



REPUBLIC OF KENYA

Industrial Court at Nairobi

Cause 772 of 2012

BOAZ MOCHAMA MACHOGU.....
CLAIMANT

VS

NEW WORLD AUTO LIMITED.....
RESPONDENT

Mr. Okioma for the Claimant

Mr. Onyancha for Respondent

AWARD

1. The Claimant seeks maximum compensation and payment of terminal benefits for alleged unlawful termination of his employment on 21st April, 2010.
2. The particulars of the claimant's case may be summarized as follows;
3. That he was employed in April 2007 as a mechanic by the Respondent and was earning a monthly salary of Kshs.7,500/=.
4. That the claimant worked continuously and had a clean record of service devoid of any misconduct. That on the 21st April, 2010 while he was repairing a customer's motor vehicle, his supervisor who is not named started shouting at him to remove his overall and surrender any property of the Respondent in his possession and leave immediately which he proceeded to do.
5. That he was not given any letter of termination. That the respondent did not pay him any terminal benefits upon termination including;
 - (a) two (2) months' salary in lieu of notice at Shs.19,461/=
 - (b) Service gratuity for each completed year of service at Shs.28,000/=
 - (c) Payment in lieu of leave calculated at 21 days per year for the 4 years' service at Kshs.21,000/=
 - (d) House allowance for 2 months at Kshs.7,000/=; and

(e) Maximum compensation equal to 12 months' salary for unlawful termination – Kshs.90,000/=.

He concludes that the summary dismissal was both unlawful and unfair in the circumstances of the case. At the time of the termination, he was employed on a contract of one year which commenced on 2nd April, 2009 and was therefore due to expire on 1st April 2010.

6. The claimant had worked for the Respondent for four years while on 1 year renewable contracts. At the time of termination there was no written contract in place, the last one having expired on 1st April, 2010.

7. The Respondent filed a reply to the Memorandum of Claim on 31st August 2012. In paragraph 5 thereof, it admits that the claimant was employed by the Respondent on a periodical basis since 2007. The Respondent denies that it terminated the services of the Claimant on 21st April 2010 as alleged or at all and states that the Claimant deserted duty without any justifiable reason. That the act of desertion amounted to a breach of Contract of Employment between himself and the Respondent and by so doing the Claimant had waived all his benefits.

8. The Respondent adds in paragraph 7 of the reply that the Claimant was at all material times employed on a one year contract renewable depending on availability of work and that the NSSF and NHIF statutory deductions were deducted and remitted and therefore the Claimant was not entitled to severance pay.

Furthermore, the Respondent adds that the Claimant was paid a gross salary inclusive of house allowance which was paid upto his last day at work and therefore is not entitled to any payment of house allowance as claimed or at all.

9. Furthermore the Claimant had been paid all leave allowances and therefore non was due or payable as claimed.

The Claimant having not issued any demand notice was not entitled to costs of the suit at all.

10. The parties agreed to proceed by way of written submissions relying on the filed pleadings and annexures and did not call any witnesses at all.

11. The court has carefully considered the documentation filed and come to the following conclusions of fact;

The Claimant worked for the Respondent for a period of four years as a mechanic and was earning a salary of Kshs.7,500/= at the time he left the employment of the Respondent on 21st April, 2010.

12. That the claimant did not provide sufficient particulars of the alleged termination of service on 21st April, 2010, in that he did not indicate the person who terminated his services on the material day. The Respondent denied that it terminated the services of the Claimant stating that he had actually deserted his employment.

The court in the circumstances finds that the Claimant has failed to satisfy the requirement of Section 47(5) which provides;

“For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

13. The Claimant having elected not to give any oral evidence and having not provided any

documentary evidence on the particulars of the termination, especially the identity of the person who terminated his services has failed to prove on a balance of probabilities that his employment was terminated by the Respondent, let alone showing that such termination was unlawful and unfair.

14. Having failed in that respect, the Claimant is not entitled to payment in lieu of notice because he has not shown that the employment was terminated by the Respondent.

15. The Claimant has demonstrated to the Court that the Respondent remitted statutory deductions to NSSF only for the period 2009 and 2010 therefore he is entitled to payment of service gratuity for the years 2007 and 2008 in respect of which no remittance was made.

16. The Court notes that in terms of Section 35(5) as read with Section 35(6), of the Employment Act, 2007, where an employer has registered an employee with NSSF and has made contributions to the fund, the employer is not bound to pay to the employee service gratuity upon termination of the employment of the particular employee.

Accordingly, the Claimant will be paid 15 days' salary for two completed years of service in the sum of Kshs.7,500/=.

17. As said earlier, the Claimant has failed to show that the Respondent terminated his services at all and therefore, the claim for compensation for unfair termination has failed.

18. With regard to the claim for payment in lieu of leave entitlement for 21 days per year for the period of four years served, the Respondent did not produce any documentation to refute the claim. The Respondent offered a feeble denial yet it is the custodian of records for the employees including the Claimant. It was in a position, therefore to substantially refute this claim but has failed in that respect. The Court finds that the Claimant has established on a balance of probabilities that he did not take leave during the period of service. The Court awards him Kshs.21,000/= in lieu of leave not taken.

The rest of the claims remain unproven and must fail.

19. In the final analysis, the Respondent will pay to the Claimant;

(a) Kshs.7,500/= being service gratuity for the years 2007 and 2008; and

(b) Kshs.21,000/= in lieu of leave.

Total award is Kshs.28,500/=.

No order as to costs, the Claimant having not served a letter of demand on the Respondent prior to the filing of the suit.

It is so ordered.

Dated and Delivered at Nairobi this 7th day of June, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE - INDUSTRIAL COURT