



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1083 of 2011

KIZITO INJILA MWENESI..... CLAIMANT

-VERSUS-

BUNSON TRAVEL SERVICE LIMITED.....RESPONDENT

JUDGEMENT

The Claimant **KIZITO INJILA MWENESI** filed a Memorandum of Claim against the Respondent **BUNSON TRAVEL SERVICE LIMITED** on 6th July 2011 alleging the following:-

- a) Unlawful, malicious, inhuman and unfair termination of employment.
- b) Unlawful and criminal deprivation of employee's personal property.
- c) Refusal to pay terminal dues and compensatory damages.

He prays for judgement against the defendant as follows:-

1. A declaration that the Respondent's action to dismiss (terminate the Claimant's employment summarily was illegal, unfair and extremely inhuman, embarrassing and demeaning.
2. A declaration that the Claimant is entitled to his terminal dues and damages as pleaded on Paragraph 16 above.
3. The Respondent do pay the Claimant a total of Kshs.619,134 in terminal dues and damages with interest from date of filing suit until payment.
4. The Respondent do pay the Claimants costs of this case.

The Respondent filed its Response to the Memorandum of Claim on 20th September 2011 in which it denies the claim. The Respondent avers in the Response to the Memorandum of Claim that the Claimant received several warning letters and that the Claimant was terminated for misconduct.

The case was heard by Hon. Justice Isaac E.K. Mukunya (now retired) on 16th and 21st March and 30th May 2012. The file was reallocated to me to finalize after the retirement of Justice Mukunya.

The parties appeared before me on 26th September 2012 and agreed that the case proceeds from where it

had reached when they were before Justice Mukunya. The parties filed their written submissions and judgement was reserved for 3rd April 2013.

From the record I have noted that the Claimant testified on his behalf while the Respondent called 2 witnesses, **TIMONTHY MWANGI NJIHIA** the Respondents General Manger and **DAVID WACHIRA MWANGI** the Respondents Financial Controller.

The Claimants case is that he was employed by the Respondent in May 2005 as a cleaner and was subsequently promoted to Travel Consultant. He testified that he had problems with his superiors who made his work difficult by putting stumbling blocks on his path. He was issued with a letter of termination on 24th May 2011. That he was never given an opportunity to defend himself. The termination was to take effect on 31st May 2011. He was instructed to clear by Mr. Njihia.

Before he cleared another employee called Wachira came to the Boardroom where he had been called to be informed of his termination and to be handed the letter of termination accompanied by policeman who searched the Claimant. Mr. Wachira seized Shs.15,000/= from the Claimant in cash. They also seized his laptop valued at Shs.37,440. He referred to a receipt for VAT at Page 24 of the Memorandum of Claim.

The policeman who identified himself as Vincent Ochieng warned him never to return to the Respondents office. He was escorted out of the premises and directed to meet the policeman the following day at Central Police Station. When he went to Central Police Station the following day he found that the policeman was not known at the station. That the Claimant's name was circulated among Travel Agencies by Timothy Njihia. The Claimant felt humiliated by the way he was treated at the office and defamed by the email. He prayed for judgement as particularized in his Memorandum of Claim.

In cross examination the Claimant admitted that he once admitted wrongdoing when he retained money paid by a client. He also admitted registering a company by the name Johnson Tours and Travel. He denied being served with warning letters attached to the Response to the Memorandum of Claim.

Respondents witness **No.1 TIMOTHY NJIHIA** testified that the Claimant was terminated on 24th May 2011 for insubordination and lack of accountability. That on 24th May 2011 there was a meeting attended by George Gitau, the Claimant's line Manage, the General Manager Mr. Njihia, the Claimant and Mr. Wachira the Financial Controller. At the meeting the issues of lack of accountability was discussed and there was no satisfactory explanation from the Claimant. His dismissal was later circulated to tour firms for information.

