime upon promotion to the position of Assistant Manager in 2005.

33. The Claimant withstood very close cross-examination by counsel for the Respondent. He denied that he had colluded and or taken money from any supplier to give them orders. He denied that he had deliberately bought old parts insisting that all goods supplied were subject to quality check by the receiving clerk and it was normal to return goods that did not meet the standards required and this could not be a genuine reason to summarily dismiss him especially after having a good record for the entire fifteen (15) years of service at the Respondent's place.

34. He insisted that Mr. John Gitonga had denounced the false statement he had given to the police and that he was dismissed without opportunity to defend himself but merely informed of the decision by management by the Human Resource Manager.

35. Mr. John Gitonga, the proprietor of Jestan Gas, testified before Court and stated that he was the proprietor of cooking and refrigeration products and tendered his affidavit sworn on 7/2/2006 as part of his evidence. The same was filed on 15th November 2011. He told the Court that he knew the Claimant well as he supplied goods to the Respondent where he worked. He was informed by the Claimant of the two (2) defective valves and asked him to return them for replacement.

36. On 5th January 2006, one security officer of the Respondent by the name Muraguri came to his shop with two policemen and he was arrested and detained at Central Police from 1.30 p.m. upto 8 p.m. in the evening when Mr. Muraguri came and told him in the presence of the police officer that if he did not make a statement implicating the Claimant he would not be released from the cell.

37. He told the Court that he fabricated a story against the Claimant to save himself. He lied that he had given the Claimant a Christmas gift of Kshs.5,000/= in 2004. He was then freed on bond at about 8p.m in the evening. The two miniset valves were returned to him two weeks later by the Respondent. He told the Court that the valves were not defective, the same were new and he sold them to another customer.

38. A police officer wrote the false statement as he narrated the story. He repudiated the statement as untrue stating that he wrote the same under duress.

39. He said he had in the past received goods returned by the Respondent and had exchanged them. That he had never given money to the Claimant.

40. He said he had never been incarcerated before, and he regretted the false testimony that led to the dismissal of the Claimant.

41. He withstood cross-examination well and the Court finds his testimony before Court credible though he admits to have lied under duress previously. He was not sued by the Respondent for breach of contract and the Respondent has not paid him to date for the goods supplied.

42. The Purchasing Manager, who was the immediate supervisor of the Claimant **Mr. John Gachamba** also testified in support of the Claimant's case. He told the Court that he had authorized the purchase of the goods in question and had signed the LPO. He was aware that two (2) valves were alleged by the Assistant Chief Engineer to be defective and the Claimant had received them from the Assistant Engineer with a view to have them replaced the following day.

The Claimant had in the meantime gone home as he was bereaved.

43. He told the Court that the LPO was valid for 6 – 8 months depending on the items to be procured. He said returning goods which did not meet specification was normal. He said he was surprised by the dismissal of the Claimant yet he was his supervisor. He had retired on 31st December 2006.

44. The witness said that at the time, miniset valves were needed urgently hence the Claimant had gone to acquire them personally with his authority. He was lucky to get the two as the valves were in short supply at the time. He often asked the Claimant to go personally to collect purchases.

45. He said that the Claimant was most hardworking and devoted employee. He told the Court that his only interest was to see justice be done. He was from Kiambu and the Claimant was from Embu and therefore they had no relationship at all.

He withstood cross-examination very well and his testimony came across as candid and truthful.

46. **Respondent's case**

The Respondent called **Mr. Stephen Mutuma**, the Director Human Resource to testify in support of his case.

He told the Court that the Claimant was dismissed for collecting defective valves from one **George Thuo**. That they had relied on a statement from Mr. Thuo to the effect that he had in 2004 given a Christmas gift of Kshs.5,000/= to the Claimant so that he could receive orders from the Respondent. That the conduct by the Claimant violated the code of Ethics of the Respondent.

47. That the Claimant was paid Kshs.86,858/= upon dismissal and therefore he was not owed by the Respondent and the case should be dismissed. He also said that the Claimant was paid overtime whenever he worked above normal hours. He indicated that the pay-slip for October 2001 showed payment of overtime. That this was due to him while he was a union member but he was not entitled once he joined management.

48. He also denied that the Respondent defamed the Claimant stating that the letter of termination was only given to him and not other people. He said that the dismissal was effected fair and for good reason.

