



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1418 of 2011

JOSHUA MUSIONI LILUMBI.....CLAIMANT

VS

SPENCON HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed his Memorandum of Claim on 18th August 2011. In the Claim he sought the resolution of the dispute framed thus: **wrongful and unlawful termination and non-payment of dues**. The Claimant pleaded he was employed by the Respondent between January 1998 and 31st March 2005 when the employer terminated the Claimant's employment. He sought terminal benefits, severance pay, outstanding payments for leave, underpayment and overtime payment due for the period he was in the employment of the Respondent amounting to a sum of Kshs. 729,415/-.

2. The Respondent filed a Reply to Memorandum of Claim on 17th October 2012. In the Reply, the Respondent denied the averments regarding the commencement and termination of services of the Claimant. In the Response the Respondent denied employing the Claimant but indicated philanthropy and the need to have "human presence" on its premises led to the relationship between the Claimant and Respondent. The Respondent attached documents evincing payments of various sums *ex gratia* and also made payments itemised as service pay and leave days not utilised. Subsequent payments to the Claimant were also averred and documentation annexed.

3. On 11th December 2012, Miss Mwanzia for the Respondent sought adjournment but the Court dismissed the application. The case was ordered to proceed. Miss Muhanda appeared for the Claimant and called her witness who gave sworn testimony. He stated as follows:- I am Joshua Musiomi Lilumbi. I was employed by Spencon Holdings Ltd. Worked as a guard. I refer to the ID at page 1 as proof of employment. Original produced as Exhibit 1. I was employed on January 1998 and left in 2005 March when I was dismissed. I used to be a gate guard and I also was involved in cleaning. I used to work from 6 a.m. to 6.00 p.m. From 1998 to 2005. I worked both day and night. I used to earn 4,200/= in 1998 and in 2005 I was earning 9,231/=. That was the only pay I got. We used to get a voucher which remained on the file. I used to go on leave and was not given leave pay. I had been asked to bring someone. The person who would come would be paid from my money. I used to go on leave but pay someone to work in my place. I never used to go for sick off. I had accident in 2001 and I had to place someone to work though I was at Kenyatta National Hospital for one month. When I was unwell NHIF paid a part and balance was paid by my family. I was dismissed when Ashur a director came in 2005 and told me there was a tenant who they had found to lease the premises and that my employment was at an end. He advised me thus and

I told him I need to get my dues. I got 110,000/= and took my things home. The 110,000/= was for service. I was told to wait for Notice pay overtime and they would also give me letter. I went back to ask and they told me I had left so there was no pay. I went to Labour on 2nd May 2006 and complained. The complaint was for overtime and holidays worked. They paid 51,594.40/= at Labour. The payment is all they gave and my complaint was for 7 years and 3 months. I never got my termination letter. I was not called to a meeting. I was just told there was no more payment. Refer to paragraph 10 of claim. Pray the court awards me all the claim plus the expenses.

4. In Cross-examination by Miss Mwanzia, the witness stated that he was a watchman. And that he was a security guarding the gate. The ID he gave in Court was his. He stated that he was employed as security guard. He stated that he was taken from Kinetics Engineering which is related. He had worked at Kinetics Engineering at Industrial Area. He worked there but had no papers. He resided in Mathare North. He was paid 110,000/- and also 59,000. He was also paid 8,000/= at another time but was not paid 18,615. He stated that in his claim he was claiming other things – overtime and others not the 110,000/- which he had received. The place he was working was a store and go-down. The Spenco Holding were the owners. The supervisor was Patrick. He is still there. The Witness stated that when he went on leave he would be asked to bring someone and brought his brother. He would take his money and give his brother. He would sign for cash and give to his brother as the company said they do not know anyone.

5. In Re-Exam by Miss Muhanda the witness testified that the amount of 8,000/= was paid as Notice through Labour. When he was hired he was not asked for papers. The Respondent knew he did not have papers. He stated that his brother is Petro Musila. Petro could not collect as they did not want to deal with anyone else.

6. Miss Mwanzia sought adjournment but when case was to resume she was absent. The Court thus reserved Judgment to 22nd January 2013 at 2.30 p.m.

7. The Claimant's claim is that he is entitled for pay on account of the years worked and the overtime etc. He testified at length and was cross-examined. He confirmed receipt of payments from the Respondent

- a) Kshs. 110,000/-
- b) Kshs. 51,495.40/-
- c) Kshs. 18,615.90/-
- d) Kshs. 8,000/-

All totaling to **Kshs. 187,111.30**

8. He accepted the sum of Kshs 110,000/- on 1st April 2005 and signed in acknowledgement. The document is Appendix SHL 7. In it the Claimant stated that he received the sum of One hundred and ten thousand being **full and final settlement of my claims. I declare that I have no other due or claims against the company. I do not owe the company any other sum.** The Claimant signed in receipt. He cannot now resile from his agreement. He received a very generous payout given his pay which was 8,000/- per month. The monies he received were paid out and when the Ministry of Labour intervened he received an additional sum of Kshs. 51,495.40. The Ministry indicated that once paid the matter would come to an end. The Court finds there has been payment of all dues, howsoever described, which could have been due to the Claimant. He was dishonest and claimed he did not receive Kshs. 18,615.90 yet the signatures on the documentation agree with the one where he received Kshs. 110,000/-

9. In the premises his claim fails and is dismissed with Costs.

It is so ordered.

Delivered dated and signed in Nairobi on this 25th day of January 2013

Justice Nzioki wa Makau
Judge