Respondents witness **No.2 DAVID WACHIRA** testified that on 24th May 2011 at about midday he was summoned to the boardroom by the General Manager Mr. Njihia together with George Gitau. The General Manger then summoned the Claimant. He testified that the purpose of the meeting was to convey to the Claimant the decision taken by the company to terminate his services, to give him reasons for the termination, give him a chance to raise any questions on explanation and hand over to give him the official termination letter. That Mr. Njihia explained the reasons for termination as:-

- 1) Insubordination.
- 2) Lack of accountability for moneys received, and
- 3) Poor performance.

That Mr. Wachira reminded the Claimant of incidents of accountability in the past, then the General Manager explained issues of poor performance. The Claimant was then given a chance to defend himself but did not respond. He was quiet. He then confirmed to Mr. Njihia that he understood. He was then handed the termination letter. Later about 1 p.m. there was a complaint about a receipt raised by the Claimant. When asked, the Claimant admitted preparing the receipt but denied receiving the money. The matter was reported to the General Manger who decided to involve the police. A Mr. Victor Ochieng

came to the office and introduced himself as a Police Inspector from Central Police Station and jointly they interrogated the Claimant. The Claimant was searched by the Policemen who asked him to report to Central Police Station the following day. There were other complaints reported against the Claimant later and investigations revealed letterheads and telephone bills for Johnson Tours. Mr. Wachira testified that the Claimant did not receive his salary for May 2011 as he did not clear with the company.

I have considered the pleadings, the record of proceedings and the written submissions of the parties.

There is no dispute that the Claimant was employed by the Respondent in May 2005 and dismissed on 24th May 2011 by letter dated 20th May 2011. The termination was effective on 31st May 2011. At the time of termination he was a travel consultant. The reasons for termination as given in the letter are insubordination, lack of accountability resulting in loss of monies and poor performance.

It is also not in dispute what the events of the day were. The Claimant was summoned to the Boardroom at about 12.00 p.m. where he found the General Manager, the Financial Controller and his immediate supervisor. He was then informed that a decision had been made to dismiss him. The Financial Controller explained what was meant by lack of accountability based on past incidents, then the General Manager explained what he meant by poor performance. Apparently there was no explanation about insubordination. The Claimant was then asked to comment or defend himself but he said nothing. He was then asked by the General Manager if he understood what had been communication to him and he confirmed he had. He was then handed the letter of termination and asked to go and clear. At about 1 p.m. there was a complaint about a receipt the Claimant had raised but not handed in the money. He was recalled to the boardroom, questioned and then a policeman was called who searched him and escorted him out of the gate with a warning never to go back to the premises, and with a directive to report to Central Police Station for further investigation.

When the Claimant reported at Central Police Station the following day, he found that the Policeman was no known at the station. Other discoveries of impropriety were made after the Claimant's termination.

The issues for determination are whether the Claimants termination was lawful and if he is entitled to the prayers sought.

Section 41, 43 and 45 of the Employment Act define the circumstances under which termination would be lawful.

Section 41 provides that before an employer terminates the employment of an employee, the employee must be given an explanation of the reasons for termination. This should be done in the presence of either a union official or a colleague of the employee. The employee should then be given an opportunity to respond to the issues. The person accompanying the employee should also be given an opportunity to comment. It is only after this that the decision to terminate the employee should be made.

Section 43 provides that the reasons for termination should be those which the employer genuinely believes to exist at the time of the termination and which caused the employer to terminate the services of the employee.

Section 45 provides that the reasons for termination must be valid, the procedure used must be fair and the employer must act in accordance with justice and equity.

In the present case, a decision was made on 20th May 2011 to terminate the Claimant's employment and the letter of termination was written on that day. On 24th May 2011, a meeting was called which according to Respondent's witness No.2 David Wachira, was to convey the decision taken by the company to terminate the Claimant's services. That decision was made long in advance. The requirements of Section 41 of the Employment Act were never complied with. The Claimant appears to have been stunned by the whole process and as stated by Mr. Wachira, he had nothing to say. He was then handed the letter of termination and sent off to clear.

Before he could clear, a “Policeman” was called in who according to the Claimant searched him, confiscated his cash Kshs.15,000 and his laptop then escorted him out of the premises with instructions not to go back to the premises.

