



IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE 4 OF 2012

FREDRICK OUMA CLAIMANT

=VERSUS=

SPECTRE INTERNATIONAL LTD..... RESPONDENTS

JUDGMENT

The claimant herein Fredrick Ouma filed his claim against the respondents herein Spectre International Ltd on 4/12/2012. The respondents were served with summons and memorandum of claim on 17.12.2012 as per the affidavit of service by the process server. The respondents never entered any appearance nor did they file any response to the claim. Interlocutory judgment was entered against the respondents on 24.1.2013 and the matter was fixed for formal proof.

The claimant's case is that he worked with the respondents from October, 2003 as a project supervisor overseeing all mechanical works of the plant. He told court that at that time he was being paid a supervisory allowance of Ksh 650/= per day as interview allowance pending a decision by the directors. He expected to be paid Ksh 90,000/= per month but this was never confirmed. He told court that as he worked some money was being deducted from his wages Ksh 400/= per month for payment to NSSF. This deduction started in May 2004. He produced a form from NSSF Indicating this position (Annexed F.O 9). In January 2005, the respondents started paying him a salary of Ksh 24,000/= per month which he earned for over one year. This was eventually increased again in 2007 to 27,000/=. His payslips FO1 shows this position. He earned Ksh 27,000/= per month until 2008 when it was increased to 34,000/=. In 2008, December he was earning Ksh 36,047/= as per his payslip FO1. He earned this amount until April, 2009 when his salary was reduced to 34,000/=. In May 2009 he was now earning Ksh 34,914/= as per Folio 2. He earned this amount until it was increased to Ksh 38,000/= in June 2010. this amount was increased to Ksh 42,631/= in December 2010.

He told court that when his salary was reduced from Ksh 36,000/= to Ksh 34,000/= he was not given any reasons as he continued serving as a mechanical supervisor. He avers that according to the organograph of the respondent, he was in the 3rd category with others such as J. Arodi and Joseph Oyoo and John Anguko & J. Maguto as per appendix FO-10. At the time he was earning Ksh 38,000/= these others were earning 68,000/= (Joshua Arodi's FO3) and Joseph Ayoo Otieno earning Ksh 67,016. they were also being given a supervisory allowance whereas he was given Kshs 5,000/= others were getting Kshs 10,000/=. These allowances were indicated in the salary slips produced before court. He told court that when he saw these discrepancies he contacted the management from time to time to intervene but they didn't. He then contacted an advocate who wrote a letter to the respondent detailing his grievances. A copy of his advocates letter was produced as appendix FO5. This was in November, 2010. After writing this letter, he worked upto December, 2010 when he was called to the office and given a letter terminating his service. The letter FO6, indicated that he had committed gross misconduct which he had not done. He

says he had only complained about reduction of his salary and asked for his house allowance. He was also asking for an Ag. Allowance as a process engineer who they had not employed and he was performing duties of this office. He told court that for the entire period, he worked he was never given any house allowance and also worked using his own tools as the company was not providing any. He worked upto December 2010 as per his job card FO4. After he was terminated, he went back to his advocate who wrote a demand letter to the company FO7. The company responded through the exhibit FO8 indicating that the termination was justified.

He then proceeded to file this case where he seeks various prayers as tabulated in his memorandum as follows:-

1. Basic salary arrears from 2003 to December 2010 - Kshs 5,652,246.
2. Unpaid annual leave for the year 2008 – Kshs 90,000/=
3. Supervisory allowance arrears - Ksh 714,000/=
4. Payment for the working tools - Ksh 1,916,250/=
5. Acting allowance as mechanical process engineer for 3 years - Ksh 1,800,000/=
6. House allowance arrears from 2003 to December, 2010 - Ksh 1,890,000/=
7. Severance pay Kshs 42,631 X $\frac{1}{2}$ X 8 years = Ksh 170,524.

TOTAL = KSH 12,233,020/=

He also seeks to be paid damages for breach of employment, exemplary damages plus costs and interest.

Having heard the evidence of the claimant, I now frame the issues for determination by this court as follows:-

1. Whether the respondent was justified in reducing claimant's salary between April, 2009 to June, 2010.
2. Whether the claimant was discriminatorily treated earning a lower salary and being paid less allowances than other officers on his level.
3. Whether the letter written to the respondent by the claimant's advocate amounts to gross misconduct.
4. If the claimant's claim is justified in relation to answers to the above questions.
5. What remedies, if any the claimant is entitled to.

