



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1182 OF 2010**

**JOHN MWEMANYAMAI.....CLAIMANT**

**VERSUS**

**RANJEETSAGOO .....1<sup>st</sup> RESPONDENT**

**SPECIALIZED AIR CONDITIONING LTD.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

The Claimant herein by Memorandum of Claim dated 22<sup>nd</sup> September 2010 and filed in court on 6<sup>th</sup> October 2010 seeks the following orders:-

1. Payment of Shs. 710,620.
2. 12 months' salary as compensation for loss of employment.
3. Terminal benefits including notice, severance pay, house allowance, leave, balance of July 2010 salary and salary for the period he was out of employment.

The Respondents filed defence on 25<sup>th</sup> November 2010 in which they state the Claimant was employed as ahead/chief day guard and not general manager as alleged in the claim. The Respondents averred that the Claimant was suspended from work on 30<sup>th</sup> July 2010 pending investigations into theft relating to 80 pieces of second hand compressors worth Kshs. 30,000, one complete body jack kit worth Shs. 80,000 and 10 pieces of second hand resealable compressors worth Kshs. 50,000. The Claimant was recalled on 2<sup>nd</sup> August 2010 but fled upon being informed that the Respondents intended to involve the police. The Respondent further avers that while in employment the Claimant obtained loans from the 2<sup>nd</sup> Respondent which were being recovered from his salary in installments and at the time of leaving employment had an outstanding loan of Shs. 28,500 which the 2<sup>nd</sup> Respondent counter-claims.

The Respondents pray that the claim be dismissed and judgment be entered in favour of the 2<sup>nd</sup> Respondent in the sum of Shs. 28,500 with costs.

The Case was heard on 3<sup>rd</sup> December 2012 when the Claimant's evidence was taken in the absence of the Respondents. The Respondents thereafter applied to cross-examine the Claimant and leave was granted. The Claimant was cross-examined on 27<sup>th</sup> May 2013 while the defence case was heard on 11<sup>th</sup> November 2013 after several adjournments. The parties thereafter filed written submissions.

Mr. Kandere instructed by S.KOpiyo & Co. Advocates appeared for the Claimant while Mr. Wachira instructed by E.MWachira & Co. Advocates appeared for the Respondents.

The Claimant testified that he was employed by the 2<sup>nd</sup> Respondent which is owned by the 1<sup>st</sup> Respondent as a Manager from 2<sup>nd</sup> January 2001. He was responsible for supervising workers and was in charge of tools. He was terminated on 2<sup>nd</sup> August 2010 for loss of a body jack and old compressors. The Claimant testified that he was given permission to attend his daughter's wedding on 17<sup>th</sup> July 2010 and reported back to work a week later. When he went back to work he asked Ali, an Asian recruited to become his boss, where the records for the lost items were but Ali said there were no records. He testified that the body jack and compressors were there when he left for his daughter's wedding. Ali later told Sagoo, the 1<sup>st</sup> Respondent in the Claimant's presence that he sold the compressors but never said anything about the body jack. The Claimant was told to go home until he was called back to work but he was not called. After one and a half months he went back to check but was told to wait until he is called. He was never called back to work.

The Claimant testified that his last consolidated salary was Shs. 16,000. Later the 1<sup>st</sup> Respondent called and offered him a settlement of Shs. 50,000/- which he declined.

The Claimant denied that he had been dismissed in 2003 and 2005.

RW1, Ranjeet Sagoo, who is the 1<sup>st</sup> Respondent, testified that he is the Managing Director of the 2<sup>nd</sup> Respondent. He testified that he employed the Claimant from 2001. The Claimant worked until July 2010. The Claimant worked as a guard. His last basic salary was Shs. 6350 with a house allowance of Shs. 1500. The Claimant was involved in theft of second hand compressors. The theft was discovered around 30<sup>th</sup> July 2010 between 5 and 6 pm. The Claimant was asked to report to work the following day to be questioned about the lost items but did not. RW1 called him and threatened to take the matter to the police but the Claimant never turned up. RW1 later received a demand letter from a union in August 2010. The company was not able to meet the Union's demands. He further testified that the Claimant is not entitled to pay in lieu of notice as he absconded duty after stealing from the Respondents. He is not entitled to leave as the company closes every year in December when all staff take leave and the Claimant was paid double salary every December.

RW1 further stated that the Claimant is not entitled to severance pay as he was not terminated and that the Claimant was paid service pay every year. The Claimant is also not entitled to house allowance as he was paid Shs. 1500 every month as house allowance. RW1 also stated that the Claimant is not entitled to compensation as he absconded duty.

RW1 stated that the Claimant had many disciplinary cases and was dismissed in 2003 and again in 2005.

RW1 stated that he had filed a counter claim for Shs. 28,000 being outstanding loans owed by the Claimant. He urged the court to dismiss the claim and enter judgment in favour of the Respondents with costs in terms of the counter-claim.

