



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 263 OF 2013**

**SALIM HAMUMI .....CLAIMANT**

**VERSUS**

**OIL COM [K] LTD .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

The claimant has sued the respondent for unlawful termination of employment and failure to pay all his employment benefits. He also seeks certificate of service and compensation for unfair termination. The respondent has denied liability and instead counter claimed that it is the claimant who resigned from employment without prior notice as required under the employment contract. She therefore prays for judgment against the claimant of Ksh. 256,446 being one month salary and money fraudulently spent by the claimant.

The suit was heard on 19/2/2014 when the claimant testified as CW1 and Hamis Mapea testified for the defence as RW1.

**CLAIMANT'S CASE**

CW1 was employed by the respondent on 1/7/2012 as Operations supervisor with a salary of ksh.40,000 which was later increased to ksh.55,000. On 27/10/2012, the Operations Manager Mr. Jafer Awly commended him by email for his exemplary service by describing him as the best manger he had ever seen.

On 24/1/2013, he was notified by phone that he was to go to Kisumu on transfer which prompted him to request for a salary increment by email dated 25/1/2013 on ground that he was going to work away from home. He also requested for the job description at his new station. The reply he got was only an email dated 25/1/2013 instructing him to train the officers who were to succeed him at Mombasa Station.

On 27/1/2013 CW1 accepted to train his successor, the RW1 and reminded the boss of the request for a salary increase. On 28/1/2013 he did another reminder and the director responded by offering to add ksh.12000 to the salary to which CW1 declined. Thereafter starting 14/2/2013 CW1 started to receive queries about stocks and maintenance expenses. The queries were very frustrating to him but he responded to each of the 6 queries raised and on 18/3/2013 he tendered his resignation to the General manager of the respondent by email.

On the same day he send resignation notice, the General Manager invited him to Nairobi by email to sort out all the outstanding issues to which he accepted. Upon verification with the accountants at the Head Quarters, all the queries were cleared and all the money deducted from CW1 in respect of the queries was refunded to him. The General manager and the Operations Manager then told him that he had the option to withdraw his resignation an continue working to which he accepted by email dated 11/4/2013. The withdrawal of resignation was never acknowledged but CW1 continued to work as usual until 30/4/2013 when he received email showing erroneous calculation of his terminal dues.

He responded saying that his resignation had already been withdrawn but again no reply was received. On 4/5/2013, the Director Mr. Khalid and Jafar came to the CW1's office and demanded the office keys and told CW1 to leave because his job was over. They promised to pay his dues through the bank. They deposited only ksh.100,000 which was not enough. He now claims a balance of ksh.67717, certificate of service, 12 month compensation for unfair termination plus costs.

On cross examination he confirmed that he had not served for a complete year. He also confirmed being a member of the NSSF. He confirmed that the appointment letter entitled him to 26 days leave after working for 12 months continuously. He denied ever receiving kshs. 109,000 from the respondent head officer. He denied ever admitting the debt of ksh.109000. He admitted giving a resignation letter without specifying the notice period. He maintained that he intended to continue serving the whole notice period of 2 months upto 18/5/2013 as per the employment contract.

He contended that the reason for his resignation was the frustration he was receiving from his seniors in the Accounts Department. He confirmed that there was a query on fuel shortfall equal to ksh.227,384.63 which was caused by leakage. That the said leakage was repaired by the maintenance manager from Nairobi Head quarters. He confirmed that RW1 was posted to Makupa after the leakage was repaired. He admitted that he secured another employment 4 months after dismissal by the respondent.

### **DEFENCE CASE**

RW1 confirmed that CW1 was his predecessor at respondent's Branch Manager in charge of Likoni and Makupa. RW1 came to work at Makupa in February 2013 following complaints that there was shortfall of diesel. From February to April 2013 there was no longer short fall in the diesel. He confirmed from the records that there was a short fall of 2258 litres equal to ksh.227,384 during CW1's watch. He also stated that there is a day he was send to get ksh.70000 from CW1 to pay workers at Likoni station but Mr. Mwadime who had the money said that he had spend it. He contended that CW1 resigned from the respondent's employment.

