



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

**AT MOMBASA**

**CAUSE NO. 92 OF 2014**

**TEDDY MWADZOYA TUNJE ..... CLAIMANT**

**VERSUS**

**HATIM SERVICE STATION ..... RESPONDENT**

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

**Introduction**

1. This is a claim for Kshs.152999 being accrued employment benefits plus compensation for unfair termination of the Claimant's employment by the Respondent in January 2013. The basis of the suit is that the termination of the contract was done contrary to the provisions of Section 35 and 41 of the Employment Act.
2. The Respondent has denied liability and averred that, it is the Claimant who deserted work after he was given a one week suspension on 24.1.2012 for misconduct. Consequently the Respondent has filed a counter claim for Kshs.10,000 being one month salary in lieu of notice.
3. The suit was heard on 8.10.2014 when the Claimant testified as CW1 and the Respondent called Ali Hussein Dayabali as RW1.

**Claimant's Case**

CW1 told the court that he was employed by the Respondent in February 2011 as Pump Attendant for a monthly salary of Kshs.10,000. The contract was verbally entered. He worked until 27th December 2012 when he received a phone call from his Supervisor Mr. Thomas telling him to go to the station to explain about an invoice which had attracted a complaint from a customer by the name Zain Logistics Limited. The invoice was never shown to him although it was alleged to have been written by CW1. Instead he was dismissed without any benefits. After unsuccessfully pursuing his benefits, CW1 instructed counsel to file this suit.

5. He prayed for one month salary in lieu of notice, 21 leave days earned, salary for January 2013 plus 12 months gross salary being compensation for unfair termination. He denied the Respondent's counterclaim for salary in lieu of notice. CW1 denied ever deserting work and maintained that he was dismissed. He also denied ever stealing fuel or money for fuel.
6. On cross examination by the defence counsel, CW1 confirmed that he was a contributor of NSSF between May 2011 and December 2011. He also admitted that his suit did not state the date of dismissal. He however explained the employer had the records on the date of dismissal at which he maintained that it was 28.12.2012. He confirmed also that he used to receive his salary by pay roll but denied that he used to receive mid month salary advance. He denied the signature on the

December 2011 payroll. He further denied receipt of any salary advance in January 2012. He confirmed also that his name did not appear in the payroll for the month of January 2012.

7. He denied service of the suspension and show cause letter dated 24.1.2012 from the Respondent. He admitted that Bin Zain Logistics Limited was Respondent's customer but denied the handwriting on the invoices dated 13.12.2011, 28.12.2011 and 10.1.2012. He also denied that they emanated from the Respondent because they bore no letterhead of the Respondent. He maintained that he never ran away fearing arrest for theft.

### **Defence case**

8. RW1 is a Senior Partner working for the Respondent. He confirmed that CW1 was employed by the Respondent in February 2011 as a Pump Attendant and was a member of NSSF. He produced NSSF records for the period between May to December 2011. According to RW1, CW1 was an efficient worker against whom RW1 had no complaint. RW1 explained that he paid CW1 his salary advance for 15th January 2012 but thereafter no further salary was paid to him. On 24.1.2012, RW1 allegedly called CW1 to explain to a complaint from a customer, Bin Zain Logistics Limited that CW1 had colluded with the customer's drivers to dishonestly issue a higher invoice than the fuel supplied. When CW1 came to the station, RW1 showed him the disputed invoices but CW1 denied the accusation by the customer. RW1 then suspended him by letter dated 24.1.2012 which CW1 refused to take and disappeared from work.
9. RW1 never reported the matter to the police because CW1 had been introduced to the Respondent by the Manager Oil Libya. RW1 however explained that Bin Zain raised a Claim for Kshs.200000 and the Respondent paid because of the CW1's alleged dishonesty. He denied that CW1 kept on coming to the station to pursue his dues. He produced pay roll and NSSF remittances to show that CW1 ceased to work from January 2012.
10. On cross examination by the Claimant's counsel, RW1 admitted the CW1's salary was Kshs.10000 per month. RW1 however did not have any evidence that he paid Bin Zain Logistics Limited Kshs.200000 due to CW1's dishonesty. He also did not have any written demand from the said Bin Zain the Kshs.200000. RW1 confirmed that all payment for fuel supply to Bin Zain was by cheque to the Respondent. He maintained that CW1 worked up to 24.1.2012 and not January 2014 as indicated in RW1's written statement. He maintained that he is the one who signed the suspension letter to CW1 on 24.1.2012. He admitted that there were other Pump Attendants in the station and an Accountant. He admitted the disputed invoices bore no letter for the Respondent or the name of the client billed but only a signature. He also admitted that the NSSF record produced did not have any signature from CW1. In conclusion, he confirmed that CW1 was never issued with any appointment letter.
11. After close of the hearing both parties filed written submissions which have been carefully considered in this judgment.

