



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 961 OF 2012

BETWEEN

SAMUEL KARANJA
NDUNG’U..... CLAIMANT

VERSUS

THIKA COFFEE MILLS
LIMITED..... RESPONDENT

Rika J

CC. Mr. Kidemi

Mr. Inyangi instructed by Ameli Inyangi & Partners Advocates for the Claimant

Ms. Owino instructed by Mbugwa, Atudo & Macharia Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on the 6th June 2012, and filed a Supplementary List of Documents on 15th October 2012. The Respondent Company filed its Statement of Response on 18th October 2012, and filed a List of Documents and of Witnesses on 22nd August 2013.
2. Mr. Ndung’u testified, and closed his case on 15th July 2013. The Respondent testified through its Accountant Mr. Josphat Maigua on 3rd October 2013 and through its Security Officer Mr. Wario Huka on 24th February 2014, when the Respondent’s case closed. The dispute was last mentioned on 17th March 2014, when Parties confirmed the filing of their Final Arguments, and were advised Award would be read on Notice.

3. The Claimant testified he was employed by the Respondent Coffee Mills as a Driver, commencing 2nd June 2010. He served diligently, until 18th January 2012 when his contract of employment was terminated by the Respondent. The Respondent informed the Claimant that the Claimant's job performance had been noted to be below the expected standard set down in his letter of appointment.

4. The Claimant explained that he was simply handed the termination letter. He was not given an opportunity to defend allegations of poor work performance in accordance with Section 41 of the Employment Act 2007. He explained that the reason for termination was not justified, and the procedure was unfair. He was not paid his terminal benefits, and did not receive the Certificate of Service. He seeks against the Respondent the following orders:-

- a. Unpaid salary from 1st January 2012 to 18th January 2012 at Kshs. 9,362;
- b. Unpaid leave days at Kshs. 18,138;
- c. Leave allowance at Kshs. 2,400;
- d. Overtime of 1,943.25 hours at Kshs. 116,012;
- e. Unpaid imprest at Kshs. 12,830;
- f. 12 months' salary in compensation at Kshs. 193,476; and
- g. 1 month salary in lieu of notice at Kshs. 16,123

Total..... Kshs. 370,741

He also prays for the Certificate of Service, Costs, Interest and any other relief the Court may deem it fit to grant.

5. Ndung'u told the Court he was confirmed after 6 months of probation, on 29th November 2010. He was diligent and worked hard, sometimes working well into the night. He worked in all for about 1 ½ years. He was not warned of poor work performance at any time. There was no performance review before termination. His last salary was Kshs. 16,123 per month. He was not paid his salary for 18 days worked before termination. He had 27 days of unpaid annual leave, with 3 days earned in 2010 and 24 days in 2011. 1,943.25 hours were served in excess of the limit of 8 hours per day for the period worked, with the hourly rate calculated at Kshs. 59.70, total overtime claim resulting in Kshs. 116,012. He incurred Kshs. 12,830 in the course of service, which was money he spent from his own pocket to fulfill work-related tasks, and was not refunded by the Respondent. He forwarded the receipts to the Respondent, and the imprest form, but the Respondent did not refund his money. He was not issued the Certificate of Service.

6. Giving further evidence on cross-examination, the Claimant sated he was assigned Motor Vehicle registration KBL 623 A. He was told termination was on account of poor work performance. He did not engage in activities outside driving. He was not engaged in criminal activities. He was not cleared by the Respondent's Finance Department. It is not true that he was invited by the Respondent for his terminal benefits which he refused to collect. The Respondent used to pay leave traveling allowance. Overtime pay was not made immediately it was claimed; the Respondent asked the Claimant to wait for payment. The Claimant asks the Court to grant the Claim.

7. The Respondent's position is that termination of the Claimant's contract of employment was on valid ground and carried out fairly.

8. Josphat Maigua testified the Claimant joined the Respondent in May 2010. The Claimant was assigned a Heavy Commercial Vehicle registration KAK 365 C and a Light Commercial Vehicle, Pick-Up

registration KBN 626 A. The Heavy Vehicle transported coffee, while the smaller Vehicle transported Police Officers within the factory.

9. In December 2011, the Respondent received information that its Drivers were siphoning fuel. The fuel seals were being broken to achieve this end. The seal on KAK 365 C was broken. There were allegations the Claimant was part of the guilty Drivers. The Mileage in his assigned Vehicle did not match the fuel usage. The Claimant alongside other Drivers were given time to explain themselves. The Claimant did not give a plausible explanation. His contract was terminated on 18th January 2012. He had been appraised by Maigua prior to termination. Disciplinary action was recommended. The Claimant had adversely been mentioned by the Respondent's Security in theft of coffee. He used his car to ferry stolen coffee. Theft of coffee and fuel were factors informing the decision to terminate. The Claimant was invited to collect his terminal dues, which he failed to do.

