



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO.279 OF 2013

JOSEPH KARANJA.....CLAIMANT

-VERSUS-

CENTRAL TIGERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th October, 2014)

JUDGMENT

The claimant Joseph Karanja filed the statement of claim on 27.08.2013 through Kiplenge & Kurgut Advocates. The claimant prayed for:

- a. A declaration that the termination of the claimant herein by the respondent was illegal, unfair and without any legal basis.
- b. Salary in lieu of notice.
- c. House allowance of Kshs. 2, 334.75 per month from 1.03.2011 to 30.06.2013.
- d. One month salary as service gratuity for two completed years.
- e. Two years unpaid leave allowance.
- f. Compensation.
- g. Costs of the cause.

The respondent filed the response to the statement of claim on 09.10.2013 through Kale Maina & Bundotich Advocates. The respondent prayed that the statement of claim be dismissed with costs.

The claimant testified that he was employed by the Savemore Group of Companies since March 2011 to June 24, 2013. The claimant further testified that the respondent was a subsidiary company of Savemore Group of Companies. The claimant testified that in March 2011 he was deployed to Gilgil, in May to December 2011 to Naivasha, and from January 2013 to February 2013 he was deployed to Nakuru. Throughout that service he had not been given a letter of appointment. While on deployment in Nakuru, the claimant testified that he was given a letter of appointment stating that he had been employed effective January 2013. The claimant considered that the letter was misleading and was disadvantageous in view of his employment in March 2011 and he refused to sign in acceptance. Further the letter had provided for a consolidated pay of Kshs. 15,620.00 and the claimant considered it unfair because he had not been paid house allowance since engagement in 2011 and the letter had failed to provide for the allowance.

The claimant testified that he continued in employment as the store manager supervising 2 store keepers, 5 salesmen and 3 other staff. Around May 2013 the management, according to the claimant's testimony, started to bypass the claimant and dealt with one of the store keepers as the reporting officer. In that state of things, the claimant received the letter dated 30.05.2013 imposing a compulsory leave. The letter

referred to formal and informal communication that required the claimant to change the way he conducted the respondent's business operations. It stated that the claimant had failed to take full responsibility of his unit's operations by not submitting daily reports with the consequence that the claimant could not explain a variance of 768 empties since his takeover of the unit. The letter stated that in view of the claimant's failure to adhere to the compliance requirements, the respondent's directors had met on 26.05.2013 and resolved to ask the claimant to proceed on leave effective Wednesday 29.05.2013 until when the claimant would be conducted. The claimant was asked to handover all his duties to one Stephen Kimaiyo.

The compulsory leave was for 21 days ending 21.06.2013 when the claimant reported back at work and he was asked to report on 22.06.2013 when the relevant manager would be present. On 22.06.2013 the claimant received the recommendation letter of same date confirming his exemplary service and wishing him all the best in his endeavors. The claimant testified that on 25.06.2013 he received the termination letter dated 24.06.2014 conveying that the respondent's board had decided at a meeting of 25.06.2013 that the claimant's services be terminated on account of unwarranted frequent off duties; reporting to work late without any explanation; and not taking full responsibilities of his work as a manager at town store as a result of which the company lost 768 empties. The termination was effective 24.06.2013. At termination the claimant earned Kshs. 15, 565.00 per month. The claimant admitted that he received the show-cause letter dated 22.06.2013 and he replied. The show cause letter addressed to the claimant stated as follows:

“RE: SHOWCASING WHY YOUR SERVICES WITH CENTRAL TIGERS LTD SHOULD NOT BE TERMINATED

Our letter dated 30th May refers.

The purpose of this letter is to confirm the outcome of a review on the loss of empties in town store. It confirms from the last letter that the said 768 empties could not be traced and are still missing.

As a result of this, the business has suffered a lot since the working capital of the company went down. The directors are of the view that you explain in writing the reasons why the company should not terminate your services with immediate effect following the above and other reasons highlighted in the first letter.

Wishing you the very best in your endeavors.

