



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 2000 OF 2011

JAMES MUSEMBI MWEU CLAIMANT

VERSUS

BUZEKI ENTERPRISES LIMITED RESPONDENT

Mr. Ongicho for Claimant

Mr. Githii for Respondent

JUDGMENT

1. The Claimant was employed by the Respondent as an Assistant Mechanic at Eldoret Branch on 2nd November 2007. He worked continuously until 28th August 2010 when he was terminated from employment following discovery of four missing spanners namely, box 16 and 17 and 13 and 14 size screw drivers.

2. The Respondent had transferred him to Mombasa from Eldoret, but before he left, he was asked to open his tool box for examination but he was reluctant to open.

The tool box was broken into whereby the said spanners, used by his colleagues at work were discovered.

3. **Mr. Wilfred Mulabi**, the Administrator at the Eldoret workshop who recovered the tools testified about the aforesaid events.

4. The Claimant apologised and asked to be forgiven since he had a good record at work and a family to take care of. The letter of apology written to the Regional Manager Mombasa **Mr. Changnon** was produced. He was still under investigations when he left for Mombasa.

5. The Claimant states that his employment was unfairly terminated and that he was not paid any terminal dues upon termination. He claims;

a. Kshs.13,243,210.00 terminal benefits calculated as follows:

- i. unremitted NSSF deductions in the sum of Kshs.6,400/=;
- ii. unremitted NHIF deductions in the sum of Kshs.11,520/=;

- iii. two months salary in lieu of notice in the sum of Kshs.76,230/=;
- iv. arrear salary during the period of suspension till date of termination on 28th August 2010 in the sum of Kshs.190,575/=;
- v. unpaid salary for the year ending August 28th 2011 in the sum of Kshs.457,380/=;
- vi. house allowance for three months calculated at Kshs.12,500/= per month in the sum of Kshs.37,500/=;
- vii. payment in lieu of leave for 3 years in the sum of Kshs.114,345/=; and (3 x 38,115).
- viii. service gratuity for 27 years (27 x 38115 x 12) in the sum of Kshs.12,349.260/=.

He also claims compensation for the unlawful and unfair termination of employment.

Analysis of Evidence

6. The Claimant provided Exhibit "I"; a letter of suspension dated 25th August 2010 which indicates that the Claimant was sent on **"indefinite suspension effective 23rd August 2010"** for stealing company property. The letter stated further;

"the Human Resource will communicate to you thereafter the final decision of the Management."

The letter was written and signed by **Mr. Kiprop Bundich**, Group Executive Director and Mr. Macreen Omondi, Human Resource Manager.

7. He also produced as exhibit "2", a record of National Social Security Fund (NSSF) for himself from January 2003 to September 2010.

The record shows that the deductions were not remitted for the period August 2004 to November 2007.

There was no explanation from the Respondent why the dues were not remitted for this period in the sum of Kshs.15,600/=.

8. The payslip for the Claimant for the month of July 2010, was produced as exhibit 3 and shows that the Claimant earned a Basic Salary of Kshs.34,650/= and was paid overtime for working on Sundays. The payslip also confirms the NSSF deductions of Kshs.200 and NHIF deductions of Kshs.320 per month. The employer adds Kshs.200 to the NSSF deduction and therefore remits Kshs.400 per month.

9. The Claimant further produced as exhibit 4 a letter dated 20th July 2009, written by the Group Executive Director, **Mr. Kiprop Bundotch** to this effect;

10. **"The Management having seen your hand work, commitment and loyalty, we are pleased to inform you that your salary has been reviewed from your current gross to Kshs.25,000/= effective 1st August 2009."** This contradicts the testimony by the Respondent on the Claimant's performance.

This is an employee who had served the Respondent as a Mechanic from the year 2007 to 28th August 2010, a period of over three (3) years).

11. The Respondent in its Memorandum of Reply dated 16th December 2011 annexed the letter of apology from the Claimant dated 17th August 2010, in which he said that he was sorry that the size 17 box spanner, and flat screw driver Type 13 & 16 were mistakenly mixed up with his spanners in the tool box.

12. The Respondent further produced a report of the incident marked Appendix "2a". Claimant was accused of using abusive language and taking company property without permission. The Claimant had refused to open the tool box when requested to do so.

