



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1479 of 2011

RICHARD OMANGA MOMANYI..... CLAIMANT

VERSUS

JOHN WAIGANJO T/A FARRAN ESTATE..... RESPONDENT

JUDGEMENT

The Claimant herein **RICHARD OMANGA MOMANYI** filed a claim against the Respondent **JOHN WAIGANJO T/A FARRAN ESTATE** by a Memorandum of Claim dated 29th August 2011 and filed in Court on 1st September 2011.

In the claim he alleges that he was employed by the Respondent as a Spray Operator on 27th May 2004 at a monthly salary of Shs.5155. He was never issued with an appointment letter. He worked for the Respondent diligently until 2nd February 2010 when the Respondent wrongfully and unlawfully terminated his employment and refused to pay his terminal benefits. He claims a total of Shs.48,456.50 being one month's salary in lieu of notice, payment in lieu of 7 years leave and severance pay. He further seeks maximum compensation in the sum of Shs.61,860.00 being 12 months' salary. The Claimant further alleges that he was not a member of National Social Security Fund or any registered pension or provident fund and claims gratuity as provided under Section 35(67 (b) and (d) of the employment Act 2007.

The Respondent filed a reply to the claim on 27th September 2011 in which it denies that the Claimant was employed by the Respondent. The Respondent has however in the same reply to claim alleged in the alternative and without prejudice, that the Claimant was terminated on the grounds that he acted in contravention of the implied terms and conditions governing his employment with the Respondent on numerous occasions and failed to perform his duties as allocated to him. The Respondent denies owing the Claimant any payments or dues. The Respondent avers that the Claimant's employment was properly and lawfully terminated, that it acted within the confines of the law, and Principles of Natural Justice. The Respondent prays that the Claimants' case be dismissed with costs.

The case was first mentioned in Court on 7th October 2011 when the Claimant was present but the Respondent did not attend. The case was fixed for hearing on 28th June 2012. On 28th June 2012 the Respondent was absent and hearing of the case was rescheduled to 29th November 2012. The Claimant was directed to serve a hearing notice on the Respondent.

On 29th November 2012, the Claimant was present but the Respondent was again absent. Having

confirmed that the Claimant had served hearing notice upon the Respondent I allowed the case to proceed in the absence of the Respondent.

The Claimant gave evidence in support of his case. He testified that he started working for the Respondent as a Farm Labourer on 27th May 2004. After a while he was transferred to spraying section. His starting salary was shs.110/= per day and he worked for 26 days a month. His last salary was Shs.5,155/= per month. He stopped working on 27th February 2010. On that day he reported to work as usual but was told to go back home as there was no work. Half of the coffee had been uprooted. He was paid cash and signed on master roll. After being terminated he reported the matter to Labour Office and the Respondent promised to pay him but never paid. He never went on leave and was not a member of NSSF. He asked Court to order payment to him of notice, leave, and leave allowance, costs and the other prayers as in his claim.

The issues for determination are whether the Claimant was employed by the Respondent, whether he was unlawfully terminated and if he is entitled to the reliefs sought.

The Claimant stated he was never issued any letter of appointment and that from 2008 he was paid through Equity Bank. Prior to that he only signed for payment on the master roll.

Although the Respondent has denied that the Claimant was its employee at Paragraph 2 of the Reply to Claim, at Paragraphs 3, 6 and 7 the Claimant avers that the termination of the Claimant was for contravention of the implied terms and conditions of his employment with the Respondent and that on numerous occasions the Claimant failed to perform the duties allocated to him, that the termination was proper and lawful, and that the Respondent acted within the confines of the law, principles of natural justice. The foregoing is an admission by the Respondent of the existence of an employment relationship between the Claimant and the Respondent, and the termination of the relationship.

The other issue for determination is whether termination of employment was proper and lawful as averred by the Respondent.

The Claimant has stated that he reported to work as usual on 27th February 2010 and was told to go away as there was no work. The Respondent admits terminating the employment of the Claimant but avers that the same was proper and lawful. No explanation is given about the process used to terminate the Claimant's employment to confirm that it was lawfully done. In the absence of such explanation I am left with only the version given by the Claimant himself.

The Employment Act Section 41 provides for the procedure of termination of employment. The Section reads as follows:-

(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) to make.

The Respondent did not comply with that procedure. The Claimant was just told to go away. He was not given any reasons for the termination. He was not even given a letter of termination. His termination was instant. From the foregoing, I find that the termination was both substantively and procedurally wrong.

I now turn to the remedies.

(1) Notice

Since the termination was without notice, I find that the Claimant is entitled to one month's salary in lieu of notice. This is as provided for in Section 49(1)(a) of the Employment Act. I award him Shs.5,155 accordingly.

(2) Leave

The Respondent in its reply did not make any denial that the Claimant never took leave for the entire period he worked. Section 10(7) as read together with Section 10(6) of the Employment Act require an employer to produce records of all prescribed particulars of employment which include annual leave. The section shifts the burden of proof of such particulars to the employer where such records are not produced. Since the Respondent did not make any denial of the allegations in the Reply to Claim or produce records to confirm the true position, I presume that the allegation by the Claimant is correct. I therefore award the Claimant the sum of Shs.25,259.50 as prayed under this head.

(3) Severance pay

The Claimant has prayed for Severance pay. He has supported his claim by reference to the provisions of Section 35(6) which provides for Service pay and not Severance pay. Again since this was specifically pleaded in the claim and not denied by the Respondent I award him the sum of Shs.18,042 as prayed.

(4) Compensation

The Claimant prays for 12 months compensation. The Respondent again did not make any specific denial of the prayer by the Claimant. I therefore award the Claimant the sum of Shs.48,456.50 as prayed.

In total I give judgement to the Claimant against the Respondent in the sum of Shs.96,913.00. In addition I award the Claimant shs.5,000/= being costs to cover filing fees and other incidental expenses. The total sum of Shs.101,913.00 should be paid within 30 days from today failing which it will attract interest at Court rates until date of payment.

Orders accordingly.

Read in open Court and signed on this 28th day of March, 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

No appearance

In the presence of:- _____ Claimant

No appearance

_____ Respondent