Sincerely,

Signed

Mutai K. Bernard

Group Accountant”

The respondent's witness (RW) was Bernard Mutai, the respondent's Group Accountant at all material time. RW testified that the respondent and Savemore Distributors Limited were separate companies. It was his testimony that the claimant joined the respondent in March 2013 and before then the claimant worked for Savemore Distributors Limited. RW testified that the claimant was served the show cause letter but never responded. The recommendation letter dated 22.06.2013 was issued upon the claimant's request. RW testified that the claimant worked for the respondent for 3.5 months and he urged that the suit be dismissed with costs. In cross examination, RW confirmed that the claimant and RW worked for Savemore Distributors Limited and like the claimant he was transferred to serve the respondent; that the claimant had been transferred effective January 2013. The transfer, according to RW, was part of the movement of employees across the companies on deployment. RW also confirmed that the claimant had joined Savemore Distributors Limited in March 2011. RW confirmed that there were no letters confirming that the claimant had been absent and there was no report about the lost empties.

The court has considered the pleadings, the evidence and the submissions filed for the parties. The court

makes findings on the issues in dispute as follows.

The **1st issue** for determination is the effective date of the claimant's employment. The court finds that as testified by RW and the claimant, the claimant was employed by the group of companies effective March 2011 and deployed or transferred across the group's companies without any break in the service.

The **2nd issue** for determination is whether the termination was unfair. It is clear from the evidence that the claimant was not accorded a hearing as envisaged in section 41 of the Employment Act, 2007. The court has examined the show cause letter. It referred to the variance of 768 empties that were not traced. RW testified that he was not aware of a report on the empties said to have been lost. The termination letter introduced two further grounds of termination namely, unwarranted frequent off duties; and reporting to work late without any explanation. The two were not included in the show cause letter so that the claimant was not given an opportunity to defend himself in that regard. Accordingly, the court finds that the reasons for the termination were not valid as at the time of the termination.

The **3rd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court's findings are as follows:

- a. The claimant prayed for a declaration that the termination of the claimant herein by the respondent was illegal, unfair and without any legal basis. The court has found that the termination was unfair and the claimant is entitled to the declaration that the termination was unfair.
- b. The claimant is entitled to a month's salary in lieu of notice being **Kshs.15, 565.00**.
- c. The claimant prayed for house allowance of Kshs. 2, 334.75 per month from 1.03.2011 to 30.06.2013. First the basis of the prayer was not established to have any contractual basis. Secondly, the parties were entitled to agree upon the consolidated pay that included reasonable provision for housing accommodation as envisaged in section 31(2) (a) of the Employment Act, 2007. There is no evidence that the parties were in dispute about the housing accommodation or the level of the consolidated pay that was paid. Accordingly, the court finds that the parties agreed on the consolidated monthly pay and the prayer for house allowance will fail.
- d. The claimant prayed for one month salary as service gratuity for two completed years. There was no evidence before the court that the claimant was a member of a social security scheme and the court finds that the claimant is entitled to **Kshs. 15, 565.00** as submitted. The court holds that the award is reasonable under section 35 (5) of the Act.
- e. The claimant prayed for 2 years unpaid leave allowance. The court has found that the claimant served for 2 years. There was no evidence that he was accorded the annual leaves. The court finds that he is entitled to **Kshs. 31, 130.00** as submitted.
- f. The claimant has prayed for compensation and submitted that it should be at 12 months pay under section 49 of the Act. The court has considered the circumstances of the unfair termination and considers that both parties failed to invoke the grievance management procedure to resolve the issues amicably. However, the respondent bear a higher responsibility because it failed to show that it had instituted such regime that the claimant could have invoked to deal with his concerns as a manager at the town unit. The court considers that 8 months salaries being **Kshs.124, 520.00** at Kshs. 15, 565.00 will meet the ends of justice.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant **Kshs.186, 780.00** by 15.11.2014 in default the respondent to pay interest thereon at court rates from the date of the judgment till full payment.
3. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 17th October, 2014**.

BYRAM ONGAYA

JUDGE