



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2065 OF 2012

JOSEPH KIMANI.....CLAIMANT

VERSUS

HON. JOHN M.N. MUTUTHO T/A FARMLINE SUPPLIES LIMITED..... RESPONDENT

JUDGMENT

The Claim herein was filed by Joseph Kimani the Claimant alleging unfair termination of employment by the Respondent Hon. John Mututho T/A Farmline Supplies Limited. He seeks the following reliefs:

- a. 1 month's salary in lieu of notice - Kshs.12,000.00
- b. Severance pay - Kshs.18,000.00
- c. Leave - Kshs.25,200.00
- d. House Allowance - Kshs.64,800.00
- e. Unpaid Salary for 3 months - Kshs.36,000.00
- f. Balance on Salary – "JK 6" - Kshs. 5,932.00

Total - **Kshs.161,932.00**

- g. Compensation for wrongful termination to a maximum of 12 months amounting to Kshs.14,000.00.
- i. Cost of this suit.
- i. Interest in (i) and (ii) above
- j. Any other relief as the Court may deem just.

The Respondent filed a Statement of Defence on 12th February 2013. The Respondent avers that the Claimant was not loyal and diligent, that he was reported to Kikuyu Police Station under OB 40/5/5/2008 for theft and impropriety, that on 29th September 2007 the claimant was accused of selling the Respondent's property without authority and for his own personal gain, that the claimant was also accused of theft of a starter for the Respondent's vehicle. That the foregoing notwithstanding the Claimant's employment was terminated after being served with one month's notice and payment of his terminal dues. The Respondent denied owing the claimant the amount claimed in his Memorandum of Claim and prayed that the Claim be dismissed with costs.

The case was heard on 26th June 2013 when the Claimant's testimony was taken. The Respondents witnesses testified on 26th February and 29th September 2014. The Respondent thereafter filed written submissions.

The Claimant was acting in person while the Respondent was represented by Kithi & Company Advocates.

On 23rd September 2014 the Respondent filed a Notice of Preliminary Objection on the following grounds:

1. **THAT** the claimant's claim is statute barred and therefore an abuse of the Court process
2. **THAT** the suit contravenes mandatory provisions of the law
3. **THAT** in view of the above grounds this Honourable Court lacks jurisdiction.

The Preliminary Objection was however not prosecuted and I will treat it as having been abandoned. In any event the Preliminary Objection would not have succeeded as the Claim was filed within time, having been filed on 11th October 2012 when the issue in dispute arose on 30th October 2007. Since it was before implementation date of the Employment Act 2007, the limitation period applicable was 6 years which had not expired.

The Claimant testified that he was employed by the Respondent in 2004 as a supervisor in the farm in Kikuyu. His salary was Kshs.12,000/= per month. He worked in the farm. There were a total of 7 employees. They planted vegetables in the farm through irrigation. In July 2007 work reduced as there was no water. Salaries were not paid in September, October and November 2007. The claimant and the other workers were given termination letters on 30th October 2007. They were not paid outstanding salaries and stayed on the farm until 10th December 2007 when the Administration Manager went to the farm with the Accountant and told the Claimant and the other workers to hand over. They were advised to liaise with the head office for payment of their terminal dues. He was never paid the terminal dues. He also claimed balance of salary for December 2005, which he alleges was not paid.

Under cross examination the Claimant denied removing the starter from a Bedford lorry belonging to the Respondent. He also denied selling a bag of beans belonging to the Respondent. The claimant also denied that his salary was consolidated or that he was provided with a house at the farm. He stated that he lived in a rental house in Dagoretti and commuted every day. He stated that when he demanded a house he was told to look for a rental house as there were no houses in the company premises.

The Respondent called Stanley Thurania Mugambi, RW1, who testified that he is the proprietor of Stanmass Security Guards Limited and the Respondent was his customer. He provided security services to the Respondent. On 5th May 2008 he was called by the supervisor by the name Samuel Gichungo who told him that the Claimant had opened a Bedford lorry and removed the starter. RW1 instructed the supervisor to report the incident to Kikuyu Police Station which he did under OB No.40/5/5/08. RW1 also discussed the incident with Hon. Mututho who asked him to leave the matter to him. RW1 issued instructions that the claimant should not be allowed into the farm until the issue was resolved. He testified that apart from the starter of the lorry there was a report that the Claimant sold beans to pay casual workers.

