



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 597 OF 2012

JOSEPH NDUNG'U.....CLAIMANT

VS

MASTERMIND TOBACCO (K) LTD.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by Memorandum of Claim dated 5th April 2012 seeks compensation for unfair termination of employment and payment of terminal dues. The Respondent filed a Reply on 19th March 2013 but did not attend the hearing on 17th December 2013 prompting the Court to hear the Claimant *ex parte*.

2. The Respondent's application to have the Claimant recalled for cross examination was allowed by consent of the parties. However, when the case came up for hearing on 20th May 2014, there was no appearance for the Respondent and the Court therefore directed the Claimant to file final submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Forklift Operator from January 2002 initially on casual basis but later on periodical one year contracts. On 27th January 2010, the Respondent issued the Claimant with a three year contract and on 22nd February 2011, he received a letter dated 18th February 2011 suspending him without pay on allegations related to a fire that had broken out in one of the Respondent's stores.

4. The Claimant states that the Police had exonerated him from any wrongdoing. The Respondent had however refused to lift the Claimant's suspension or pay him his terminal dues.

5. The Claimant further states that the Respondent's action in suspending him indefinitely amounts to constructive dismissal.

6. The Claimant claims the following:

- a. A declaration that the Respondent's action of suspending the Claimant indefinitely amounts to constructive dismissal
- b. A declaration that the dismissal was unlawful and unfair and in breach of the Claimant's contract of employment
- c. Unpaid salary from 1st to 22nd February 2011.....Kshs. 9,342

d. Unpaid overtime from 15th January to

15th February 2011.....Kshs. 3,480

e. One month's salary in lieu of notice.....Kshs 12,740

f. Unpaid salary from date of suspension to

filing of claim.....Kshs. 168,592

g. Compensatory damages for unlawful termination.....Kshs. 280,280

h. Costs and interest

The Respondent's Case

7. In its Reply filed on 19th March 2013, the Respondent admits having employed the Claimant from 1st January 2002 and suspending him on 22nd February 2011. The Respondent further states that the Claimant was suspended without pay following a fire incident at the Respondent's Leaf Processing Plant on 9th February 2011 upon which the Claimant was arrested. The Claimant was required to assist in the investigations which according to the Respondent were yet to be concluded.

Findings and Determination

8. The issues for determination in this case are as follows:

- a. Whether the Claimant's suspension amounts to constructive dismissal
- b. Whether the Claimant is entitled to the reliefs sought

The Claimant's Suspension

9. It is common cause that the Claimant was suspended by letter dated 18th February 2011. No further action has been taken by the Respondent either to lift the suspension or to terminate the Claimant's employment altogether. The Claimant claims that this amounts to constructive dismissal.

10. As held by **Mbaru J** in the case of *Emmanuel Mutisya Solomon Vs Agility Logistics (Industrial Court Cause No 1448 of 2011)* where an employer creates a situation in the work place that makes continuation of the employment of an employee untenable, the employer is deemed to have constructively dismissed the employee and the employee is at liberty to sue for damages for unfair termination of employment.

11. In its Reply, the Respondent states that the Claimant's suspension remains in force since investigations into the fire incident have not been completed. In my view, this is an abuse of the provision for suspension. Suspension is not a form of disciplinary action but a neutral action by an employer requiring an employee to step aside in order to allow investigations into some alleged wrong on the part of the employee.

12. An employee cannot be kept on suspension indefinitely and I agree with the Claimant that his continued suspension amounts to constructive dismissal amounting to unfair termination of employment. I therefore award the Claimant 12 months' pay in compensation for unfair termination. I also award him one month's salary in lieu of notice as well as salary for the days worked in February 2011. The claims for unpaid overtime and salary for the period between the date of suspension and filing of the Claimant's claim were not proved and are dismissed.

Reliefs

13. In the final analysis I make an award in favour of the Claimant as follows:

a. 12 months' salary in compensation for unfair

termination.....Kshs. 152,880

b. One month's salary in lieu of notice.....Kshs. 12,740

c. Unpaid salary from 1st to 22nd February 2011.....Kshs. 9,343

Total.....Kshs. 174,963

14. The Respondent shall pay the costs of this case. The award amount shall attract interest at court rates from the date hereof until payment in full.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF JULY 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Makokha for the Claimant

No appearance for the Respondent