On cross examination he admitted that he saw repairs being done on the pipes at Makupa station in January 2013 but in February there were shorts being recorded. He denied seeing the claimant receiving the said ksh.109000. He however confirmed that he heard Mwadime say that he spend the money. RW1 confirmed that CW1 continued to work even after his resignation until the boss told CW1 to hand over keys to RW1. After the hearing both parties filed submissions which the court had carefully considered in this judgment.

### **ANALYSIS AND DETERMINATION**

The issues for determination arising from the pleadings, evidence and submissions are

- 1. whether the claimant resigned from employment or was unfairly terminated by the respondent.**
- 2. Whether the claimant is entitled to the relief sought.**
- 3. Whether the respondent is entitled to the reliefs in counter claim.**

### **Resignation or Termination**

It is common knowledge that on 18/3/2013 the claimant served the respondent with a written resignation

notice. It is also not in dispute that after receiving the said resignation notice the Directors of the respondent called the CW1 to Nairobi to sort out the issues in dispute. It is also a fact that the reason for the claimant's resignation was the frustration he was getting from the respondent's Senior accountants after declining to go on transfer to Kisumu without enhanced salary.

After considering the evidence and the submissions before it, the court finds that the termination of the claimant's employment was by his resignation. It is however this court's further finding that the said resignation was not voluntary. The claimant was forced to resign by the change of attitude by his seniors who had just described him as the best manager ever known to them. The court is persuaded by evidence of repairs to the pipelines and tanks at Makupa station to hold that the claimant did not defraud the respondent's fuel and money. The truth of the matter is that the short fall in the fuel shortage was caused by leakage while the money for salary allegedly defrauded by CW1 was stolen by Mr. Mwadime. Considering all the above facts the involuntary resignation of the claimant amounted to unfair constructive termination of employment by the employer. It so found because the evidence on record clearly show that the claimant was willing to continue serving after the frustrating issues were sorted out and all his money wrongfully deducted to cover false stock short falls was refunded to him.

The responded however did not want to give CW1 another chance to continue working after she had succeeded in forcing him to resign following his refusal to go on transfer to Kisumu without a higher pay.

### **Counter-Claim**

In view of the foregoing finding that the termination was not through voluntary resignation the counter claim is dismissed for want of merits. RW1 confirmed that there was leakage on the pipes and tanks which were repaired in January 2013. Secondly he confirmed that Mr Mwadime told him that he had personally spend the money. There is therefore no evidence to connect the CW1 with the loss of the salary money. Lastly the defence did not rebut the allegation by CW1 that all the queries were sorted out and CW1 was refunded all the money deducted in relation to the various queries by the accountants.

### **Reliefs Sought**

After dismissing the counter claim the only reliefs remaining for consideration are respect of the claimant. The claimant is awarded one months salary in lieu of notice being ksh.55,000 under Section 35(1) (c) and 49 of the Employment Act because the termination was made before he served the two months notice period. The claimant is also entitled to his salary for April 2013 being ksh.55000. The claimant is also entitled to leave on prorata basis for the period served between July 2012 and May 2013. The court awards 1  $\frac{3}{4}$  leave days per month as provided under Section 26(1) (b) of the Employment Act. The court approximate the period at 11 months and awards kshs. 35,291.70 for leave outstanding.

The prayer for service pay is disallowed because the claimant was a member of NSSF. The prayer for salary arrears is also dismissed for lack of evidence. In total the claimant accrued employment dues is ksh.145,291.70 less salary advance and loan of ksh.30,000 plus ksh.100,000 deposited to the bank towards settlement as pleaded by the claimant. The net dues and payable is Kshs.45,291.70.

The claimant is also entitled to compensation for unfair termination in view of the earlier finding that the resignation was not voluntary. He will have 3 months gross salary being ksh.165,000 because he mitigated further loss by securing another employment with the County Government of Mombasa within 4 months of the termination.

The claimant will also be issued with certificate of service as per Section 51 of the Employment Act.

### **DISPOSITION**

Judgment is entered for the claimant against the respondent for payment of ksh.210,291.70, certificate of service, costs and interest. It shall remain so ordered.

**Dated, signed and delivered this 9<sup>th</sup> May 2014.**

**O. N. Makau**

**Judge.**