



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 26 of 2013

THOMAS MUMO NZIVU.....CLAIMANT

-VERSUS-

SPIN KNIT LIMITED.....RESPONDENT

JUDGMENT

The claimant filed the memorandum of claim on 08.11.2011 through Gordon Ogolla and Associates. The claimant prayed for:

- a) One month pay in lieu of notice of Ksh.41,000/=.
- b) Pay for severance or service in view of 22 years of service of Ksh.367,500/=.
- c) Full salary per year from 2005 up to 2011 being 237,350/= for bonuses due but not paid.
- d) Compensation based on section 49(c) of Employment Act, 2007 at Ksh.41,000/= for 12 months being Ksh.492,000/=.

The respondent's memorandum of reply was filed on 20.02.2013 by the respondent Spin Knit Limited through the Federation of Kenya Employers. The respondent pleaded that the claimant was not entitled to the remedies as claimed in the memorandum of claim.

The case was heard on 30.04.2013 when the claimant gave evidence to support his case and the respondent's witnesses were Richard Obure Obiko the respondent's boiler attendant (RW1) and Winfred Gicheru the respondent's Human Resources Manager (RW2).

In view of the testimony by the witnesses the facts of the case are as follows:

1. The claimant was employed by the respondent as a machine operator on 1.01.1990 as per letter TMN I on the memorandum of claim and was promoted to maintenance supervisor and later to a senior supervisor, a position he held till his termination by the letter dated 04.06.2011 being appendix TMN III on the memorandum of claim.
2. On 31.05.2011, the claimant reported at work at 7.30 am. He met his workmate Richard Obure near the production department and who worked at the workshop. The said Obure was among newly elected cooperative officials who had replaced the outgoing officials of whom the claimant had been serving with.

3. During his tenure as a cooperative official, the claimant had participated in borrowing Ksh.250,000/= from one Babu with a view of boosting the cooperative funds. The money was never banked in the cooperative accounts. By letter dated 10.03.2011 being appendix TMN VI on the memorandum of claim, the four outgoing cooperative officials were required to repay the money with a view of the incoming officials to refund the said Babu. The claimant would refund Ksh.62,500/= which was added to his outstanding cooperative loan effective April, 2011. The letter stated that the monthly deduction would remain constant but the repayment period would be extended in view of the addition. Appendix TMN VII shows the respondent's policy was that loan deductions were not to exceed 40% of the employee's net pay after the statutory deductions.
4. Appendix TMN IV is the claimant's pay slip for May, 2011 showing that instead of being deducted the constant rate as agreed, the deduction doubled through an increment of about Ksh.10,000/= as compared to his February pay slip being TMN V on the claim. The failure to honour the deduction rate as conveyed earlier put him in difficult financial position especially that schools were opening for second term and he had to pay his children's school fees.
5. On the morning of 31.05.2011, the claimant sought to raise his dissatisfaction with that action of double deduction with Obure because the said Obure was one of the cooperative officials. The evidence shows that the two had a somewhat unpleasant encounter. The evidence of what exactly took place is not accurately presented to the court. Of particular interest to this case is whether the claimant uttered the words "I will kill you" against the said Obure. The witness statements on record by staff who witnessed the encounter did not record that they heard the words but only the said Obure alleged that he heard them. The other witnesses were close enough to have heard the words. On a balance of probability, the court finds that the claimant did not utter such words. Further, the court finds that on that morning the two had unpleasant encounter inconsistent with cordial working relationship expected at the work place and further that the claimant instigated that undesirable encounter.
6. The court has considered the testimonies and further finds that the claimant had a genuine grievance because he had suffered double deduction and contrary to the conveyed mode of deduction whereby the deductible sum would remain constant but the period extended.
7. On 31.05.2011, after the unpleasant encounter at about 8.30 am security personnel came for the claimant and escorted him to the personnel office where he found Obure. The claimant was told he had mishandled Obure. The personnel officer went to the Director's office and upon return the claimant was advised to go home and to report back at work on 6.06.2011. On 6.06.2011 he was not allowed past the respondent's gate. Instead, the personnel officer came and handed the letter of summary dismissal dated 04.06.2011 being appendix TMN III on memorandum of claim and the certificate of service marked TMN VIII on the claim. The letter of dismissal stated that he had been dismissed on account of gross misconduct for manhandling Obure and threatening him by uttering the words, "I'll kill you". It also stated that he would be paid days worked up to 6.06.2011; leave due and not taken; leave travel allowance; and would get a certificate of service. The claimant was not paid as conveyed in the dismissal letter.
8. The claimant prayed for payment of dues in the letter of dismissal, the bonus due but not paid as per letter of appointment from 2005 to 2011, unpaid overtime, and other prayers made in the claim.
9. There was no evidence that the show cause letter dated 31.06.2011 being appendix 10 on the memorandum of reply was delivered to the claimant. There was no satisfactory explanation of the date on the later long after the dismissal letter of 04.06.2011. The court finds that the show cause letter was never served upon the claimant. It was stated the bonus was not paid because it had been stopped by the internal memorandum in appendix 12 and letter marked 13 on the memorandum of reply. The court has considered the evidence and finds that the bonus appears to have been stopped but is doubted that the stoppage was conveyed to the claimant. Further, the court finds that the respondent could not unilaterally vary a prevailing and agreed term of the contract without consulting the claimant or seeking his acceptance as envisaged in section 10(5) of the Employment Act, 2007.

