



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 434 OF 2013

GEORGE OMONDI OTIENO.....CLAIMANT

- VERSUS -

VALLEY CONFECTIONERY LIMITED.....RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 11.12.2013 through Magatta & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. One month salary in lieu of notice Kshs.8,048.85.
- b. Normal overtime Kshs.155,581.90.
- c. Annual leave for 5 years being the 2nd February 2007 to the 2nd March 2012, Kshs.24,664.40.
- d. Severance pay under section 40(1) Kshs.17,497.50.
- e. Compensation Kshs.96,586.20.
- f. Total Kshs.302,378.85.

The statement of response to the claim was filed on 22.01.2014 through Sheth & Wathigo Advocates. The respondent prayed for dismissal of the claimant's claim with costs.

The claimant testified that he was employed by the respondent verbally as a guard effective 2.2.2007. The claimant served on a day shift from 6.00 am to 6.00 pm and a night shift from 6.00 pm to 6.00 am. At employment, the claimant testified the respondent was known as Valley Bakeries or Toasty till 2011 when the name changed to Valley Confectioneries Ltd. As the name changed, the claimant testified that the respondent retained him in employment as some workers were terminated and paid Kshs.30,000.00 each.

On 2.03.2012, the claimant testified that he reported at work at 6.00 am to substitute his workmate called

Jackson Wafula who conveyed to the claimant that the day was the claimant's last day at work. The claimant testified that he worked till 6.00 pm. Upon checking out at 6.00 pm, the claimant reported at the office and met the respondent's employees Joseph and Mohammed who confirmed the termination. No letter of termination was issued but the claimant testified that later he reported a dispute at the Labour office and the Labour officer handed to the claimant the undated letter of termination of employment which shows the claimant had signed on 31.3.2012. The letter was given to the claimant by the Labour officer on one of the claimant's numerous visits at the Labour office.

The letter of termination stated that the respondent no longer required the claimant's services and the termination did not reflect on the claimant's performance which the letter stated had been satisfactory. The letter stated that the last working day would be on 30.04.2012 and the terminal dues to be paid included basic salary for days worked up to including 2.04.2012; 28 due leave days for 2011/2012 and to proceed on leave from 3.04.2012 to 30.04.2012; and less statutory deductions, bank loans and cooperative loan. The letter thanked the claimant for the services rendered to the respondent. There was no evidence before the court on the computation of the promised dues and there was no evidence that the dues as promised were paid to the claimant.

A recommendation letter dated 2.04.2012 issued to the claimant by the respondent shows that the claimant worked for the respondent from 1.05.2011 to 30.04.2012. The claimant's case was that he was not paid the redundancy dues except Kshs.1,040 he received from the Labour office as partial payment. The claimant further testified that Maina was employed in his place and work had not reduced as alleged by the respondent.

The respondent's witness was Joseph Ongare Apondi, the respondent's transport and security officer (RW). He testified that he worked for Valley Bakeries Ltd from 1998 and the company wound up in April, 2011 and respondent started operations in May, 2011. RW then testified that he started working for the respondent. RW testified that the claimant was employed by the respondent from April, 2011. RW's evidence was that the claimant had not worked for valley Bakeries Ltd but that he used to pass by seeking employment.

RW testified that the respondent had outsourced security services thereby terminating the claimant's employment on account of redundancy. RW testified that the claimant's only dues were Kshs.1,040.00 that was paid. RW stated that the claimant's suit should be dismissed to serve as an example to those who cheat the court.

The court has considered the pleadings, the evidence and the submissions on record. The court makes findings on the issues for determination as follows:

1. The court finds that the claimant disputes that the claimant was terminated on alleged account of redundancy. In the circumstance that the termination is said to have been on account of redundancy as urged for the respondent, the court's opinion is that the claimant was entitled to the due process and payments as set out in section 40 of the Employment Act, 2007. The claimant has established that there was no notice of the intended termination and the respondent never prepared the claimant for the looming redundancy. The termination was procedurally unfair. The claimant has testified that Maina was employed to take over his job and the respondent has failed to demonstrate that the security service was indeed outsourced by the respondent. The court finds that the reason for termination was equally not genuine as envisaged in section 43 of the Act. The claimant did not in any manner contribute to his termination and is awarded 12 months gross salaries for the unfair termination at the rate of the last monthly pay making **Kshs 96,586.20** as prayed for.
2. The court finds that the claimant has showed by evidence that he worked from 6.00 am to 6.00 pm or 6.00 pm to 6.00 am. The court has evaluated the evidence. The claimant is coherent about his service initially at the enterprise he says was known as Valley Bakeries and later known by the respondent's name after what the claimant says was change of name. The claimant's evidence on the payments that were made to some of the staff for their service prior to the change of name was

coherent and the court finds no reason to doubt that account. RW testified that the respondent started operations in May, 2011 and in a contradictory manner stated that the claimant was employed by the respondent effective April, 2011 (meaning that the claimant was employed by the respondent before the respondent commenced business). The court finds that such contradictory evidence cannot be trusted and the claimant's evidence that he was employed effective 2.2.2007 is credible. The court further finds that the respondent filed some records signed by the claimant showing that the claimant was paid overtime as per the computed overtime hours. The court has considered that the claimant did not establish that grievances existed on the issue of overtime while he was in the respondent's employment. Accordingly, the court finds that the claim for overtime has not been established and the claim will fail.

3. The claimant has prayed for annual leave for 5 years being **Kshs.24,664.40**. Under section 28, the claimant was entitled to not less than 21 working days of leave with full pay. The court finds that the claimant was not granted leave or paid in lieu of annual leave. There is no reason to doubt the claimant's claim especially in circumstances whereby the respondent has not filed any documents on leave before or after the change of name. The court finds that the claimant is entitled as prayed for.
4. The claimant has prayed for one month salary in lieu of the termination notice. The court has found that the termination notice was never served upon the claimant. The respondent relies on the letter exhibit **GOO 1** on the claim that the claimant was to proceed on leave from 3.4.2012 to 30.04.2012 but as submitted for the claimant, the claimant's evidence that he was verbally terminated on 2.03.2012 has not been rebutted. The court finds that the letter came long after the dismissal as submitted for the claimant. Thus, the court finds that the claimant is entitled to **Kshs.8,048.85** as prayed for.
5. The claimant has prayed for severance pay being Kshs.17,497.50. The respondent has submitted that the termination was on account of redundancy. It was gross injustice that the respondent partially paid the claimant Kshs.1,040.00 and was submitted that the same was severance pay. The court finds that **Kshs.17,497.50** as prayed for is reasonable and just in this case whereby the respondent failed to prepare the claimant for the redundancy despite the claimant's satisfactory and good service.

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.146,796.75 by 1.08.2014, 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