



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 1368 OF 2013

JUDGMENT

MACHARIA KIMUHU

VERSUS

KARURI WATER & SANITATION COMPANY LIMITED

DELIVERED BY

HON. LADY JUSTICE MAUREEN ONYANGO

REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1368 OF 2013

MACHARIA KIMUHU.....CLAIMANT

VERSUS

KARURI WATER & SANITATION COMPANY LIMITED.....RESPONDENT

JUDGMENT

The Claimant Macharia Kimuhu filed this suit against the Respondent Karuri Water & Sanitation Company Limited alleging that his employment was unfairly terminated by the Respondent.

The Memorandum of claim is dated 22nd August 2013 and filed on 23rd August 2013 through Kinyanjui Kirimi & Company Advocates. He seeks the following reliefs:

- a). Certificate of service.
- b).Kshs.19,950/= being salary for June 2013.

- c). Kshs.19,950/= being salary one month's salary in lieu notice.
- d). Kshs.31,779/= being employee pension contributions for between July, 2011 and June 2013.
- e). Kshs.63,558/= being employer pension contribution for between July 2011 and June 2013 and shall direct where it should be transferred.
- f). Kshs.61,512/= for 74 days of un utilized leave days.
- g). Kshs.127,116/= house allowance (30% x 17655 x 45).
- h). Kshs.35,310/= leave allowance (50% x 17655 x 4).
- i). Kshs.717,234.40/= for overtime worked over the four years for between Monday and Friday. He used to work from 6 am to 7 pm every day.
- j). Kshs.76,560/= for overtime worked over the four yer5s between Saturdays and Sundays.
- k). Kshs.36,780/= for overtime worked over the four years for public holidays.
- l). Damages for unfair termination at twelve months pay Kshs.239,400/=.
- n). Such as other relief as may be found due to our client.
- o). Such as other relief the court may just fit to grant.

Costs and interest.

The Respondent filed a Reply to the Claim on 17th September 2013. The Reply is dated 16th September 2013 and is filed through C.N. Kihara & Company Advocates.

The Respondent denied mistreating the Claimant as alleged in the Memorandum of Claim and averred that it is the claimant who wrote a letter to the Respondent terminating his services unilaterally without giving notice. The Respondent further averred as follows:

- (a). The Certificate of service is ready for the Claimant to pick.
- (b). The Net salary of Kshs.8,055/= was paid directly to the Claimant's Bank – Family Bank Banana to offset his loan hence no June salary is owed.
- (c). The Claimants quit without notice hence not entitled to one month salary in lieu of notice.
- (d). The claimant was never deducted any money for pension scheme and is estopped from claiming the same.
- (e). Lack of funds to commit and the consequent correspondence of the same to the Claimant estops the Claimants from claiming the same.
- (f). The Respondent denies and put the Claimant to strict proof thereof.
- (g). The employment contract provides for a consolidated salary (No breakdown) hence claimant cannot ask for housing allowance.
- (h). The Respondent denies and puts the Claimant to strict proof thereof.
- (i). The Claimant never worked overtime and is put to strict proof thereof.

(j). The Claimant never worked during the weekends and is put to strict proof thereof.

(k). The Respondent avers that the Claimant never worked on holiday.

(l) The Respondent avers that the Claimant contract was never unfairly terminated.

The Respondent prayed that the claim be dismissed with costs.

The case was heard on 7th July 2014. The Claimant testified on his behalf while John Patrick Kariuki, the Managing Director testified for the Respondent.

The Claimant was represented by Mr. Kirimi while the Respondent was represented by Ms. Kibera. The parties thereafter filed written submissions.

The Claimant's case is that he was employed by the Respondent in April 2009 as an Operation and Maintenance Assistant but was given a contract in September 2009. The contract was for the period 1st September 2009 to 31st August 2010. The contract was renewed and on 27th June 2011 the Claimant was issued with a letter of permanent appointment. His salary was Kshs.17,655/= with a house allowance of Kshs.2,285/=. He worked in Muchatha zone, then Kimuga zone. He was then transferred to Karura where he stayed for 2 months. At Karura he was using bus fare of about Kshs.120 per day.