The claimant has complained that his salary was reduced from Kshs 36,360/= in April, 2009 to January, 2010. He produced his payslip for April, 2009, showing he was earning a basic pay of Kshs 34,914, yet in December 2008 as per Exhibit FO1, he was earning Kshs 36,047/=. The reason if any that prompted this reduction is not explained. Under Article 41 (2) (a) of the Constitution of Kenya.

“Every worker has the right to fair remuneration.”

Fair remuneration in my view means remuneration that is adequate and commensurate to the services rendered. It certainly includes a measure of certainty. This is why it is imperative that the remuneration payable to an employee is discussed and agreed upon before services are rendered. The certainty here is important to allow the employer prepare and budget for his pay. Such preparation may include taking a loan in anticipation of the salary that is payable .

To reduce an employee's pay without any discussion or warning would therefore disorganize the employee in question and may render the employee incapable of meeting his obligations and especially pre-arranged obligations including payments of rent and bills. When the respondent herein reduced the claimant's salary without any reasons, they were indeed infringing on his right to be fairly remunerated as enshrined in our Constitution.

Remuneration is defined under ILO Convention 100. Equal Remuneration Convention, 1957 to include

“ordinarily, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly whether in cash or in kind by the employer to the worker and arising out of the worker's employment”

This definition in itself envisages that this remuneration cannot be reduced or valued negatively to the detriment of the worker hence the use of the words basic or minimum. This remuneration can only be improved and never reduced unless there is a special understanding between the employer and the employee and after discussion and agreement by the employee.

The action of the respondent in reducing the claimant's salary in the period under scrutiny was unfair and unjustified given his legitimate expectation to continue receiving the salary he was anticipating.

On the second issue, the claimant alleges discrimination on the way he was paid as compared to other officers on his level. He produced the organizations organograph indicating that he was on the same level as other officers. He produced the said officer's payslips showing that one of them was earning Ksh 67016 and the other Kshs 68,681 in the same period he earned kshs 34,914. In the same period, the claimant earned Ksh 5,237/= as supervisory allowance when those officers earned Ksh 10,052 for the same allowance. A scrutiny of the payslip however show, that whereas the claimant was paid Kshs 4,200/= as telephone benefit, one of the other officer was paid Ksh 3,900 and the other nil as telephone benefit. It is true there is a discrepancy in their payments and allowances. The claimant however failed to show that they were for instance employed on the same day and have similar qualifications. In fact the discrepancy in their telephone allowance may also point to the fact that they were doing different duties with claimant's demanding more telephone communication than the others.

I have already in a previous judgment of Miguna Miguna VS AG – Industrial Cause No. 473/2011 alluded to the concern of discrimination in employment due to different remuneration packages and stated that;

“It is apparent that salaries of officers who may be serving in the same capacity change due to seniority in rank and even due to experience ---“

It is therefore not discrimination to have officers serving at the same level being paid differently and Section 5(3) of the Employment Act 2007 states that;

“It is not discrimination to

a) -----

b) Distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

c) -----“

When other employees were remunerated differently from the claimant, it cannot be alleged that the claimant was discriminated against and therefore his assertion fails.

On the 3rd issue the claimant states that he was summarily dismissed on allegation of gross misconduct. According to exhibit FO6 claimant's termination letter, the respondents' employee stated:-

November, 17, 2010
Fred Ouma
P. O Box 2131 – 40100
KISUMU

Dear Sir,

SUMMARY TERMINATION OF EMPLOYMENT ON GROSS MISCONDUCT

This is in relation to your recent conduct in making false and insulting allegations against the Company. The Company has lost faith in your person and can no longer retain you to supervise other employees.

In view of the foregoing, your services are summarily terminated pursuant to Section 44 (d) of the Employment Act 2007, Laws of Kenya that considers insulting or behaving in a manner insulting to one's employer a gross misconduct and grounds for summary dismissal from service. Your terminal dues will be worked and paid as by law required.

Yours faithfully,

For: Spectre International Ltd

Signed

Lynn Owino
ADMINISTRATION MANAGER

CC: Plant Director

In view of this letter of summary termination, the only alleged recent conduct of the claimant which respondent considered an abuse is the letter written by claimant's advocates to the respondents marked as FO5. The letter was actually an explanation as to how he has worked and been remunerated by the respondents including complains raised in this claim e.g his salary being reduced in April, 2009. He further alleged that he was being underpaid and demanded his rightful pay including house allowance. Whether this letter amounts to gross misconduct by an employee is then an issue this court must address.

