



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1168 OF 2010

ROBERT MUSYOKACLAIMANT

VERSUS

MISSIONS HOPE INTERNATIONALRESPONDENT

JUDGMENT

By a memorandum of Claim dated 16th September 2010 and filed in Court on 6th October 2010 the Claimant Robert Musyoka alleges unlawful dismissal and non-payment of his terminal dues by the Respondent, Mission of Hope International. He seeks the following orders:-

- i. Declaration that his employment with this defendant was constructively or, alternatively, wrongfully terminated on or about 21st of June 2010;
- ii. Damages as a result of the constructive or wrongful termination of the plaintiff's employment in the amount of Kshs. 78,000 being wages for 12 months as provided for under Section 49 of the Employment Act.
- iii. Gratuity of Kshs. 9,750.
- iv. Salary for the months of February to June of Kshs. 32,500.
- v. Notice Period being one month's salary of Kshs. 6,500
- vi. Unpaid leave Kshs. 18,200.
- vii. Certificate of service.

The Respondent filed a Memorandum of Reply on 23rd November 2010 in which it admits employing the Claimant on a renewable yearly contract from 2nd January 2008. The contract was renewed on 2nd January 2009. That due to Claimant's unsatisfactory performance the contract was not renewed but instead the claimant was placed on probation. On 4th February 2010 the Claimant was suspend from duty without pay for 2 weeks with effect from 5th to 20th February 2010. The Respondent avers that the Claimant did not report back to work after the suspension. He reported back in May 2010. The Respondent pleads that it had no contract with the Claimant in the year 2010 and had no duty to take the Claimant back in employment. The case was heard on 6th June 2013 when the Claimant's testimony was taken, and on 4th July 2013 when the evidence of the Respondent's witnesses was taken. The parties thereafter filed written submissions.

The Claimant was represented by Mr. Kariithi instructed by Waiganjo Wachira & Company Advocates while the Respondent was represented by Mr. Itonga and Mr. Mwang'ombe instructed by K. Itonga & Co. Advocates. The Claimant testified on his behalf while the Respondent called 2 witnesses.

The main facts of the case are not in dispute. The Claimant was employed as a cook by the Respondent at a consolidated salary of Shs. 6500 per month. He was on a yearly contract commencing 2nd February 2008. The contract was renewed on 2nd January 2009.

The parties however do not agree on whether the contract was renewed again in January 2010. The Claimant alleges that the contract was renewed in January 2010 while the Respondent's case is that the contract was not renewed in 2010 due to the Claimant's unsatisfactory performance.

Parties also differ on how the Claimant left employment. The Claimant testified that on 4th February 2010 the Personal Secretary to the Chief Executive Office (CEO) by the name Margaret Ndegwa called him to the officer and told him to go and rest. He reported to work on 5th February 2010 but was told to go home for two weeks. He went back to work on 21st February 2010 and was told to wait for the CEO. He waited until 3.00 pm when Raphael Kinyora the kitchen supervisor told him to go back the following day. He reported to work daily until June 2010 when he was advised to leave his phone number and will be called. When he met the CEO in June 2010 she told him she knew nothing about his case. She advised him to reapply if he wanted his job back. He however did not apply.

For the Respondent **RW1 JOSEPH MUTI MASITSA** who worked with the Claimant as a cook testified that in February 2010 the Claimant was stopped from working. RW1 was told that the Claimant failed to report for work and did not inform the office. He was told the Claimant was given a letter but had no idea of the contents of the letter. **RW2 STEPHEN MUIGAI KIMANI**, a Human Resources Manager for the Respondent stated that he started working for the Respondent in 2012 and only knew about the Claimant from the records which showed that the Claimant was suspended for two weeks for absconding duty but did not return to work after suspension. He went back to the office in May 2012 to request to be taken back. He was however not taken back as he had been replaced after he left work in February.