This to me is a classical example of an unfair and humiliating termination of employment. To add insult to injury the Respondents General Manager circulated a letter to Tour Operators to the effect that the Claimant ceased to be the Respondents employee as a result of fraudulent activities.

The Claimant has prayed for several remedies:-

(1) Unpaid salary for May 2011

The Respondent admitted that the Claimant was not paid salary for May 2011 as he had not cleared.

I therefore find that the Claimant is entitled to the same. The Claimant has submitted that his salary was Shs.28,590 and attached a payslip for July 2010 as proof of the amount. The payslip shows that the Claimants salary was Shs.27,500/=. The Respondent has denied that this was the correct salary in the written submissions but does not give the correct amount. In the absence of proof to the contrary by the Respondent in accordance with Section 10(7) of the Employment Act which shifts the burden of proof to an employer who fails to produce written particulars of prescribed terms of employment, I find that the Claimant is entitled to Shs.27,500 as salary for May 2011 and award him the same.

(2) One month’s salary in lieu of notice

The Claimants letter of termination offers payment of 1 months’ salary in lieu of notice. This is also provided for in the Claimants letter of appointment and in Section 35 of the Employment Act. I therefore find that the Claimant is entitled to payment of 1 months’ salary in lieu of notice in the sum of Shs27,500 and accordingly award him the same.

(3) Service Pay

The Claimants payslip shows he was a contributor to both National Social Security Fund and a pension Fund. The Claimant has not demonstrated that his terms of employment entitled him to payment of service pay. In accordance with Section 35(5) as read together with Section 35(6) the Claimant is not entitled to service pay. I therefore dismiss the claim for service pay.

(4) Pay in Lieu of untaken leave

The Claimants clearance Form attached to the respondent response to the Memorandum of Claim as Appendix 2 shows that the Claimant was entitled to 51.5 days as at 31st May 2011.

I therefore award him Shs.47,208.30. This is derived from dividing his monthly salary by 30 days to get the daily rate of pay and then multiplying by 51.5.

I therefore award the Claimant Shs.47,208.30 accordingly.

(5) Compensation for unfair termination

The Claimant has prayed for maximum compensation for unfair termination. Taking into account the circumstances under which the Claimant was relieved of his employment, I award him maximum compensation for loss of employment in the sum of Shs.330,000/= being 12 months’ salary at the rate of Shs.27,500.00.

(6) Damages for malicious and inhuman treatment

This is an example of a case where I would have had no hesitation in awarding the Claimant damages for malicious and inhuman treatment. He was subjected to a trespass to the person by a “policeman” who turned out to be unknown at the police station, humiliated by being escorted out of the gate by the said “policeman” and the Financial Controller and then had a letter circulated to all tour agents to the effect that he was relieved of his duties due to unspecified fraudulent activities. Unfortunately Counsel did not make any submissions in respect of this head. In the circumstances I make no finding on the same.

(7) Refund of Shs.15,000/= cash and Shs.37,440 being value of laptop confiscated from the Claimant.

The Claimant pleaded and again testified that the Respondent confiscated Shs.15,000/= and a new laptop valued at Shs.37,440 from him. The Respondent merely made a general denial of the same at Paragraph 9 of the Response to the Memorandum of Claim and in the written submissions. The Respondents’ witnesses did not deny the allegations in their testimony in Court. In the written submissions the Respondent has only questioned the validity of the receipt and not denied that the cash and laptop were confiscated from the Claimant. This leaves the Claimant’s testimony unchallenged. I therefore find that the Claimant is entitled to a refund of Shs.15,000/= cash and Shs.37,440 and award him the same.

From the foregoing I make the following orders:-

(i) A declaration that the termination of the Claimant’s employment by the Respondent was unfair and demeaning. A declaration that the Claimant is entitled to judgement against the Respondent in the sum of Shs.484,643.30.

(ii) The Respondent shall pay Claimants costs of this case.

(iii) The said decretal sum should be paid within 30 days failing which interest shall accrue at Court rates from date of judgement.

Orders accordingly.

Read in open Court and signed on this 29th day of April 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

No appearance

In the presence of:- _____ for the Claimant

Oyugi

_____ for the Respondent