### **Analysis and Determination**

12. There is no dispute that CW1 was employed by the Respondent as a Pump Attendant from February 2011 for a monthly salary of Kshs.10,000. There is no dispute that CW1 worked efficiently and the employer had complained against him. There is also no dispute that a customer named Bin Zain Logistics Limited raised a complaint about exaggerated billing which led to the Claimant being summoned from home to the station to explain the alleged misconduct. There is also no dispute that CW1 was never paid his salary thereafter or his separation dues.

13. The issues for determination are:-

- (a) Whether CW1 deserted work after suspension on 24.1.2011 or was unfairly dismissed on 28.12.2012.
- (b) Whether the reliefs sought in the suit and the counterclaim should issue.

## **Desertion vs Dismissal**

14. After carefully going through the evidence and the documents produced by both witnesses, the court finds in a balance of probability that CW1 worked for the Respondent until January 2012. The only reliable documents to help the court in that determination are the NSSF statement produced by the CW1 and suspension letter dated 24.1.2012 and corroborated by the oral testimony of the RW1. There is no sufficient evidence from the CW1 adduced to prove that his dismissal was on 28.12.2012. The burden of proving unfair termination is upon the employee under Section 47 of the Employment Act. That burden includes the obligation to plead and prove the date and the circumstances of the alleged unfair termination. Only after the employee has discharged that burden should the burden of proof shift to the employer to prove substantive and procedural fairness. In this case, the Claimant did not discharge that burden of proving that he was unfairly dismissed on 28.12.2012. During cross examination by the defence counsel, CW1 admitted that he did not plead the date of his alleged dismissal and stated that the information was with the Respondent who had the records of his dismissal. The Respondent has denied ever dismissing CW1 and instead accused him of deserting work after suspension. Consequently and for lack of sufficient evidence, the court finds that CW1 was never unfairly dismissed by the Respondent. He deserted work after the lapse of the 7 days suspension period from 24.1.2012.

## **Reliefs**

15. In view of the foregoing the prayer for 12 months salary as compensation for unfair dismissal is declined. Likewise the prayer for salary in lieu of notice is dismissed for reason that he is the one who deserted work. He will also not get the prayer for service pay and salary for January 2013. He will however get salary for January 2012 being Kshs.10,000 because the suspension period ended on 31.1.2012 and after which he deserted work from 1.2.2012. He will also get Kshs.7000 pay in lieu of 21 leave days earned between February 2011 and January 2012 which amounts to 12 months period. In total CW1 is awarded Kshs.17000.

16. On the other hand, the court has found merits in the Respondent's counter claim and awards her Kshs.10000 being salary in lieu of notice. Even if there was no written contract, Section 36 of the Employment Act requires that a breaching party shall pay salary in lieu of notice to the infringed party. The Kshs.10,000 will set off against CW1's award of Kshs.17000.

## **Disposition**

For the reasons stated above, judgment is entered for the Claimant in the sum of Kshs.7000. Each party shall bear his or her own costs because they all succeeded in their respective claims.

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

**O.N. Makau**

**Judge**