The issues for determination are therefore the following:-

1. **Whether the Claimant deserted work or was unfairly terminated?**
2. **Whether the Claimant is entitled to his prayers?**

Before I address the issues in dispute I would like to comment on the Respondent's position that the Claimant's contract was not renewed in 2010 but he was placed on a 3 months' probationary contract as stated by RW2.

According to Section 2 of the Employment Act a probationary contract is defined as "***a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.***"

Section 42 (2) of the Employment Act provides that a probationary contract shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of an employee.

My understanding of a probationary contract is that it is for the initial period of employment when the employer wishes to observe the employee to ensure that the employee has capacity to perform the job for which the employee has been employed.

For this reason the Respondent's contention that the Claimant was placed on probation after working for two years is not legally tenable. In any event the Claimant testified that he signed a renewal contract and the Respondent did not produce the alleged probationary contract. I will therefore assume that the Claimant was on a month to month contract at the time he ceased to work for the Respondent.

1. **Whether the Claimant deserted work or was constructively dismissed?**

The Respondent produced a suspension letter alleged to have been issued to the Claimant. The letter suspended the Claimant from work for two weeks without pay for failure to report to work on 1st February 2010 “**after several verbal warnings.**”

Suspension is not provided for by law. It can therefore only be resorted to by the employer if the specific terms of employment of the employee provide for it. This therefore means that the suspension of the Claimant was unlawful.

Secondly the Claimant testified that he reported to work on 21st February 2010 but was never seen by the boss. This evidence was not controverted by the testimony of either RW 1 or RW2. No records were produced to support this fact.

For these reasons I find that the Respondent terminated the employment of the Claimant unfairly by failing to give him a hearing as provided by Section 41 of the Employment Act and by suspending him in contravention of the law and failing to allow him to resume duty when he reported back after suspension.

2. Whether the Claimant is entitled to his prayers?

The Claimant prayed for the following:-

i. Salary for February to June 2010?

The Claimant’s employment is deemed to have been terminated when he reported to work on 21st February 2010 after suspension and was not allowed to resume duty. He is therefore entitled to salary only up to 21st February and not June 2010 as claimed. His last salary was Shs. 7000 according to his last payslip attached to the memorandum of Claim. I therefore award him 21 days salary being Shs. 4900/-.

ii. Notice

Having been unfairly terminated without notice the Claimant is entitled to one month’s salary in lieu of notice as provided in his contract and in Section 49 (1) (a) of the Employment Act. I therefore award him Shs. 7000/- being one month’s salary in lieu of notice.

iii. Leave

No records were produced to prove that the Claimant took leave during the period he worked for the Respondent as provided in Section 74 (1) (f) . According to his contract he was entitled to 28 days leave per year. For the two years and one month he was entitled to 58.3 days. This translates to Kshs. 13,603.10 which I award the Claimant in lieu of leave.

I award the Claimant Shs. 13,603.10 in lieu of annual leave.

iv. Gratuity

The Claimant’s contract did not provide for gratuity. He is also not entitled to gratuity under Section 35 (5) of the Employment Act as he was a member of NSSF as evidenced by the payslip.

The Claimant argued that the deduction for NSSF was never remitted but he did not produce any evidence of a statement from NSSF confirming that no remittance was received on his account at NSSF.

The Claimant is therefore not entitled to service gratuity and the claim is dismissed.

v. Compensation

The Claimant seeks compensation of 12 months’ salary for unfair termination. I have taken into account

the Claimant's length of service, the manner in which he was dismissed and all other relevant factors as set out in Section 49 (4) of the Employment Act and in my opinion 6 months compensation is reasonable in the circumstances. I therefore award the Claimant Shs. 42,000 as compensation.

vi. Certificate of Service

The Claimant is entitled to a Certificate of Service as provided in Section 51 of the Employment Act. The Respondent is directed to issue the Claimant with a Certificate of Service within 30 days from the date of this judgment.

vii. Costs

The Respondent will pay the Claimant's costs for this suit.

Orders accordingly.

Delivered and signed in open court on 24th July, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Waiganjo for Claimant

Asiyo for Respondent