



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 426 OF 2013**

**HAJI HASSAN MOHAMMED .....CLAIMANT**

**VERSUS**

**SALIM MOHAMED AL-MOUDY LTD .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. The claimant has brought this suit against the respondent seeking ksh.270,168 as the dues accruing after his dismissal from employment on 30/8/2013. According to the claimant, his dismissal was without any justifiable reason and was therefore unfair and unlawful.
2. The respondent has denied liability and blamed the claimant for deserting employment. She further denied the claim for the dues sought and prayed for the suit to be dismissed.
3. The suit was heard on 25/9/2014 when the claimant testified as CW1 and the respondent called Mr. Ali Mohammed Salim and Salim Anachale Mwangome as RW1 and RW2 respectively. Thereafter both parties filed written submissions.

**CLAIMANTS CASE**

4. CW1 told the court that he was employed by the respondent in 2003 and worked until 30/8/2013 as a loader. He was a contributor of NSSF from March 2007 according to the NSSF statement he produced as exhibit 1. On 19/1/2013 the cashier Mr. Omar Mohamed made a mistake while calculating the sales collections surrendered by CW1 which prompted CW1 to report the matter to the boss. On 20/7/2013, the cashier asked CW1 why he reported him to the boss and slapped him. CW1 then rushed to the police and reported the assault vide OB No. 50/20/7/2013. When the boss learned about the reporting of the assault to the police, he was not happy because the cashier was his cousin in law. On 22/7/2013, the cashier suspended CW1 for reporting him to the police. When CW1 went to see the boss, he was told to stay away until further notice.
5. On 25/7/2013, CW1 reported the matter to the labour officer who went to see the respondent. On 26/7/2013, the labour officer told CW1 that he was only on suspension and that he should continue reporting to work daily even if no work was assigned to him. CW1 complied with the advice of the labour officer but the boss told him to stay away until further notice. CW1 returned to the labour officer who advised him to wait until the end of July 2013 to see what happens. On 30/7/2013, CW1 went for his salary but he was paid only Ksh.7000 instead of ksh.10206, which was his salary per month. When CW1

reported back to the labour officer he was told that he was not yet dismissed but that he should wait until end of August 2013. When CW1 was denied salary in the end August 2013 he served a demand letter through his lawyers followed by this suit.

6. He prayed for dues because his dismissal was in breach of the law. He prayed for ksh.30618 being 3 months salary in lieu of notice. He further prayed for ksh.102,060 being accrued leave for the 10 years worked at the rate of 30 days leave per year. He also prayed for ksh.86,460 being holidays worked for 10 years. Lastly he prayed for ksh.51000 being severance pay for 10 years service. He denied ever deserting work and maintained that he was denied work by his supervisor. He also denied ever assaulting his supervisor.

7. On cross-examination by the defence counsel, CW1 explained that his immediate boss was Ahmed Muhammed, the owner of the business. CW1 maintained that on 20/7/2013, the cashier Mr. Omar is the one who slapped him. CW1 denied assaulting Mr. Omar. According to him, Omar was only a cashier and not his supervisor. CW1 denied deserting work and maintained that it is Mr. Omar who told him to stay away from work until further notice on 22/7/2013. He blamed his problem on nepotism at the workplace. He also contended that the labour officer was a friend of the respondent because he used to visit the company frequently. CW1 maintained further that on 22/7/2013 his boss supported the decision by Omar to suspend him. As regard the ksh.7000 paid on 30/7/2013, CW1 explained that the cashier told him that is the money for the days worked in that month. On the dues sought CW1 contended that the labour law entitled him to 30 days notice. He however could not tell how many holidays are in one calendar year.

### **DEFENCE CASE**

8. RW1 is a director of the respondent. He explained that CW1 was his employer since 2013. While away, he was told CW1 assaulted his supervisor Mr. Omar Mohammed Omar and ran away. The respondent however continued to pay his NSSF and NHIF thereafter. The respondent then finally wrote a letter to the labour officer on 2/9/2013 to notify him of CW1's desertion from work after beating the supervisor. The labour officer responded on 5/9/2013 and CW1 was replaced by another person. He maintained that CW1 should not get any salary in lieu of notice because he is the one who deserted work. He further maintained that CW1 was entitled to 21 days leave per year and he was paid in lieu of leave. He also denied the claim for holidays worked and maintained that CW1 never worked during holidays.

9. On cross examination by the claimant's counsel, RW1 admitted that CW1 had a problem with Mr. Omar but denied that CW1 was suspended on that ground. According to him CW1 deserted work after he ran into problem with Omar. RW1 did not have the records in court to prove that there was no work in the responded during holidays or that CW1 never worked on holidays. RW1 contended that CW1 never beat Omar but explained that he only pushed him down. RW1 further admitted that no letter was served on CW1 to explain his desertion from work and no report was made to the police about the alleged assault of Mr. Omar by the CW1.

