



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 261 OF 2013

PIUS KIPRUTO KETER.....CLAIMANT

- VERSUS -

FANKIWA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 11th July, 2014)

JUDGMENT

The claimant filed the memorandum of claims on 16.08.2013 and prayed for judgment against the respondent for:

- a. Salaries on suspension.
- b. Reinstatement to his former employment.
- c. Payment of annual leave for 13 years he was in the respondent's employment.
- d. Compensation during the period of suspension.
- e. Payment for overtime and public holidays.
- f. Payment for underpayment as per legal notice No. 71 of 2012.
- g. Costs of the suit.

The respondent's statement of response and counter-claim was filed on 26.09.2013 through Kiboi Tuwai & Company Advocates. The amended response and counter-claim was filed on 04.12.2013. The respondent prayed that the claimant's case be dismissed with costs and counter-claimed for:

- a. Kshs.355,428.00 being overpayment made to the claimant and any additional sum thereof based on statutory notices on salary wages.
- b. Kshs.8,000.00 in lieu of notice.
- c. Costs of the counter-claim.

The claimant filed reply to the amended response and response to the counter-claim on 20.05.2013 through Nyairo & Company Advocates. The claimant prayed that the amended response and counter-claim be dismissed with costs.

The case was heard on 20.05.2014. The claimant gave evidence to support his case. The respondent's witness was Sophia Chemengen Too (RW), one of the respondent's directors.

The claimant was employed by the respondent on 24.04.2001 and he served as a security officer. The claimant testified that on 28.08.2013, the respondent's director called Mark Kiptarbei Too telephoned the claimant and told the claimant to return the respondent's motor bike to the Administration Police at Airport-line, Eldoret and to leave the respondent's farm as the claimant's employment had come to an

end. The claimant testified that the reasons for the termination were not given by the director. The claimant testified that at termination the director, Too was in Kenya but the other director RW was outside Kenya. Further, at termination, the respondent's cow and power saw had been stolen, the claimant had recovered the cow but the claimant had not been asked to produce the power saw as the head of security. It was the claimant's further testimony that he was not implicated in the theft of the power saw and he had not been arrested in connection with the theft of the power saw.

RW testified that the claimant was employed by the respondent in 2001 to 2013 and he served as a watchman, deputy head of security and finally as head of security at the respondent's farm. RW testified that it was not true that the claimant was terminated by telephone call but that the respondent's two power saws got lost and all other workers implicated the claimant. RW testified that her husband and co-director Mark Too called in the police to investigate the allegations and the claimant was questioned after which he took his belongings from the housing accommodation provided for him on the farm and disappeared. RW testified that later, a police officer informed her that the claimant had acquired alternative engagement in tree harvesting enterprise. RW testified that the claimant had left employment without notice.

The court has considered the pleadings and the evidence. The issues for determination are two. First, is whether the termination was unfair and secondly, whether the parties are entitled to the remedies as prayed for.

For the 1st issue, it was submitted that the claimant voluntarily left employment without notice and he should pay the respondent Kshs.8,000.00, being one month pay in lieu of notice. The respondent further submitted that the claimant had not produced transcript from the telephone operator to show that the director, Mark Too telephoned him on the material date of termination. The court has considered that the respondent did not call the director, who the claimant testified had called and terminated the employment, to give his account of the events. Secondly, RW testified that the claimant was seen by the police but no explanation was offered by the respondent why the police did not arrest the claimant if indeed there was evidence to implicate the claimant with the theft of the power saws. Thirdly, if the claimant disappeared from duty as per RW's account, it is not explained why the respondent failed to initiate the relevant disciplinary process to terminate the employment. Accordingly, in this case, the court finds that the claimant's account is more credible than the respondent's account. The court finds that the claimant was terminated by telephone call on 28.04.2013 when the respondent's director asked the claimant to surrender the motor bike and to leave the respondent's farm.

In making the finding, the court has considered the respondent's inaction to institute the relevant disciplinary action against the respondent and upholds its opinion in Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR where in the judgment it was stated thus, **“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.”**

The court finds that the termination in the present case was without notice and hearing as provided in section 41 of the Employment Act, 2007. Further, no genuine reason for the termination was provided as envisaged in section 43 of the Act. The court finds that the termination was unfair in substance and in

procedure. The court has considered the long service by the claimant in employment and that the claimant did not in any way contribute to his termination. The court finds twelve months' salaries at Kshs.8,000.00 per month being **Kshs.96,000.00** will meet the ends of justice in view of the unfair termination.

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

- a. The claimant has claimed for underpayment and the respondent has claimed refund of overpayment. The claim for underpayment is predicated on the claim that the farm was within Eldoret Municipality. The respondent has testified that the farm was outside the Municipality and located near the Eldoret International Airport. There is no reason to doubt the respondent's evidence especially in circumstances whereby the claimant has failed to show by evidence that the farm was within the Municipality. The court has considered the evidence and finds that throughout the employment relationship, the parties agreed on the pay and there were no grievances by either party on the claimant's remuneration. RW testified that the respondent paid willingly in appreciation of the claimant's services. The court finds that the claim for underpayment and the counter-claim for overpayment were misconceived and mere afterthoughts. The claim and counterclaim will therefore fail.
- b. As the termination has been found to have been unfair, the court finds that the claimant is entitled to **Kshs.8,000.00** being pay in lieu of the termination notice.
- c. The claimant claimed pay for working on public holidays and overtime. RW testified that the claimant used to oversee security services and as a supervisor, he did not work overtime. The court finds the evidence credible and reasonable. The specific days for overtime and public holidays in issue were not established by the claimant. The court finds that the claims were mere afterthoughts especially that there were no grievances on the issues while the employment relationship subsisted. Further, there is no reason to doubt RW's evidence that work on public holidays was set off by granting the claimant rest off days.
- d. The claimant has prayed for annual leave for the 13 years he was in employment. The muster roll filed in court showed numerous days the claimant was given offs. There is no evidence of grievances on the leave claim over the period of 13 years of the claimant's employment. The claim will therefore fail.
- e. It is not disputed that the claimant served for 12 complete years and the respondent did not make the relevant National Social Security Fund contributions or provide the claimant alternative pension or provident arrangements. Section 35(5) of the Employment Act, 2007 provides that an employee whose services are terminated shall be entitled to service pay for every year worked and terms of which shall be fixed. The court considers that one month pay at the rate of the last monthly pay of Kshs.8,000.00 making **Kshs.96,000.00** for service pay will meet ends of justice in this case.
- f. As the relationship between the parties is irreparably strained, the court finds that reinstatement is not a justified remedy in the circumstances of the case. In any event, the claimant did not urge to be reinstated and the court deems that the claimant abandoned the claim and prayer.
- g. As the claimant has substantially succeeded, the respondent will pay costs of the suit.

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 Kshs.200,000.00 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 11th July, 2014.

BYRAM ONGAYA

JUDGE