REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1295 OF 2011

BETWEEN

ANASTAS FUKWO LUSWETI…….…….…… CLAIMANT

VERSUS

NAVISAT TELEMATICS LIMITED…….……..... RESPONDENT

Rika J

CC. Edward Kidemi

Mr. W. Khalwale instructed by Khalwale & Company Advocates for the Claimant

Mutuli & Apopo Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 2nd August 2011. The Respondent filed its Statement of Response on 16th August 2011. The hearing took place on 22nd July 2014. Though served, the Respondent did not attend the hearing, or make any communication to the Court or to Mr. Khalwale for the Claimant. The Claimant gave his evidence, and closed his case in the absence of the Respondent. The delivery the Award was reserved for 17th October 2014, but has been brought forward, as the undersigned Trial Judge has been transferred to Mombasa.

2. Lusweti testified he was employed by the Respondent Company as a Technician in June 2011. He earned a salary of Kshs. 35,196 monthly. In February 2011, his contract of employment was terminated by the Respondent without warning, notice, reason or payment of terminal dues. The Respondent's Chief Executive Officer alleged the Claimant was a criminal. He was paid Kshs. 15,000 for the month of January 2011, instead of his normal rate of Kshs. 35,196. He was never paid house rent allowance or provided with housing accommodation during employment. He was denied social security benefits. He was not issued with a letter of termination. He worked for a period of 8 months. He asks the Court to grant him:-

a. Compensation for unfair termination.

b. Monies meant to be remitted to N.S.S.F and N.H.I.F.

c. 2 months' salary in lieu of notice at Kshs. 70,392.

d. House rent allowance at Kshs. 42,235.

e. Balance of the January 2011 salary at Kshs. 15,196.

f. Certificate of Service.

g. Costs and any other suitable reliefs.

3. The Respondent answered in the Statement of Response that the Claimant was its Employee during the period given in his Claim. He was employed as a Technician, through an oral contract in the month on June. He was to install security systems on motor vehicles, and was required to show integrity and honesty of a high level, in discharge of this role. It is not true that the CEO referred to the Claimant as a criminal.

4. It came to the attention of the Respondent in the month of January 2011 that the Claimant had earlier been charged with the offence of carjacking. He had been convicted and imprisoned for 1 year. The Claimant alleged that he had in fact been acquitted of the said offence and offered to provide the Respondent with a certified copy of the Judgment acquitting him. He did not do this, instead opting to desert work, on or around 15th January 2011. The Respondent did not terminate his contract. He was paid for the 15 days worked in January 2011 at Kshs. 15,000, and is not entitled to the balance claimed. His salary included house rent allowance. N.S.S.F and N.H.I.F contributions were remitted to the respective Statutory Bodies. The Respondent states the Claim has no merit and should be dismissed with costs to the Respondent.

The Court Finds and Awards:-

5. These are strong statements coming from the Respondent, but unfortunately, the Respondent did not support its statements with evidence or other material.

6. Under Section 43 and 45 of the Employment Act 2007, it is the duty of the Respondent to prove valid and fair reason or reasons for termination. The bare statements contained in the Response do not, in the absence of the Respondent from the hearing, demonstrate valid and fair reason or reasons for termination.

7. The Claimant states he was alleged to be a criminal by the Respondent, was not heard, notified or warned before termination, and was denied terminal benefits. The Court is persuaded on the basis of the unchallenged evidence of the Claimant, that termination was not based on fair and valid reason or reasons, and was not carried out fairly. Sections 41, 43 and 45 of the Employment Act 2007 were disregarded by the Employer. ***The Claimant is granted 3 months' salary in compensation at Kshs. 105,588.***

8. The pay slips attached to the Statement of Response indicate the Claimant received a basic salary of Kshs. 35,196 a month. Basic salary is the bare salary, devoid of any allowances. There was no house rent allowance captured in the pay slip. The Respondent did not provide the Claimant with reasonable housing accommodation at, or near the place of work, in accordance with Section 31 of the Employment Act 2007, and was obliged to pay to the Claimant house rent allowance in addition to the basic salary. ***The Claimant is granted arrears of house rent allowance at 15% of the basic salary for 8 months, added at Kshs. 42,235***.

9. The Claimant did not show to the Court any contract, wage order, collective agreement or policy, affording him 2 months' salary as pay in lieu of notice of termination***. He is allowed 1 month salary in***

lieu of notice, under Section 35 [1] [c] and 36 of the Employment Act 2007, at Kshs. 35,196.

10. There was no evidence given to show that the Claimant deserted work mid January 2011. ***He is granted the balance of his salary for January at Kshs. 15,196.*** The certificate of service is given to all Employees with at least 4 weeks of service, under Section 51 of the Employment Act 2007. ***The Respondent shall release to the Claimant his Certificate of Service forthwith.***

11. The Court is unable to order that the Respondent refunds to the Claimant statutory deductions paid to the various Statutory Bodies. The pay slips show deductions were made and the tax card suggests they were paid to the relevant Bodies. The Claimant did not produce any statements from the relevant Bodies showing non-remission, and appears not to have reported the Claimant to the prosecutorial arms of these Bodies for enforcement. The prayer for refund of these contributions to the Claimant is rejected. IT IS ORDERED:-

[a] Termination of the Claimant's contract of employment was unfair.

[b] The Respondent shall, within 30 days of the delivery of this Award, pay to the Claimant 3 months' salary in compensation at Kshs. 105,588; 1 month salary in notice pay at Kshs. 35,196; arrears of house rent allowance at Kshs. 42,235; and balance of January 2011 salary at Kshs. 15,196- total Kshs. 198,215.

[c] The Respondent to avail to the Claimant his Certificate of Service forthwith.

[d] No order on the costs and interest.

Dated and delivered at Nairobi this 18th day of September 2014

James Rika

Judge