



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 405 OF 2013

JULIUS KARINGITHI MAHINDA.....CLAIMANT

- VERSUS -

TAIDY'S INVESTMENT LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th July, 2014)

JUDGMENT

The claimant Julius Karingithi Mahinda filed the memorandum of claims on 18.11.2013 through Geoffrey Otieno & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. 1 month pay in lieu of termination notice Kshs.12,500.00.
- b. 5 days worked in May, 2012 Kshs.2,404.00.
- c. Annual leave for 2010 and 2011 Kshs.23,077.80.
- d. Five months prorated leave Kshs.2,824.70.
- e. Overtime day and night shifts Kshs.406,458.50.
- f. 12 months' gross salaries compensation under section 49 (1) (c) of the Employment Act, 2007 Kshs.190,000.00.

- g. Other SACCO contributions Kshs.70,000.00.
- h. Grant total prayed for Kshs.707,265.00.

The statement of response to the memorandum of claim was filed on 04.02.2014 through R.W. Chege & Associates. The respondent prayed that the claimant's claim be dismissed with costs.

The case was heard on 12.06.2014 and 23.06.2014 when the claimant together with his witness Richard Kisiangani Wepukhulu (**CW2**) gave evidence to support his case. The respondent's witnesses included Kennedy Kihara Chege the respondent's director (**RW1**), and James Wafula Muhanda, the respondent's accountant (**RW2**).

The claimant was employed by the respondent as a casual worker in December, 2002 to January, 2005 when the respondent's premises were brought down by a fire. In November 2005, the claimant was reemployed as a waiter till September, 2008 when the claimant was promoted to the position of a supervisor.

The claimant testified that on 2.05.2012 he was on an off and it was a Tuesday. The respondent's branch manager at Nakuru had asked him to report at work on that day and the claimant was asked to explain events of 20.3.2012 involving allegations that the respondent's guard had been seen leaving the respondent's premises with a black polythene bag said to contain the respondent's property. The claimant

testified that he knew nothing about the allegations.

The claimant reported on duty on 3.05.2012 for the morning shift. At about 9.00 am, he was summoned and told to leave duty until 8.05.2012 when outcome of the investigations would be out.

On 8. 5. 2012, the claimant received a letter of indefinite suspension. The suspension letter being exhibit **JKM V** stated that due to allegations made against the claimant, the claimant was to be away until investigations were completed and determined. The letter stated that the claimant's unpaid suspension had commenced on 4.05.2012 and that the respondent would communicate to the claimant further information. The claimant testified that thereafter and despite his demand for explanation about his predicament, he never resumed duty.

The 1st issue for determination is whether the termination was unfair. The claimant testified that the termination letter dated 15.02.2012 being the respondent's exhibit **KC1** was never delivered to him. CW2 who was the respondent's branch manager at the time testified that he never saw the letter as it was never issued and delivered to the claimant. The termination letter exhibit KC1 addressed to the claimant stated thus, **"In terms of the employment contract entered into between you and the company, the company hereby terminates your employment and in lieu of notice you shall be paid one month salary. Your statement of terminal benefits is attached hereto. You may please call into the office to collect your certificate of service as you clear with the company."** The letter was signed by the respondent's general manager, Festus Kigen.

The court has considered the evidence. First, the court finds that in absence of the evidence of delivery, the termination letter was not delivered to the claimant. Secondly, the court finds that the letter of termination did not state the reason for the termination and in such circumstances, the court finds that the respondent did not establish the reason for the termination as at the time of termination and the termination was unfair under section 43 of the Employment Act, 2007 for want of a valid termination reason. Thirdly, the court finds that throughout the period leading to the termination, the claimant was not heard about the fictitious reason for the termination. The court finds that the claimant was told about some alleged theft by the respondent's guard, he was suspended and thereafter, he was not given any further chance about the termination. The court finds that the termination was without due hearing as envisaged in section 41 of the Act. The court has considered that the claimant did not contribute to the termination and he had served for several years. In the circumstances, the court finds that the claimant is entitled to the 12 months' gross salaries being **Kshs.190,000.00** as prayed for.

The next issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

- a. The court finds that the claimant is entitled to 1 month pay in lieu of termination notice **Kshs.12,500.00** as prayed for.
- b. The court finds that the claimant is entitled to 5 days worked in May 2012 **Kshs.2,404.00** as prayed for.
- c. The claimant did not establish the claim for annual leave for 2010 and 2011 and the court finds that he is not entitled to Kshs.23,077.80 as prayed for. In making that finding, the court has noted that the claimant admitted taking his leave from time to time.
- d. The court finds that the claimant is entitled to five months prorated leave of **Kshs.2,824.70** as prayed for.
- e. The claimant prayed for overtime day and night shifts Kshs.406,458.50. The court has considered the evidence on record. It is not said that there was a dispute on remuneration including the alleged overtime. The court finds that the claims and prayers on overtime were afterthoughts that lacked contractual basis. The claimant did not establish the justification for the claim and it will fail.

- f. The evidence established that the SACCO contributions were separate from the employment relationship and the court finds that the prayer for other SACCO contributions Kshs.70,000.00 will fail.

The respondent counterclaimed for Kshs.125,117.00 being part of an advance to the claimant to meet his son's medical bills and a further Kshs.15,886.00 being money the claimant allegedly owed to Vioken Self Help Group and secured by the claimant's salary. As for the advance by the Self Help Group, the respondent did not urge any evidence in that regard and the court finds that the counterclaim was abandoned.

The claimant denied asking the respondent's directors to advance him money to settle medical bills. Further, he organized a medical bill fund raiser and the respondent's director voluntarily contributed Kshs.30,000.00 to that medical fund. About the medical bill for the claimant's father, the claimant testified that his father passed on before the CT scan was done and for which he needed funds to undertake. RW1 testified that he gave the claimant Kshs.53,000.00 and later Kshs.150,000.00 for the medical bills for the claimant's son. RW1 testified that he did not record the advances that he made.

CW2 testified that RW1 was a very kind person but at the material time and as the branch manager he was not aware of advances made to the claimant to settle medical bills and in any event, the respondent did not at the material time give loans to staff. RW1 testified that he did not claim the money back because the claimant said that he was in financial difficulty. The court has considered that the money alleged to have been advanced was substantial and it was unbelievable that RW2 being an accountant would have delivered it to the claimant (as he stated in his testimony) without any records for that purpose. In such circumstances, the court finds that the respondent, on a balance of probability, has failed to establish the counterclaim as made and the same will fail.

In conclusion, judgment is entered for the claimant against the respondent for:

1. A declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant a sum of **Kshs.207,728.70** by 1.09.2014, failing, interest to be payable at court rates from the date of the judgment till full payment.
3. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday 18th July, 2014**.

BYRAM ONGAYA

JUDGE