



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAKURU
CAUSE NO. 145 OF 2013
(Formerly Cause No.800 of 2011at Nairobi)

PAUL NGUGI KINUTHIA.....CLAIMANT

-VERSUS-

NGOTHO COMMERCIAL AGENCIES LIMITED.....RESPONDENT

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

JUDGMENT

The memorandum of claim was filed on 24.05.2011 through Gordon Ogolla & Associates. The claimant prayed for the order that the respondent pays the claimant the terminal dues due to unfair termination including:

- a. 1 month salary in lieu of notice.
- b. Salary for January 2011 when claimant was on unjustified compulsory leave, and another one of 20.03.2009 up to 20.04.2009.
- c. Overtime.
- d. Annual leave.
- e. Refund of the money used to buy I.P.O.S in the safaricom plus interest.
- f. Underpayments.
- g. Compensation based on section 49 (c) of the Employment Act, 2007.
- h. Service pay.

The respondent's memorandum of claim was filed on 04.05.2012 through Karanja Mbugua & Company Advocates. The respondent stated that the claimant is not entitled to the reliefs sought and prayed that the claimant's case is dismissed with costs.

The claimant testified that he was employed by the respondent on 2.12.2007 as a field officer. His job entailed collecting rent from the respondent's customers; eviction of tenants as instructed; maintain records of due repairs; and performing related duties as assigned by the respondent. The employment was based on verbal agreement under which the claimant was initially paid Kshs.4, 000.00 per month. In April 2009 the claimant testified that he received the letter dated 01.11.2008 under which he was to be paid by monthly commission of 0.7% and 1% when total arrears were less than Kshs. 100, 000.00 with respect to the houses that would be allocated to the claimant to collect rents. Under the letter the claimant was entitled to Kshs. 100.00 every week for mobilising field operations.

By the letter dated 25.01.2011 the respondent demanded that the claimant returns a Sony DVD player he had collected from a customer as security for outstanding rent. The claimant testified that he knew the respondent's director who had signed the demand letter had allowed the claimant's workmate one Wachira to use the DVD player at his home. It was the claimant's evidence that Wachira returned the DVD player to the office on 26.01.2011 and Wachira admitted before the director in presence of the claimant that the director had allowed Wachira to take and use the player at his (Wachira's) home.

On 19.01.2011 the claimant received a suspension letter on account of alleged failure to remit collected rents. The claimant testified that the suspension was for a month and when he resumed duty on 22.02.2011 the respondent's director one Ngotho told the claimant he was unfit to serve in the employment of the respondent. The claimant's case was that he was terminated from employment on 19.01.2011 following the suspension. The claimant testified that he was terminated without a notice and a hearing.

The respondent's witness was Thomas Njenga Ngotho(RW) the respondent's director. RW admitted that the claimant was employed by the respondent in December 2007 as a field officer. Initially, the claimant was paid a monthly salary and latter parties agreed to a monthly commission.

The court has considered the evidence and finds that the claimant was dismissed without due notice and a hearing as envisaged in section 41 of the Employment Act, 2007 as per the claimant's account which the court finds not to be in dispute. The termination was unfair. The court has considered the shaky employment relationship between the parties with warnings against the claimant but the claimant established that he had not engaged in any misconduct and the court considers that 12 gross monthly salaries will serve ends of justice.

The court further finds that the claimant has not established the claims for underpayment because it is established that the parties agreed to payment based on commissions. The court finds that Ngotho Maryland Sacco was a different entity separate from the respondent and the claimant's prayer for refund of the Sacco contributions will fail. Finally, the court finds that the claimant is entitled to one month pay in lieu of termination notice; and one month pay in lieu of annual leave both at the rate of the last monthly pay as at December 2010.

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

1. The declaration that the respondent's termination of the claimant's employment was unfair.
2. The respondent to pay the claimant 12 months' pay at the rate of the gross pay as at end of December 2010 for unfair termination; one month pay in lieu of termination notice; one month pay in lieu of annual leave, and to pay by 1.12.2014 failing interest at court rates to be payable until the date of full payment.
3. The claimant to file and serve the computation of the dues in order (2) above, within 7 days, and to record the quantum on a convenient mention date.
4. The respondent to pay costs of the suit.

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

BYRAM ONGAYA

JUDGE