After 1 month his airtime was stopped. When he asked why, he was referred to Human Resource (HR). At HR he was told to go back to work. The Claimant further testified that he was not given a motorbike and had to use his own transport. After one month he received a letter asking him to report to a watchman. He worked to the end of the month and was asked to write a letter explaining how he worked. That is when he wrote the letter dated 30th June 2013. He was objecting to being asked to report to a junior person. He was later called to collect the termination letter which is dated 8th July 2013.

The Claimant testified that he was never told what his fault was. He was never called for a disciplinary hearing.

The Claimant testified that he was a pioneer employee and among the most senior. He worked hard. When he went to Muchatha there were only 120 consumers and the collections were about Kshs.70,000/=. By the time he left there were 620 active consumers and the revenue was about Kshs.500,000/=.

The Claimant prayed for the prayers in the Memorandum of claim.

The Respondent's case is that the Claimant was first employed on contract from 1st September 2009 to 31st August 2010 as a pump attendant. He was later issued with a letter of appointment dated 27th June 2011 for the position of Operation and Maintenance Assistant II with effect from 1st July 2011 on permanent and pensionable terms.

The Claimant's core duties were to maintain and improve sources of water, ensure regular and reliable water service delivery and minimize water loss. The claimant's terms of appointment include a contributory pension scheme into which the employee contributed 7.5 % while the employer contributed 15% of basic salary. However the scheme did not take off for lack of adequate funding.

Upon employment the claimant was deployed to Muchatha zone. He was later transferred to Kimuga zone. While at Kimuga there were several complaints by customers against the Claimant's attitude and service delivery. As a result the Respondent transferred the Claimant to Karura Wangunyu zone by letter dated 26th June 2013. The claimant never reported to the new station as expected. Instead on 30th June 2013 the Claimant wrote a letter asking the Respondent to terminate his employment. The Respondent pointed out that the letter attached by the Claimant to the Memorandum of Claim was different from the one he sent to the Respondent, reflecting his dishonesty. The Respondent dismissed the Claimant on the

strength of the Claimant's letter where he asked to be terminated.

I have considered the pleadings, the viva voce evidence and the written submissions. I have also considered the relevant law and the authorities cited by the parties.

The issues for determination are whether the Claimant's dismissal was fair and whether he is entitled to the reliefs sought.

On whether the termination of the Claimant's employment was fair, section 41 provides for the procedure while section 43 provides for validity.

Section 41 requires that before a decision is made to terminate or dismiss an employee he must be given an opportunity to defend himself in the presence of a Union Official of colleague of his choice.

The Claimant's letter states that he was dismissed on the strength of his letter. His letter referred to as attached to the Respondent's Memorandum read as follows:

Macharia Kimuhu

00219

P.O. Box 682-

Karuri

30th June 2013

The Managing Director

Karuri Water & San Co. Ltd

P.O. Box 818-00219

Karuri.

Sir I wish to bring your attention to a letter Ref KWSX/W/est/0008 of 26th June 2013.

I have worked for the company with a lot of dedication, selflessness and determination.

Your office have not shown any appreciation.

I have reflected, searched myself and have failed to pinpoint any wrong doing.

The humiliation is too much. The insult is more than I can possibly stomach. Terminate my services.

May I be the first and last to be treated so.

Signed

The letter is not a resignation. It is an aggrieved employee seeking redress from the employer. It is a cry for justice by an employee who is in so much anguish that he is ready to leave employment if his grievance is not resolved by his employer; it is the plea of an employee in so much pain, he is willing to sacrifice his employment so that other employees do not suffer his fate. The least that the employer would have done in the circumstances is to respond to his letter to reassure him that being asked to report to the watchman was not a demotion but for the watchman to introduce him to the station so that he can thereafter take charge, if this was indeed the intention of the Respondent as explained by the Respondent's witness. This was an employee who needed reassurance, not dismissal. I find the action of

the Respondent in dismissing the Claimant most insensitive, and declare the Claimant's dismissal unfair both substantively and procedurally. There was no valid reason for the dismissal and the Respondent failed to comply with fair procedure or any procedure at all.