10. RW2 is the Chief Accountant and in charge of the finance in the respondent. He told the court that on 13/8/2013, he was in his office when he heard commotion at the respondent's shop entrance and when he came out he found CW1 and Mr. Omar held by people separating the two. After that day CW1 continued being paid salary for 3 months which he collected from Omar. He denied that CW1 was paid ksh.7000 on 30/7/2013.

11. On cross examination by the claimant's counsel, RW2 stated that NSSF remittances for CW1 started in February 2007 and continued till July 2013. He further confirmed that there was CCTV camera footage showing what happened but he did not produce in court. He contended that the supervisor (Omar) had the power to recruit and fire workers. RW2 admitted that he was not present when Omar told CW1 not to come to work. He however maintained that CW1 stopped working in fear of the consequences of assaulting Omar. He admitted that CW1 reported to the police and further contended that the respondent also reported to the police and his lawyer had the OB number. RW2 denied that worker attended work on Sunday but he was not sure whether they are called to work on holidays. He

denied that CW1 was served with any termination letter.

### **ANALYSIS AND DETERMINATION**

12. There is no dispute that CW1 was employed by the respondent as a loader for a salary of ksh.10206 per month. There is further no dispute that CW1 was assaulted by the respondent's cashier named Omar Mohammed Omar on 20/7/2013 and reported the matter to police. There is also no dispute that RW1 and RW2 were not present on 20/7/2013 when CW1 was assaulted by Mr. Omar and they did not witness what happened immediately thereafter.

13. The issues for determination are whether CW1 deserted work or was wrongful dismissed. The court must also determine whether the reliefs sought should issue.

### **DESERTION OR DISMISSAL**

14. According to CW1 he was dismissed from work because, although he was initially suspended, he was not paid any salary for the days not worked and no NSSF remittance was made for the months not worked. On the other hand, the respondent had denied the alleged suspension and dismissal and accused CW1 of deserting work for no good reason. The defence never called Mr. Omar who allegedly suspended CW1 to deny that allegation. She did not also call Mr. Ahmed Salim, the boss who accepted the suspension of CW1 by Mr. Omar. The said two witnesses were crucial to shed light to this court on whether or not CW1 was suspended or he merely deserted work. Failure to call the said witness left the CW1's testimony unrebutted by the hearsay evidence of the two defence witnesses. In fact, the evidence of RW2 was out of context with the suit and unsupported by any records. He gave evidence on events that allegedly accrued on a different date from the one before the court now.

15. The court therefore finds on a balance of probability that CW1 was suspended for instituting criminal proceedings against his supervisor and a relative of the directors of the company. Thereafter his effort to resume work was thwarted by the respondent by failing to call him back to work and /or failing to pay his salary in July and August 2013. That default to pay salary is a fundamental breach on which to base a reasonable inference that the contract had been terminated. Consequently the answer to the first question for determination is that CW1 was dismissed from employment. The dismissal was wrongful and unfair because CW1 was dismissed without notice and for instituting legal proceedings against his employer by reporting an assault case to the police within the meaning of Section 46 of the employment Act.

### **RELIEFS**

16. For the reasons above, the court makes declaration that the claimant was wrongfully and unfairly terminated. He will therefore get ksh.10206 being one month salary in lieu of notice. No evidence or law was cited to prove that CW1 was entitled to 3 months notice before termination. Consequently, the court is guided by Section 35 of the Employment Act in making the award for one month salary. Likewise, CW1 did not adduce any evidence or cite any law that entitled him to 30 days annual leave. Consequently the court is guided by Section 28(ii) (a) of the said Act to declare that he was entitled to 21 days leave per year. The court will only grant him ksh.21,432.60 in lieu of leave for last 3 years of his service due to limitation period. No evidence or law was cited to show that CW1 was entitled to accumulate leave beyond the limitation period or at all. The prayer for holidays worked is dismissed for lack of particulars and evidence. According to CW1 he did not know how many holidays exists in a calender year. Likewise th prayer for severance pay is dismissed for the reason that CW1 was not declared redundant. Even if CW1 intended to pray for service pay, the same would still not be available to him because under Section 35(6), he was disqualified from that remedy for reason that he was a member of NSSF to which his employer remitted 50% of his contribution. The prayer for general damages is dismissed because it is not contemplated under Section 49 of the Employment Act.

### **DISPOSITION**

17. For the reasons stated above judgment is entered for the claimant for ksh.31,638.60 plus costs and

interest from date of the dismissal.

**Dated, signed and delivered this 10<sup>th</sup> December 2014.**

**O. N. Makau**

**Judge**