I have considered the pleadings, the evidence adduced in court and the submissions by the parties. I have also considered the authorities cited and the relevant law.

The issues for determination are the following:-

- 1. Whether the Claimant was employed as a guard or Manager;**
- 2. Whether the Claimant was unfairly terminated or absconded duty;**
- 3. Whether the Claimant is entitled to the prayers sought.**

- 1. Whether the Claimant was employed as a guard or Manager?**

The Claimant alleged in his Memorandum of claim that he was employed as a general Manager by the Respondent. In his testimony he stated that he was employed as a Manager and was responsible for supervision of Workers and also in charge of tools. RW 1 testified that the Claimant was employed as a guard responsible for security and recording tools. He recorded vehicles that entered the workshop and

occasionally went to the yard to confirm if what was done in the workshop corresponded with the receipt. The Claimant did not have a letter of appointment and his employment card does not state his designation.

From the description of his duties by both himself and RW1, I find that the Claimant has not proved that he was employed as a Manager. I am more inclined to believe that he was employed as a security guard based on the description of his duties by RW1.

## **2. Was the Claimant unfairly dismissed from employment?**

The Claimant testified that he was told to go home and would be called another day after the loss of second hand compressors and a body jack. The Claimant testified that the items were stolen by Ali, who had been employed as his boss. In the Memorandum of Claim the Claimant pleaded that he was terminated without notice.

RW1 testified that after the discovery of the loss of secondhand compressors and body jack which were in a store that the Claimant was responsible for, the Claimant was asked to report for work the following day but never turned up. RW1 called and threatened to report the Claimant to the police but the Claimant did not go back to work. He later received a demand letter from a union. However in the statement of Response it is pleaded that the Claimant was suspended from duty on 30<sup>th</sup> July 2010 and when called back on 2<sup>nd</sup> August 2010 failed to report back to work.

No questions were put to the Claimant during cross-examination to confirm the manner in which he left employment. There is no record at all about the manner in which the Claimant left employment. The Respondent did not even respond to the demand letter from the union which RW1 confirmed receiving, to explain how the Claimant left employment.

I am inclined to believe that the Claimant was suspended from duty and was never called back to work. This is what the Respondents pleadings and the Claimant's testimony confirm. This constitutes unfair termination of employment.

## **3. Is the Claimant Entitled to his prayers?**

The Claimant prayed for several reliefs which I consider below:-

### **a. Notice**

Having found that the Claimant was unfairly terminated from employment, he is entitled to notice.

The Claimant alleged that his salary was Shs. 16000/- which during his testimony he claimed was paid by two separate vouchers. However, from the records produced by the Respondent, the Claimant was paid a salary of Shs. 7850 inclusive of house allowance of Shs. 1500/-

I therefore award the Claimant Shs 7870/- on account of one month's salary in lieu of notice.

### **b. Severance Pay**

The Claimant was not declared redundant and is therefore not entitled to severance pay.

The Claim is thus dismissed.

### **c. Leave**

The records produced by the Respondent confirm that the Claimant took leave or was paid in lieu of leave for the entire period that he worked for the Respondents.

The Claim is therefore dismissed.

**d. House Allowance**

The Claimant in his testimony stated that he was paid a consolidated salary. The Respondents produced salary vouchers which confirmed that the Claimant was paid basic salary and a separate house allowance of Shs. 1500/- per month.

The claim for house allowance is without basis and is therefore dismissed.

**e. Balance of July Salary**

Although this claim appears in the memorandum of Claim the Claimant did not make any reference to the same in his testimony. No question was put to RW1 on the same in cross-examination.

I find that the claim for balance of July 2010 salary has not been proved and dismiss the same.

**f. 12 months' salary compensation.**

The Claimant worked for a period of about 9 years. Having found that he was unfairly terminated he is entitled to compensation in terms of Section 49(1)(c). I however do not think the Claimant is entitled to full compensation taking into account the circumstances under which he was terminated. I also find the testimony of the Claimant full of contradictions.

For this reason I award him 8 months' salary as compensation in the sum of Shs. 62,800.

**Respondents' Counter-Claim**

The Respondents prayed for payment of Shs. 28,500 being balance of advances and loans to the Claimant. The Claimant admitted under cross-examination that he was advanced Shs. 31,500 out of which he paid Shs. 1300 leaving the balance unpaid.

I therefore enter judgment for the Respondents in the sum of Shs. 28,500 as prayed in the counter claim. This sum will be recovered from the sum that has been awarded to the Claimant.

Each party will bear its costs.

Orders accordingly.

Dated and delivered at Nairobi this 10<sup>th</sup> day of July 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

Nyamai for Claimant

Ms. Kangethe holding brief for Mr. Wachira for Respondent