49. Under cross-examination he agreed that he joined the respondent in May 2010 and therefore had no personal knowledge of the circumstances leading to the dismissal of the Claimant. He only relied on the records and was not in a position to refute the testimony by the Claimant and his two witnesses.

50. He was also unable to refute the allegations by the Claimant that he was not paid for the overtime worked between 1994 to 2005 when he became a manager. He said he only had one (1) pay-slip for 2001 showing that overtime was paid. He agreed that the Respondent used a clocking system and the time keeper kept those records. He also agreed that the Claimant was not charged with any offence and was not given a notice to show cause.

51. **Conclusion of Facts and Law**

The evidence by the Claimant as supported by that of his two witnesses, clearly shows that the Claimant had an almost excellent record as an employee of the Respondent for a period of 15 years.

52. That at the time of dismissal, he was on the verge of being promoted to the position of purchasing manager.

53. That he had received many accolades indicative of his strong qualities in the positions he held at the work place.

That he had no adverse record whatsoever for 15 years.

54. That the dismissal was wholly based on false evidence deliberately obtained by the security officers of the Respondent with the help of police officers from the Central Police Station.

55. That the false statement, which has been recanted was obtained under duress while CW2 was under police custody.

The conduct by the officers of the Respondent who orchestrated this charade, behind the back of the outgoing supervisor of the Claimant (CW3) is most reprehensive and led to a most callous, inhumane and unjust treatment of an employee whose star was on the rise at the Respondent's work place.

56. It is unfortunate that the then Human Resource Manager did not come to the aid of the Claimant even when it was clear that he was being lynched to block him from replacing the supervisor who was about to retire and did retire on 30/12/2006.

57. **Section 43(1)** of the **Employment Act** provides:

“In any claim arising out of a termination of a contract the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair and within the meaning of Section 45.”

58. It has been established on a balance of probability by the Claimant and his witnesses that the reason for his dismissal from work was false and orchestrated. That the same was actuated by malice and ulterior motive.

59. Furthermore, in terms of **Section 47(5)**, once an employee makes a *prima facie* case that a wrongful dismissal has taken place, the provision places the burden of rebuttal on the employer with a view to justify the grounds for the wrongful dismissal.

60. The Respondent herein has failed in this respect and the Court without any hesitation finds that the dismissal of the Claimant was contrary to

Section 45(1) which provides:

“No employer shall terminate the employment of an employee unfairly.”

This is clearly the case here as the reason for the dismissal of the Claimant was not valid.

61. Furthermore, it is clear that the Claimant was not charged with any offence nor was he asked to show cause why he should not be dismissed from employment. He clearly made exculpatory statements to the security officer with the hope that management would accord him a fair hearing and exonerate him from the false allegations obtained under duress and in police custody from a supplier who went ahead to swear an affidavit and recant the false allegations.

The fact that those false statements were obtained at the behest of the officers of the Respondent is most disheartening as no employer should treat a long serving and honest employee in this manner.

62. Accordingly I find this case in favour of the Claimant and make the following award:

The Respondent is to pay to the Claimant;

(i) Maximum compensation of twelve (12) months gross salary for the unlawful and unfair dismissal in the sum of Kshs.81,250/= x 12 = Kshs.975,000/=.

(ii) One month salary in lieu of notice in the sum of Kshs.81,250/=

(iii) Overtime

The Respondent failed to produce records to rebut the claim for overtime except one pay-slip for October 2001. The Claimant established on a preponderance of evidence that he worked for ten (10) hours instead of 8 hours and was therefore entitled to payment for the extra two hours.

However, this claim was filed on 6th July 2006 and any claim based on the contract of service that went outside the six (6) years limitation period under **Cap 22** of the **Laws of Kenya** is bad as it is time barred and the Court has no jurisdiction to award in respect thereof.

The Claimant was also not entitled to payment of overtime from the date he became a manager.

The Court awards the Claimant payment of overtime for two hours per day worked excluding the period he was a manager and any time outside the six years limitation period from 6th July 2006.

The Claimant is to compute and file the quantum of overtime as above and serve on the Respondent within 14 days from the date of this judgment to enable the Court to consider and award accordingly.

(iv) The Respondent is to pay the costs of this suit.

Dated and Delivered at Nairobi this 9th day of May, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE