



IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1628 OF 2011

ALOIYS JUMA OGOLA.....CLAIMANT

VERSUS

PEPCO KENYA LIMITED.....RESPONDENT

JUDGMENT

The Claimant in this suit **ALOIYS JUMA OGOLA** has sued his former employer **PEPCO KENYA LIMITED** seeking the following orders:-

- i. Terminal benefits/severance pay outs, NSSF Deductions, payment in lieu of notice amounting to Kshs. 290,200.
- ii. General and special damages.
- iii. Costs of these suits.
- iv. Interests on a, b, c above at court rates.
- v. Any other remedies that this honourable court may deem just and expedient to grant.

He alleges in the Memorandum of Claim that the Respondent wrongfully and unlawfully terminated his employment and refused to pay his terminal dues.

The Respondent filed a brief reply to the memorandum of claim comprising one page with 6 paragraphs in which it avers that the claimant left employment on his own volition and voluntarily wrote a letter of resignation citing ill health. The Respondent further avers that the Claimant was paid terminal benefits of Kshs.93,871.00 on compassionate grounds. It prays that the claim be dismissed with costs.

At the hearing the Claimant testified on his behalf while the Respondent called three witnesses; **CHECCHINI GUISEPPE, RW1**, a director of the Respondent, **STANLEY ARADI MBITI, RW2**, a clerk to the Respondent and **IMMANUEL KENGA, RW3**, a handwriting examiner. The Claimant appeared in person while the Respondent was represented by Mr. Moibi appearing jointly with Ms. Rweya instructed by Ongweny & Moibi Advocates. After the hearing the Claimant made oral submissions while the Respondent filed written submissions.

The Claimant testified that he was employed by the Respondent on 1st February, 1994 and worked as a gardener in the workshop and the garage. His tasks included gardening, cleaning the roof and carrying metal bars in the workshop. While working for the Respondent he was injured and was paid compensation. He was stopped from working on 30th June, 2011 because he complained about compensation for his injury. He was not given notice or a letter of termination. He prayed for payment in

lieu of notice, NSSF and service pay for 17 years. He further prayed for overtime as he worked from 7.30 am to 5.00 pm from Monday to Saturday. His last salary was Kshs.9,000/=. The Respondent deducted Kshs.200/= from the salary for 6 years but did not remit to NSSF. Earlier the Claimant deducted Kshs.80/= per month.

Under cross-examination, the Claimant denied writing the letter of resignation dated 31st May, 2011 attached to the Respondents reply to the memorandum of claim. He stated he did not resign from employment and the signature in the letter was not his signature. He further denied that he was paid money on the petty cash voucher dated 30th June 2011 attached to the Respondents reply to the memorandum of claim. He stated he knows Stanley who was a Secretary and worked in the office. Originally his salary was paid by RW1 but later he was paid by Stanley and signed in the master roll after receiving payment. He only signed petty cash vouchers for salary advance. He denied that Stanley paid him terminal benefits. He also admitted he knew Tom who paid him compensation for injury at the labour office, Industrial area. He further stated that whenever he asked for NSSF statement he was threatened with dismissal and that he never refused to be deducted NSSF.

For the Respondent **RW1 CHECCHINI GUISEPPE** testified that the Claimant worked with the Respondent from 1994 as a casual but was placed in the master roll in February, 1998. RW1 was informed by Stanley the accountant that the Claimant wanted to go home and showed him the claimant's letter of resignation. He authorized payment to the claimant in the sum of Ksh. 82,558/= which constituted severance pay, leave balance and balance of salary. The Claimant was paid Kshs. 67,871/= after deductions but denied receiving the payment.

Under cross-examination by the Claimant RW1 admitted signing a certificate of service confirming that the Claimant worked for the Respondent from 1994 to 2011. He however could not recall the letter which he alleged the Claimant wrote in 1998 asking for payment of service pay for 4 years. RW1 further stated he did not know if kshs.200 for NSSF was deducted from the Claimant's salary as payment was done by Stanley Mbithi. RW1 further stated he did not know who signed the voucher for the Claimant's terminal benefits.

RW2 **STANLEY ARADI MBITHI** testified that he worked for the Respondent as a clerk from 6th February, 1995 and he controlled petty cash, paid salaries and made returns. He testified that the claimant started working for the Respondent in 1998. He admitted preparing the certificate of service to the effect that the claimant worked from 1994 to 2011, but he only had records from April, 1998 when he started keeping the records. He testified that he paid the claimant through petty cash vouchers.

He never heard the Claimant speak English and did not know if the Claimant could read and write.