The respondents' letter refers to Section 44 of the Employment Act 2007 to reach a finding that the claimant abused them. Section 44(4) indicates that it is justifiable for an employer to dismiss an employee summarily if (d) an employee uses abusive or insulting language or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer ---“

I have already explained what the letter from claimant's advocate stated. There is no abusive or insulting language in it and what the claimant was trying to put forward were his rights some of which the court has found justifiable in this judgment.

Section 46(h) of the Employment Act 2007 attributes dismissal as meted on the claimant as unfair as it provides as follows:-

“The following do not constitute fair reasons for dismissal or for imposition of a disciplinary penalty:-

(a) ----

(b) ----

(c) ----

(d) ----

(e) ----

(f) ----

(g) ----

(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation ----“

The reason that claimant sought legal help from his counsel cannot be used against him as a reason for summary dismissal.

The fact that the respondent interpret this as an abuse is indeed irresponsible and shows the respondents allergic reaction to a worker's complain on any infringement of their rights whether justified or not. I therefore find that the claimant committed no gross misconduct and his dismissal on that account is unfair and unjustified.

Now to the 4th issue, whether the claimant's claim is justifiable. The claimant has laid down his claims in his memorandum of claim, I have part alluded to why some of his claims are justifiable and others are not. He sought to be paid salary arrears from 2003 to December, 2010. This is based on his perceived claim that he was to be paid Ksh 90,000/= per month and not the salary he used to be paid. Where this perception comes from is not explained. However, the claimant was offered a job with certain laid down expectation of a salary which he accepted and started work. Nowhere has he shown that he was promised that he would be paid Kshs 90,000/=. This claim for salary arrears on what he expected *vis a vis* what he received cannot stand. This also goes with his claim for annual leave for the year 2008. Every worker is entitled to leave. If the claimant failed to take leave for the year 2008, it is imperative that he demonstrates that the respondent denied him that right on in exchange for work done, he forfeited his leave. This, the claimant has not demonstrated and therefore this claim of leave for Kshs 90,000/= cannot stand.

On issue of supervisory allowance, I have already alluded to it while explaining that he was not discriminated upon by being paid a low supervisory allowance than his colleagues.

The claimant alleges that he is entitled to be reimbursed for the tools he used at work. This claim has not been proved as there is no indication that the respondents asked claimant to provide tools for his work. The claimant has also not demonstrated that he requested for working tools from his employer and he was denied or asked to bring his. He chose to use the tools he used and his claim on this item cannot stand.

The claim of Ag Mechanical Process Engineer would also not stand in view of the fact that the claimant has not demonstrated the duties of the Mechanical Process Engineer *vis a vis* what he himself did.

The claimant seeks to be paid house allowance from 2003 to 2010. From the claimant's payslip, there is no indication that the claimant was ever paid his allowance for the period he worked. He is indeed justified in seeking for this as envisaged under S. 31(1) of Employment Act 2007.

“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary, of the employee, as will enable the employee to obtain reasonable accommodation ---“

Given that there is no contract between the claimant and respondent showing that the salary paid included the house allowance, the claimant is entitled to payment of house allowance for the period worked

equivalent to 15% of his salary for each month. This translates into;

$$\underline{15/100 \times 38,000 \times 7 = 478,800}$$

Claimant also sought payment of severance pay which is only payable in cases of redundancy as provided under S. 44 (1) (g). This prayer therefore can't be granted.

Having analyzed these issues, what remedy is the claimant entitled to? I find that the claimant has indeed proved his case as required, I therefore find for him and make orders as follows:-

(a) That the alleged summary dismissal of the claimant by the respondents was unfair and unjustified and I convert it to a normal termination.

(b) The claimant is entitled to payment of his dues as follows:-

i) Salary due and reduced in the month of April, 2009 to June 2010 from 36,047 to 34,914 – difference being 16 months X 1933 = Kshs 30,928/=

ii) House allowance not paid for 7 years =
Kshs 478,800/=

iii) 12 months salary as compensation for wrongful termination = 38,000 X 12 = 456,000/=

TOTAL = 965,728/=
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(a) The claimant be issued with a certificate of service.

(b) The respondents to pay costs of this suit.

HELLEN WASILWA

JUDGE

26/04/2013

Appearances:-

P.D Onyango h/b Owino for Claimant present

N/A Respondents

CC. Sammy Wamache