10. Maigua prepared the computation of final dues, based on the Claimant's pay slip. A Certificate of Service dated 21st January 2012 was prepared by the Respondent, which the Claimant again, failed to collect. He did not clear with the Respondent in full. He had outstanding leave of 19 days, at Kshs. 11,345. Overtime was paid at the end of each month. The forms on overtime exhibited by the Claimant had not been approved by the Operations Manager and the Finance Manager, and some had not even been signed by the Supervisor contrary to overtime claim procedure in place at the Respondent. The Claimant never demanded for overtime pay, and Maigua found it unusual that one would wait for 2 years to claim overtime. He was offered notice pay in the computation of final dues done by Maigua, and the item is not contested.

11. On cross-examination, Maigua stated he serves as the Accountant, but undertook alongside the Operations Manager, the functions of Human Resource because the Respondent did not have a Human Resource Department. The Respondent Owner and CEO Mr. Ngugi also exercised the role; he would hire and fire Employees. There was evidence of broken seal on the Claimant's given Motor Vehicle. This was determined by a Technical Person, but no report was prepared showing his findings. The Claimant engaged in theft of coffee and fuel. None of the incidents were reported to the Police. Maigua carried out the appraisal. The Claimant was not under Maigua's department and was not under Maigua's supervision. It was an internal appraisal, where Maigua consulted several Managers. The Witness testified he did not carry out the appraisal, but only signed on behalf of a larger appraisal team. Maigua analysed all the concerned Vehicles. The Drivers were all present within the factory, and were given the day's agenda once in the meeting. They were given 1 hour to explain themselves.

12. Wario Huka recalled that on 21st October 2011, he was at the Respondent factory. Around 7.15 a.m. he saw the Claimant drive in the Vehicle KBN 262, ferrying 2 sacks of coffee beans. The Claimant explained it was to be weighed the following day. Ordinarily coffee was brought and processed at the factory. 2 Employees came and complained coffee had been collected from the adjacent Cashew Nut factory. It was alleged the coffee was stolen by the Claimant. The 2 Employees had followed the Claimant into the Respondent's premises after theft of the coffee. Huka reported the incident to his Supervisor, and did not know what followed. Cross-examined, the Witness stated he understood the present dispute in Court to be about theft of coffee. Coffee was stolen from Coffee Thika Mills. Huka recorded the incident in the Occurrence Book of the Respondent. The Claimant left employment on account of theft of coffee. It was not Huka's duty to report the matter to the Police. The Respondent urges the Court to dismiss the Claim.

The Court Finds and Awards:-

13. In the ***Industrial Court Cause Number 2177 of 2012 between Maina Mwangi v. Thika Coffee Mills Limited*** similar matters of fact and law as in the present Cause arose, upon which the Court made certain findings. The Parties in that Cause were represented by the same Law Firms, and the Principal Witness for the Respondent in either Cause was Mr. Josphat Maigua. In both disputes the Claimants were employed as Drivers by the Respondent, and had their contracts terminated, against the same background; the Respondent alleged the Drivers had performed their work below the expected standards and were involved in siphoning of fuel.

14. There is no evidence led by the Respondent in the instant Cause, which would persuade the Court to reach different findings of fact and law, from the findings registered in the previous Cause.

15. Evidence of poor performance was based on the appraisal by Mr. Maigua. The Court rejected this evidence in the earlier case, concluding appraisal was not based on standards that could be said to be reasonable, measurable, understandable, verifiable and achievable. Appraisal was no more than a colourable exercise aimed at affording the Respondent more grounds in justifying the ejection of the Drivers out the employment place. These earlier findings of the Court remain unaffected, by the evidence adduced by the Respondent in the current case.

16. The Court found and finds fair procedure was not observed in executing termination. The Respondent took mass statements from the Drivers in the presence of the CEO, and made the decision to terminate on the same day. The allegations of fuel siphoning were not supported by the evidence of a Witness with specialized knowledge of motor vehicle fuel consumption. Mr. Maigua's speculative evidence was previously found to be unreliable, and the Court finds such evidence unchanged in the present dispute. The allegation that the Claimant was involved in theft of coffee was not made to him before the termination. He was not shown to have been called upon to respond to this very serious allegation, and the incident was not reported to the Police. Wario Huka's evidence on this appeared to the Court muddled. It was not clear where or whom the coffee was stolen from, and where it was destined to. There was no link between this offence and the ostensible ground stated in justifying termination - that the Claimant performed his work below the expected standard.

17. In sum, termination fell short of the substantive standards contemplated by Section 43 and 45 of the Employment Act 2007, and the procedural standards set under Section 41 and 45 of the Act.

18. The Court is satisfied the Claimant is entitled to **18 days' salary for work done in the month of January 2012 which the Court grants at Kshs. 9,362 as prayed**. The Claimant seeks 27 days of unpaid leave. The Respondent acknowledges 19 days, but gave no records on the Claimant's annual leave. What was given to the Court is a blank, standard leave application form that communicates nothing. **The Court allows the claim for 27 days of annual leave, valued at Kshs. 16,743.**

Judge

Dated and delivered at Nairobi this 5th day of June 2014

D.K. Njagi Marete

Judge