In view of the facts and the court's considered findings, the court makes the following findings on the remedies prayed for:

1. The claimant was not accorded the notice and the hearing as provided for in section 41 of the Employment Act, 2007. The reasons for summary dismissal were not as grave as to warrant the drastic punishment imposed in view of the claimant's long service of 21 years and the consideration that the claimant had raised a genuine grievance about the double deduction contrary to the conveyed arrangement of extending the recovery period. In the considered view of the court, this was a case for grievance management. RW2 testified that the respondent embraced grievance management, counseling and staff support so that punishment was not the first line of recourse. RW2 also testified that there had been instances of junior staff fighting at workplace and employees were keen to follow whether the punishment of dismissal would apply to the claimant as had been imposed against the junior staff. The court considers that the instant case would be properly handled by grievance management procedures and counseling. Further, RW2 did not provide any evidence of the alleged dismissal of the junior staff and in any event the unpleasant encounter between the claimant and Obure did not involve fighting. The punishment was imposed without due process and was disproportionate as weighed against the alleged misconduct. Thus, the dismissal was unfair and the court finds that the claimant is entitled to **Ksh.246,000/=** being six months gross salaries at Ksh.41,000/= per month. The court, in making the award, has considered that the claimant had a long service with rather bumpy record as shown by the cooperative funds' case.
2. The claimant is entitled to one month pay in lieu of notice of **Ksh.41,000/=**.
3. Severance or service pay in view of 22 years of service of Ksh.367,500/= is not justified because the claimant was a member of the National Social Security Fund. Section 35(5) of the Employment Act, 2007 is clear that the claimant would not be entitled as prayed in circumstances whereby he is a member of the Fund.
4. Full salary per year from 2005 up to 2011 being 237,350/= for bonuses have been prayed for. As the court has found, the bonuses were an agreed term of the contract of employment and could not be varied unilaterally. However, the court considers that section 90 of the Employment Act, 2007 limits the cause of action to three years and the court finds that the claimant is entitled only to bonuses with respect to the three years immediately before the filing of the case making **Ksh.123,000/=**.

In conclusion judgment is entered for the claimant against the respondent for:

- a) the respondent to pay the claimant a sum of **Ksh.410,000/=** plus interest at court rates from the date of judgment till payment in full; and
- b) the respondent to pay costs of the case.

Signed, dated and delivered in court at **Nakuru** this **Friday, 10th May, 2013**.

BYRAM ONGAYA
JUDGE