



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1583 of 2011

BETWEEN

KENNETH GITONGA MARANGU CLAIMANT

VERSUS

BOOKFIRST SPORTS PUB AND RESTAURANT SHERLOCKS DEN.....RESPONDENT

CC. Elizabeth Anyango

Mr. Onyony instructed by Onyony and Company Advocates for the Claimant

M/S Masila holding brief for Mr. Waiganjo instructed by Macharia Waiganjo and Nyakoe Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Kenneth Gitonga Marangu filed his Statement of Claim on 19th September 2011. The Respondent filed Its Statement of Reply on 20th December 2011 and additional List of Documents on 3rd August 2012. On 17th October 2012, the Parties consented to have the dispute considered and disposed of by way of written submissions. The Claimant filed his submissions on 8th November 2012, while the Respondent filed its own submissions on 19th November 2012. The dispute was last mentioned in Court on 7th December 2012, when the Court advised Parties the Award would be delivered on notice.

2. The Claimant was employed by the Respondent on 1st October 2008, as a Stock Controller, earning a salary of Kshs. 12,000 per month. His contract was terminated at the instigation of the Respondent, on 25th November 2010. He was not given the opportunity to be heard. No reasons for termination were disclosed to him, by his employer. There was no warning preceding the Respondent's decision. He was not paid any terminal benefits.

3. The Claimant submits that termination was against the Constitution of Kenya, the Employment Act 2007, the Labour Institutions Act 2007 and the International Labour Organization Conventions, particularly Convention Number 158. It was in violation of the right of fair labour practices. Marangu claims termination was unfair and unlawful. He was 27 years old on the date of termination. He expected to work until the statutory retirement age of 60 years. He therefore seeks:-

- a) Salaries for the remainder of the 33 years to retirement calculated at Kshs. 12,000 x 12 = 144,000 x 33 = 4,752,000;
- b) Service pay at Kshs. 12,000 x 12 x 3 = Kshs. 432,000;
- c) Loss of earning capacity at Kshs. 300,000;
- d) Incorporeal loss at a comparative conservative figure of Kshs. 300,000; and,
- e) Compensation of 12 months' salary at Kshs. 240,000;

In total, the Claimant pleads Kshs. 1,740,200, although a casual look at the arithmetic shows a total figure of Kshs. 6,024,000. The error in the Statement of Claim flows from the first item above, whose total was given as Kshs. 475,200.

The Claimant also prays for a declaration that termination was unfair and unlawful; payment of interest on the principal amount at the rate of 14%; costs; and any other relief the Court may deem fit to grant.

4. The Respondent wrote a letter to the Claimant stating:

“This is to serve you with a month’s termination notice with effect from 25th November 2010. Your employment shall be terminated on the 24th November 2010. Your services to the company are no longer required.”

The reason for termination translates to redundancy under the definition contained in Section 2 of the Employment Act 2007. Theft was not given as the reason for termination.

5. The Respondent admits the Claimant was its employee, in the position and on terms and conditions of employment given in his Statement of Claim. His contract of employment was lawfully terminated, upon the issue of one month written notice. Termination was in accordance with the contract and the law. The Respondent does not see in what way, termination could be said to transgress the Constitution, Labour Laws and the ILO Convention.

6. The Claimant was suspended from work in a letter dated 18th October 2010. Suspension was for a period of fourteen days, to pave way for investigations. The Claimant was required to give a written explanation how two cakes, each weighing one kilogram, disappeared from the workplace. The suspension letter states that:

“ It was noted you collected two cakes weighing one kilogram each, and indicated you were going to deliver them to City Hall Branch. According to the Display Attendant Isabella Muthoni, she confirmed she did not receive any cakes that day. On arrival back to Moi Avenue Branch, you told the Display Attendant Esther Meli, that the said cakes were actually delivered to Lifestyle Branch. The Manager confirmed that the cakes were never delivered at Lifestyle.” Marangu was asked to give a written statement explaining the loss of the two cakes. He did not. The Respondent had no option but to notify the Claimant of termination. The Respondent gave the reasons for termination in writing, and gave further explanation to the Claimant by word of mouth.

7. All benefits legally due to the Claimant were paid to him. He accepted payment and discharged the Respondent from future liability. He does not merit service pay; he was a member of the National Social Security Fund. He correctly accepted his settlement cheque, and cannot turn around and demand for more from the Respondent. The Respondent urges the Court to rely on the witness statements recorded by Isabella Muthoni and Esther Meli, together with its other documents, pleadings and submissions and reject the Claim in its totality, with costs borne by the Claimant.

The Court Finds and Awards-:

8. Kenneth Gitonga Marangu was employed by the Respondent on 1st October 2008 as a Stock Controller. His contract was terminated on 24th December 2010. He alleges termination was unlawful and unfair, and has prayed for several remedies. At the time of termination, his salary was Kshs. 12,000.

9. The Court is persuaded from the evidence on record that the decision to terminate the Claimant's contract was based on valid reason. He was entrusted by his employer two cakes weighing 1 kilogram each, to deliver at their City Hall Branch. It is confirmed by two Display Girls, Isabella Muthoni and Esther Meli, that he did not deliver the cakes to any outlet. He did not explain to the Court whether he ate the cakes or sold them. The Claimant committed, or was on reasonable and sufficient grounds suspected of having committed, a criminal offence against, or to the substantial detriment of his employer, or employer's property. Eating the cakes or selling the cakes without the authority of employer, amounted to an employment offence under Section 44 [4] [g] of the Employment Act, for which the Respondent was entitled to summarily dismiss the Claimant.

10. There is nothing to show that the Claimant was not availed the procedural protections guaranteed under Section 41 of the Employment Act. He was suspended on 18th October 2010. He was asked to give his written response and report back to work on 2nd November 2010. He chose not to respond. An employee who is given the facility to defend himself, and refuses to take the offer, cannot be heard to complain later that he has been denied procedural justice. The employer discharged its obligation by inviting the Claimant to offer his explanation. The Claimant rejected the invitation. It was only after this that the Respondent gave the Claimant a notice of termination of service on 25th November 2010, informing the Claimant that his contract would terminate at the end of 30 days, on 24th December 2010. The Claimant served his notice period, after which he was paid terminal dues of Kshs. 19,227.

12. His Claim for a total amount of Kshs. 6,024,000 is baseless. There is nowhere in his contract, or applicable substantive law, showing his retirement age would be 60 years. There is nothing in law or fact, which warrants him to receive anticipatory salaries for what he believes to be his remainder years of service. There is no law which says an employee is paid service pay at the rate of 30 days' salary for each year completed in service. Even if there was such a law, the Claimant would not, under Section 35 [6] of the Employment Act, be eligible to receive service pay, as he was subscribed to the National Social Security Fund. He did not explain to the Court how termination made him lose the earning capacity. The peculiar claim for incorporeal damages was not supported by any law or evidence. Termination was not shown to be unfair or unlawful to merit any statutory compensation or contractual damages. The Constitution of Kenya, Labour Institutions Act, Employment Act and the cited ILO Conventions were not in any manner violated. IT IS ORDERED:-

a] *The claim is hereby dismissed in its entirety.*

[b] *No order on the costs.*

Dated and delivered at Nairobi this 17th day of May 2013

James Rika

Judge