RW2 testified that the Claimant wrote a letter of resignation on 31st May, 2011. The letter was received by his colleague and was signed by the claimant only the signature looked smaller. When he received the letter he did not do anything about it. At the end of the month the claimant said he was going home and wanted payment that very day as he had given notice. The Managing Director asked the Claimant to wait but he refused. RW2 was given money by the boss and he paid the Claimant who signed a petty cash voucher. The calculations were for severance pay from April, 1998 to June 2011 at the rate of 18 days per year worked. He deducted loans and salary advances, added payment for leave of 20 days and paid the claimant Kshs.67,871/=. The Claimant was not paying NSSF. He did not know the time when the claimant reported to work or left work but the Claimant never demanded payment of overtime.

RW3 IMMANUEL KENGA testified that he is an Assistant Commissioner of Police and a document examiner. He had worked for more than 22 years and examined documents and signatures. He had trained as a document examiner at CID, Nairobi, Jerusalem in Israel, Leone in France and Moshi in Tanzania.

On 15th March 2013 he received documents and a letter from Angweny and Moibi Advocates and the Claimant also went to his office to give specimen signatures.

He was asked to examine the signatures and documents. He prepared a report dated 5th April 2013. He examined the signatures in A1, B1 and B2 and C1 to C6 and concluded that the signature in A1 was by a different person. He also checked A2 and the signatures in D1 to D3 and found similarities. He concluded that the writings were by the same hand. He produced the Report, which was marked as Ex. R1.

I have considered the pleadings and the evidence adduced in court, the documents and the submissions.

The issue in dispute is **whether or not the Claimant resigned from employment** and secondly **whether or not the Claimant received terminal benefits**. The final issue is whether the Claimant is entitled to the prayers sought.

The Claimant in his pleadings, testimony and final submission maintains that he did not resign from employment, was never issued a letter of termination and was never paid terminal benefits.

RW1 testified that he was informed by RW2 that the Claimant had resigned. He availed payments due to RW2 and as far as he is concerned. RW2 paid the Claimant. RW2 alleged the Claimant resigned from employment and he personally calculated the sums due to the Claimant and paid him and further that the Claimant signed the petty cash voucher in his presence. RW3 however testified that both the letter of resignation and the petty cash voucher were not signed by the Claimant. RW3 testified that both the letter of termination and the payment voucher were signed by the same person and that it is the same person who wrote exhibits marked D1 to D3. However no evidence was adduced as to the identity of the author of the signatures on the documents marked D1 to D3 or petty cash voucher and letter of resignation.

From the foregoing it is evident that the Claimant did not write the resignation letter and did not receive terminal benefits referred to in the payment voucher. This being the case, the termination of the Claimants employment was unfair.

The truth about the author of the resignation letter and the person who signed the petty cash voucher can only be revealed by RW2 who seems to be the common denominator, having been the one who informed RW 1 about the resignation and having received money from RW1 to pay the Claimant money which the Claimant received.

Having been unfairly terminated the claimant is entitled to terminal benefits which should include notice, service pay, pending leave. The Claimant also claimed refund of Shs 200 deducted on account of NSSF but not remitted. RW1 testified that he was not aware whether or not the same was deducted while RW2 denied that it was deducted. No records were submitted to court by the Respondent to prove that the deductions were not made although RW2 testified that the Claimant signed petty cash vouchers for all payments while the Claimant testified that he signed the payroll for all payments he received.

I find that the Respondent has not discharged its obligation under Section 10 (7) to disprove the allegation that it deducted Shs. 200 on account of NSSF from Claimant's salary and failed to remit it to NSSF. The Claimant is therefore entitled to be refunded as prayed.

The Claimant has further prayed for general and special damages for unfair termination. No evidence was adduced on special damages. Section 49 (1) (c) however provides for payment of compensatory damages of up to 12 months' salary.

Taking into account the length of Service of the Claimant of 17 years as evidenced by the certificate of service, his age and the circumstances under which his employment was terminated I am of opinion that maximum compensation is reasonable. I therefore award the Claimant the sum of Kshs 108,000/- on account of compensation for unfair dismissal.

In summary, judgment is entered for the Claimant against the Respondent as follows:-

a. Notice	Ksh.	9,000
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b. Leave	Kshs. 6,923
c. Service pay for 17 years at 18 days	
Per year worked	Kshs.105,923
d. NSSF Refund	Kshs. 40,800
e. Compensatory damages	Kshs. <u>108,000</u>
Total	Kshs. <u>270,646/-</u>

The Claimant will also be paid expenses incurred in the prosecution of this case to be assessed by the Registrar. He will also be entitled to interest from date of judgment.

Order accordingly.

Dated and delivered at Nairobi this 7th day of July 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

No appearance for Claimant/Applicant

No appearance for Respondent