It was recommended that disciplinary action be taken against the Claimant and a statement of the incident

written by RWI, was produced as exhibit '2b'.

13. A further letter of apology by the Claimant to the Managing Director dated 18th July 2011 was produced. He begged for forgiveness and for the suspension to be lifted.

14. No letter of termination of employment was produced by the Respondent and it would seem that none was ever written. The Claimant remained in limbo while under suspension until he filed suit before Court.

15. No records of Claimant's leave were produced to counter his claim for untaken leave for three (3) years.

16. With respect to the claim for gratuity, it is now settled law that service gratuity is payable where it is;

- i. expressly provided for in the contract of employment;
- ii. where in the absence of an express provision in the contract of service, it is shown that the employee was not registered with, and no remittances were made to the NSSF; and
- iii. where an employee was registered with NSSF and no remittances were made by the employer upon deduction; and
- iv. where the employee who is not registered with NSSF or is registered with NSSF but no remittances were made is not a member of an alternative Pension or Profident Scheme.

17. Furthermore, an employee who qualifies for service gratuity may be excluded from benefiting from the same where the contract of service has an exclusion Clause where an employee's employment is terminated for misconduct.

18. It should be noted that service gratuity accrues upon completion of every year of service and must not be denied retroactively unless there is a very good reason either provided under the law or the contract of service. The **Employment Act, 2007** has no such provision and only provides for denial of payment of gratuity where an employee has alternative Pension Scheme or is covered under the National Social Security Fund (NSSF).

Findings

19. In the present case the Court finds as follows:

a. Termination of Employment

The Respondent did not subject the Claimant to any disciplinary process but kept him on indefinite suspension until he came to Court. This is therefore a case of constructive dismissal which took effect the date the Claimant stopped working.

20. This being the case, the manner of terminating the employment of the Claimant is contrary to **Section 41** of the **Employment Act**, which provides that the employee be subjected to a disciplinary process and thereafter be provided with the reason for termination.

21. In terms of **Section 43** of the **Employment Act**, the employer is required to prove the reason for the termination once the employee queries the lawfulness of the termination in terms of **Section 47(5)** of the **Act**. Failure by the employer to show that the termination was for a valid reason entitles the employee to a remedy under **Section 49(1)(c)** of the **Act**, for a maximum of 12 months salary compensation or be considered for reinstatement or re-engagement without loss of benefits.

22. The Court has also powers to award general damages in terms of **Section 12** of the **Industrial Court Act, 2011**, where it is deserved.

23. Whereas, there was a valid reason to terminate the employment of the Claimant, subjecting him to an indefinite period of suspension greatly prejudiced his chances of seeking alternative employment and lost means of livelihood during that period. He was also not given a certificate of service to date to enable him mitigate his losses.

24. The termination was therefore procedurally unfair and in violation of **Section 45(1)** as read with **Section 45(2)(c)**.

The Court in the circumstances awards the Claimant five (5) months salary as compensation in the sum of Kshs.173,250/=.

NSSF Refund

25. The Court awards Kshs.6,400 being refund for unremitted NSSF funds.

NHIF Funds

26. No evidence was adduced with respect to this claim and same is dismissed.

Notice Pay

27. In terms of the Employment Act, the Claimant is entitled to one (1) month's salary in lieu of notice in the sum of Kshs.34,650/= and the Court awards accordingly.

Leave Pay

28. The evidence by the Claimant to the effect that he was not granted annual leave for 21 days per year was not effectively rebutted by the Respondent by producing leave records. It is trite that where an employee disputes a term of service, the employer who is bound to keep the records under the Employment Act, must produce the record to refute the claim or else an adverse inference is made against the employer.

Accordingly, the claim for three (3) years leave stands proven and the Court awards Kshs.72,765/= in lieu of 63 leave days not taken.

Service Gratuity

29. The Court having found that the Claimant was duly registered with NSSF and remittances were made except those ordered to be refunded by the Respondent makes no award in respect thereof.

30. In the final analysis the Respondent will pay to the Claimant a total of **Kshs.287,065/=**.

The said sum is to be paid with interest at Court rates from date of this judgment to payment in full. The Respondent is also to pay the costs of this suit.

Furthermore, the Respondent is to provide the Claimant with a certificate of service within 30 days from date of this judgment.

Dated and Delivered at Nairobi this 11th day of July, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE

