



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 22 OF 2013
(Formerly Nairobi Cause No. 1329 of 2012)

MALACHI OCHIENG PIRE.....CLAIMANT

-VERSUS-

RIFT VALLEY AGENCIES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th June, 2013)

JUDGMENT

The claimant Malaki Ochieng Pire filed on 06.08.2012 the memorandum of claim in person and praying for judgment against the respondent for a sum of Kshs.1,417,789.15. The respondent filed the reply to the memorandum of claim on 20.03.2013 through Ikua, Mwangi & Company Advocates and prayed that the suit be dismissed with costs. With the leave of the court the claimant filed the amended memorandum of claim on 18.04.2013 through Oumo & Company Advocates. The claimant has prayed for payment in lieu of notice, underpayment, overtime, off duties or rest days, annual leave for 13 years, maximum compensation under section 49(1) (c) of the Employment Act, 2007, costs of the case, severance pay for 13 years and certificate of service. The claim is for a sum of Kshs.2,058,859.45. The respondent also filed the response to the memorandum of defence on 06.05.2012. The case was heard on 27.05.2013 and on 06.06.2013 when the claimant testified to support his case and the respondent's witness (RW) was its director Edward Cherotich Kiptanui.

The claimant's evidence was as follows:

- a. The claimant was employed by the respondent on 7.03.1996 as a loader in an oral agreement under which he was paid weekly at a daily rate of Kshs.130/= . He worked without a break in service until 2004 when he was deployed and promoted to the position of a store clerk. The promotion was oral and he was paid monthly at the rate of Kshs.165/= per day and working 30 days per month including Sundays and without any rest. The working hours were from 7.15 am to 8.00 pm without lunch breaks and rest days as the store clerk. At termination, he was paid at a daily rate of Kshs.269/=.

- b. On 18.12.2009, the claimant was at the stores. A transporter off-loaded beer at the stores and the transporter had to load 1000 crates of empty beer bottles after off-loading the beer. The claimant had only 600 crates of the empty bottles. The transporter's driver declined to take the 600 because they were less than the expected 1000 crates. The claimant reported to the manager called Ken Kioko and the transporter's driver went to the manager's office. The driver then left without loading the 600 crates and the manager demanded of the claimant to ensure that the 600 crates are transported to Nairobi. Later that day, the manager summoned the claimant and told him to go home to be called after a week. After the week, the claimant reported to the manager and was handed the termination letter of 18.02.2009 being M.O.P II on the response to the memorandum of defence. The letter addressed to the claimant stated as follows:

“RE: TERMINATION OF EMPLOYMENT

We are currently facing very hard economic times that have affected the operations of the company.

Due to this, the company has been compelled to terminate your services effective; 18th December 2009.

We wish you all the best in your future prospects and thank you for the good work at Rift Valley Agencies Limited.

Your terminal dues have been calculated and attached.

Yours faithfully,

Signed

Kennedy Kioko

General Manager.”

- c. The claimant reported a dispute at the Labour office and the parties failed to reach an amicable settlement. The Labour officer recommended that the respondent pays the claimant a sum of Kshs.349,693.85 as per the letter dated 8.06.2010 being M.O.P II on the response to the memorandum of defence. By the letter dated 19.07.2010, the respondent's Advocates rejected the Labour officer's recommendation and opted for settlement in court.
- d. The claimant was not given any termination notice and was not paid in lieu of the termination notice. He worked from 7.15 am to 8.00 pm and was not paid overtime dues. At termination, he had worked for 13 years and he prayed for the service pay. The respondent made the remissions for the National Social Security Fund (NSSF). He was not given the certificate of service. The union officials advised on the underpayment claim.
- e. During cross-examination, the claimant admitted that there had been some shortages attributable to him and which he signed to acknowledge the same. In particular, he signed letter of 25.11.2009 admitting a shortage of Kshs.44,267/= but denied that he did not owe the respondent any other money.

The respondent's witness RW testified as follows:

- a. The respondent was in beer distributorship business since 1968.

- b. The claimant worked for the respondent till 15.06.2006 when he was given the letter of employment dated 15.06.2006 being exhibit R1 by which he was employed as an assistant salesman. For the casual service, no letter was given.
- c. The claimant's record of service was characterized with shortages and on 22.06.2009, the respondent was served with the final warning being document No.4 on the respondent's list.
- d. The termination letter dated 18.12.2009 being No. 7 on the respondent's list was issued because the claimant was unfaithful and he incurred shortages. RW told the court that the claimant was persuaded to come back to his senses but he persistently became a liability to the respondent. He was terminated in terms of the termination letter as a soft landing to avoid a disciplinary action so that the claimant could secure alternative employment. The respondent decided to be polite.
- e. The claimant's dues were computed as per document No. 7 of the respondent's list and all dues less shortage were factored so that the net terminal dues were Kshs.23,449/= which the respondent was willing to pay any time the claimant goes to collect the same.
- f. RW was not sure if the claimant took his annual leave. If not taken, then the respondent was willing to pay for the three years at one month per year. The respondent is willing to pay the overtime as computed on the schedule for final dues. Work on Sundays was paid for through a set-off with a rest day.
- g. RW explained that the respondent had lost the beer distributorship contract and it was in a redundancy process.

The claimant's written submissions were filed on 21.06.2013 and the respondent's on 20.06.2013. The court has considered the pleadings, the evidence and the submissions and makes the following findings:

1. RW admitted that prior to the 2006 contract, the claimant served on casual basis without a written contract. The court has considered the claimant's evidence and finds that he served without break from 1996 to 2006 without a written contract and continued in service till termination on 18.12.2009 under the written contract. The court finds that the claimant served for complete 13 years in the respondent's employment.
2. The second issue for determination is whether the termination was unfair. First, the court finds that the reason was not genuine because in the termination letter the respondent alleged difficult economic times suggesting a redundancy situation. At the hearing, RW alleged that the claimant had occasioned shortages and was persistent in such poor performance leading to his termination.

The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.

The court finds that in this case, whether it was redundancy or poor performance, the due process for

redundancy in section 40 and the due process for termination on account of poor performance in section 41 of the Employment Act, 2007 were contravened. The termination was unfair. The court has considered the claimant's service record with admitted cases of shortages and finds that **six months gross** salaries at the rate of the last monthly pay will serve the balance of justice in this case. The due monthly pay at termination being Kshs.8,632/= as per the rectified salary in view of the underpayment, the court finds that claimant's entitlement under this heading is **Kshs.51,792/=**.

3. The respondent has not opposed the claimant's computation of the underpayment as prayed for and as based on the relevant Orders on the minimum wages as set out in the claimant's submissions and the court finds that the claimant is entitled to **Kshs.149,740.20** as elaborated in the amended memorandum of claim.
4. For overtime, the court finds that RW's evidence that some overtime days were converted to off-days is credible and the court finds that **Kshs.42,000/=** for overtime and Sundays worked as computed by the respondent is due to the claimant.
5. For the sixteen days worked in December 2009, the court finds that the claimant is entitled to **Kshs.4603.70** in view of the Kshs.8,632/= monthly minimum statutory pay.
6. The respondent did not demonstrate that the claimant ever proceeded for annual leave and the court finds that on a balance of probabilities he has established that claim and is entitled to **Kshs.97,254.30** as prayed for.
7. In view of the award for overtime and work on Sundays, the court finds that the claim for rest days and off duties is not justified and has not been established by the claimant. It shall therefore fail.
8. The claimant is entitled to one month statutory pay in lieu of the termination notice being **Kshs.8,632/=** as prayed for. The claimant's evidence was that he was a member of the NSSF and the court finds that he is not entitled to service pay in view of the remissions made by the respondent to the NSSF. The court has found that this was a case of unfair termination and not redundancy and the claimant is therefore not entitled to severance pay as claimed.
9. The claimant has admitted by signing that at termination he owed the claimant **Kshs.43,267/=** and the court finds that the respondent is entitled to recover the liability as owed. Less that respondent's liability, the court finds that the claimant is entitled to a sum of **Kshs.310,755.20**.

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

- a. a declaration that the termination of the claimant's employment by the respondent was unfair;
- b. the respondent to pay the claimant a sum of **Kshs.310,755.20** by 1.9.2013 failing which interest to be payable from the date of the judgment till full payment;
- c. the respondent to deliver to the claimant a certificate of service by 15.07.2013; and
- d. the respondent to pay the costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 28th June, 2013**.

BYRAM ONGAYA

JUDGE