I will now consider the reliefs sought by the Claimant:

(a) Certificate of Service

The Respondent admitted that the Claimant was not issued with a Certificate of Service. I award his prayer to be issued with the same.

(b) Salary for June 2013

The Claimant acknowledged that he had a loan in Family Bank. The same is also reflected in his pay slip for both January and June 2013. RW1 testified that in the form signed by the Claimant for check-off, the Respondent undertook to pay the Claimant's last salary to the bank. I find that payment of the Claimant's salary to the bank discharged the employer from liability to pay the same to the Claimant and dismiss the prayer for payment of salary for June 2013.

(c) Notice

Having found that the Claimant was unfairly dismissed he is entitled to pay in lieu of notice. I award him the sum of Kshs.19,950 as prayed.

(d) Employee's Pension Contributions

The pension contributions were supposed to be recovered from the Claimant but it was not. The pay slips attached by the claim testify to this fact. The Claimant cannot require the Respondent to pay what was his responsibility to pay and which he did not pay. The claim is dismissed.

(e) Employer's pension contribution

The Respondent admitted that the Claimant's terms of employment included membership to a pension scheme into which the Respondent would pay 15% of Claimant's basic salary. The Respondent admitted not paying the same. The Respondent's reason was lack of funds.

This is not sufficient reason for not making the payment. Like every other term of employment in his letter of appointment the claimant was entitled to the pension contribution. The claimant did not ask for the term to be included in his letter of appointment. The Claimant was in employment for a period of 24 months from the date of commencement of his contract and the Respondent did not demonstrate that any time during that period the Claimant was informed of the Respondent's inability to make the contribution due to lack of funds.

I find that the Respondent is liable to pay the contributions that it failed to make on account of the Claimant to a pension scheme as provided in his letter of appointment and award him 15% of basic salary for 24 months in the sum of Kshs.63,558/=.

(f) 74 days unutilized leave days

RW1 confirmed during his testimony that the Claimant did not take annual leave for the entire period he worked for the Respondent. As stated by the Claimant, he started working for the Respondent on 1st April, 2009. He therefore worked for 4 years and 3 months. Under section 28 of the Employment Act the Claimant was entitled to a minimum of 21 days annual leave with pay every year. He is entitled to 89.25 days. This amounts to Kshs.59,351.25 which I award the Claimant.

(g) House allowance

The Claimant prayed for payment of house allowance for the entire period he was in employment. His original contract stated that his salary was gross. His letter of appointment stated that the salary attached to his post was Kshs.17,655/= per month. It did not state that this was basic salary.

I find that the claimant has not proved that he was entitled to a separate house allowance and dismiss the prayer.

(h) Leave allowance

The Claimant's contract did not provide for leave allowance. The claimant himself did not mention the same during his testimony and no question was put to the Respondent's witness in relation to leave allowance.

I find that the Claimant has not proved that he was entitled to leave allowance and dismiss the prayer.

(i) Overtime

The Claimant testified that he worked from 6 am to 7 pm from Monday to Sunday. In his Memorandum of Claim he pleaded that he worked from Monday to Friday from 6 am to 7 pm. RW1 testified that the Claimant worked from 8 am to 5 pm from Monday to Friday and from 8 am to 1 pm on Saturday. He further stated that whenever overtime work was done, the employees would be paid an allowance if they informed the manager.

I find that the Claimant has not proved that he worked overtime on weekdays, weekends or public holidays and dismiss the Claim.

(j) Damages for unfair termination

Having found that the Claimant was unfairly terminated, he is entitled to compensation. I have taken into account the circumstances under which the Claimant was dismissed and all the factors provided in section 49(4) of the Employment Act and award the Claimant 10 months salary as compensation in the sum of Kshs.199,500/=.

(k) Costs and interest

I award the Claimant costs of this suit.

The decretal sum will attract interest from date of judgment to date of payment in full.

Orders accordingly.

Read in open Court this 15th day of December, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms. Mwarunga holding brief for Claimant

No appearance for Respondent