RW2 Samuel Gichungo testified that he was employed by the Respondent as a storekeeper in February 1989. He testified that the Claimant told him he had been authorized to sell beans but he was later told they were not supposed to sell beans. He also stated that there was a water pump and starter of a lorry that got lost. RW2 and Claimant were suspended for 3 months after which the two were told to defend themselves before the Administration Manager, the late Mr. Jackoyo and the Accountant. RW2 was later reinstated but the Claimant was not. He also testified that both himself and the Claimant were housed by the Respondent. He however stated under cross examination that the Claimant was allocated a house but did not live on the farm. He testified that he Claimant left employment on 10th December 2007.

I have considered the pleadings and the issues for determination are whether the claimant was unfairly terminated by the Respondent and whether he is entitled to the prayers sought.

1. **Whether the termination of the claimant's employment was unfair.**

During the hearing the Respondent concentrated on justifying the grounds of termination of the Claimant's employment by bringing up issues about disappearance of a bag of beans, a lorry starter and a water pump. However, the letter of termination of the Claimant did not mention any of these issues. The letter states as follows:

Farmline Supplies Ltd

30th October, 2007

Joseph Kimani

C/o Ourselves

Dear Sir,

RE: One month notice

After a careful consideration and in view of your performance at the farm, it has been decided that you be and is hereby give one month's notice for you to quit your job and vacate the company premises.

Liaise with the Accounts clerk for settlement of your terminal dues.

Yours faithfully,

John M. N. Mututho

Managing Director

From the letter I find that the Claimant was terminated and was to serve 1 months' notice which he apparently did not serve because he was on suspension. RW2 testified that he was suspended together with the Claimant for 3 months following which he was reinstated while the Claimant was not.

I therefore find that the Claimant was terminated by the letter dated 30th October 2007. At the time of his termination the applicable law was Employment Act 1976 which provided for termination of Employment at Section 13(5) as read with 16 that either party may terminate the employment contract by paying salary in lieu of notice.

I find that the termination of the Claimant's employment was not unfair as the law as it was then permitted the Respondent to terminate the Claimant's employment in the manner it did.

2. Whether the Claimant is entitled to his prayers

I will now consider the Claimant's prayers:

a. 1 month's salary in lieu of notice

The Claimant prays for one month's salary in lieu of notice in the sum of Kshs.12,000/=. The Respondent did not contest that the Claimant's salary was Kshs.12,000/=. In the letter of termination the claimant was given 1 month's notice which he served as he testified that he stayed on the farm until 10th December 2007.

I therefore find that the Claimant is not entitled to one month's salary in lieu of notice and dismiss the claim.

b. Severance Pay

Severance pay is only payable upon redundancy. The Claimant was not declared redundant. I therefore find that the Claimant is not entitled to severance pay.

c. Leave

The Respondent did not deny that the Claimant did not take annual leave for the entire period he was in employment. He is entitled to 21 days leave for each year worked from November 2004 to October 2007, a period of 3 years. He is thus entitled to 63 leave days. Based on his salary of Kshs.12,000/= per month, he is entitled to $(12,000 \div 30 \times 63)$ Kshs. 25,200/=.

I award him the said sum of Kshs. 25,200/=.

d. House allowance

The Claimant testified that he was not provided with a house at the farm and operated from rented accommodation at Kshs.3,500/= and commuted to work daily. RW2 testified that the Claimant was not living in the farm but was provided with a house.

I find that the Claimant has not proved his prayer for house allowance and dismiss the same.

e. Unpaid salary for 3 months

The Claimant seeks salary for September, October and November 2007. He stated that although he got his letter of termination on 30th October 2007 he was at the farm until 10th December 2007 for which period the Claimant and all other employees were not paid. None of the Respondent's witnesses contested this fact.

I therefore award the claimant the salary for September, October and November 2007 at Kshs.36,000/=

f. Balance of salary for December 2005

The Respondent did not content owing the Claimant the sum of Kshs.5,932 being balance of salary for December 2005. None of the Respondent's witnesses denied the claim. None of them made any reference to the same. Since the claim is not denied, I award the claimant the said sum of Kshs.5,932/=.

g. Compensation for wrongful dismissal

As I mentioned above, the Claimant's employment was terminated in 2007 before the coming into force of the Employment Act 2007 on 2nd June 2008. Since the right to compensation accrued by virtue of the new Act, the Claimant is not entitled to the same and the claim is dismissed.

h. Costs

The Claimant acted in person and is therefore not entitled to costs.

i. Interest

The amount awarded will attract interest at court rates from date of judgment until payment in full.

In summary I award the Claimant the total sum of **Kshs.67,132/=**. Interest as specified above.

Orders accordingly.

Read in open Court this 10th day of December, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Joseph Kimani for Claimant

No appearance for Respondent