



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 28 OF 2013
(Formerly Nairobi Cause No. 966 of 2012)

SAMUEL MUKONESI WASHISINO.....CLAIMANT

-VERSUS-

RAKESH GUDKA..... 1st RESPONDENT

MEERA UMOJA (K) LTD.....2nd RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th July, 2013)

JUDGMENT

The claimant Samuel Mukonesi Washisino filed the memorandum of claim on 06.06.2012 through B.I. Otieno & Company Advocates. The claimant prayed for judgment against the respondents for:

1. **One month pay in lieu of notice- Kshs.10,867.50**
2. **Severance pay – Kshs.27,482.50.**
3. **Underpayments 179,907/=.**
4. **Days worked in February 2012 – Kshs.5,055.50.**
5. **Compensation under section 49(1) (c) of the Employment Act, 2007 – Kshs.130,410/=.**

The respondents did not serve any response and were represented by Kanyi Ngure Advocate. The case was heard on 8.07.2013. The claimant gave evidence to support his case. The respondents did not call any witness and relied on the documents and claimant's admission that the respondents paid Kshs.15,700/= for leave days due but not taken and for and days worked in February being up to 20.02.2012.

The claimant was employed by the respondents on 24.10.2002 as a loader at the respondents' wholesale shop at a salary of Kshs.3,200/= per month. The claimant was promoted to a shop assistant in 2003 at a salary of Kshs.3,600/= per month and Kshs.4,700/= per month in 2004. In 2005, he earned Kshs.5,400/= and in 2006 Kshs.5,700/= per month. There were salary increments every May till separation in February

2012 at a time the claimant was earning Kshs.7,350/=. He served in the employment for 9 years.

On 20.02.2012, the 1st Respondent being the claimant's supervisor called the claimant at a meeting at the respondent's office. The claimant was informed that work had reduced and the respondents wanted to redeploy him to their newly acquired farm in a place called Makindu at a daily payment of Kshs.200/=. The claimant suggested he be paid Kshs.400/= if he were to proceed on the deployment. The claimant declined to proceed on the deployment in view of the low pay of Kshs.200/= as the respondents were not willing to increase the pay.

The parties scheduled another meeting for 21.02.2012 at 5.00 pm after the day's work and no agreement was reached. The 1st respondent advised the claimant not to report on duty until after 21 days when he would return from a scheduled travel to India. The claimant attended a meeting upon the 1st respondent's return from India and he was shown a computation of the terminal dues. It was Kshs.15,700/= being pay for leave days not taken and for days worked in February 2012. He received the money to meet his financial constraints. He had made a claim for Kshs.45,970.20 per his letter dated 23.02.2012 on the memorandum of claim. The respondents' counsel submitted that the respondents were willing to pay the difference of Kshs.30,270.20 if the claimant had given the relevant notice as the claimant had rushed to court.

The claimant testified that he was industrious, a good honest worker and had not been involved in any theft. The alleged ground for the termination, the claimant testified, was diminishing work yet at the material time, all the other staff remained at work even as at the time of the hearing no employee had been removed on account of redundancy.

In view of the pleadings, evidence and the submissions, the court makes the following findings on the issues under determination:

1. The first issue for determination is whether the claimant's employment was unfairly terminated. The claimant has submitted that he was unfairly declared redundant. The respondents submitted that the claimant voluntarily left employment upon refusal to take up a new deployment. Redundancy occurs where the employment comes to an end for no fault of the employee and for attribution to abolition of the office the employee held. The claimant told the court that he was informed that work had reduced and he had to go on a deployment to the farm at Makindu at a reduced and unsustainable pay of Kshs.200/= per day.

The court finds that there was no redundancy in this case. All the employer did was to impose new and disadvantageous terms of employment upon redeploying the claimant. First, the job was to change from a shop assistant to a farm assistant or unknown work at the farm. Secondly, the pay was to diminish to Ksh.200/= per day from the monthly wage of Kshs.7,350/=. Thirdly, the daily wage arrangement would diminish the claimant's entitlement to a termination notice as envisaged under section 35 (1) (c) of the Employment Act, 2003.

So, did the claimant terminate himself or better still terminate his employment by his own voluntary action that is, resigned? Under the Black's Law Dictionary, 9th Edition, resignation is the act of relinquishing or surrendering an office. In this case, the claimant was employed as a shop attendant. He never relinquished that office. He declined to take up a different job at a farm upon inferior terms of payment and tenure of continued service in view of the respondents' proposed daily wage. The court finds that the claimant did not resign.

The court considers that the respondents breached the initial contract of employment by unilaterally and capriciously varying the duty station, the pay, the periodicity of pay and did not bother to negotiate with the claimant all these fundamental elements of the anticipated variation. The respondents' conduct, in the opinion of the court went to the foundations of the contract of employment and it was proper and valid for the claimant to consider himself as terminated. If the claimant failed to do so, he would be treated as

having accepted the respondent's adverse terms and thereby get bound by the new and disadvantageous engagement. In the circumstances of this case, the court finds that the respondents constructively terminated the claimant's employment. The procedure and the substance of the issues involved were unfair. The constructive termination, in the court's findings, was unfair.

2. The second issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes the following findings:
 - a. As the court has found that this was not a case for redundancy, the claimant is not entitled to the severance pay as claimed for.
 - b. The underpayments were particularized in the memorandum of claim. The respondents have not, by evidence or even pleadings, raised any objections to the claims and the prayer as made. The court finds that the claimant has established the claim and is entitled to **Kshs.179,907.00** as prayed for.
 - c. The claimant was paid at monthly intervals and the court finds that he was entitled to a one month termination notice under section 35 (1) (c) of the Employment Act, 2003 and therefore one month in lieu of notice under section 36 of the Act. The court finds that the claimant is entitled to **Kshs.10,867.50** as prayed for.
 - d. The claimant admitted that he had been paid for the days worked in February, 2012 and the claim shall fail.
 - e. The claimant has prayed for compensation for the unfair termination under section 49 (1) (c) of the Employment Act, 2007. The court has considered the balance of justice in the matter and finds that six months gross salaries being **Kshs.65,205.00** at the monthly last statutory pay of Kshs.10,867.50 will meet the ends of justice in this case.
3. Costs follow the outcome of the case and the court finds that the claimant is entitled to the costs of this case.

In absence of a written contract, there is no dispute that both respondents dealt with the claimant and the court's view is that ends of justice will be served by entering judgment against the respondents jointly and severally.

In conclusion, judgment is entered for the claimant against the respondents jointly and severally for:

- a. A declaration the claimant's employment was constructively terminated and the termination was unfair.
- b. The respondents to pay the claimant **Kshs.255,979.50** by 15.08.2013 in default interest to be payable at court rates from the date of the judgment till full payment.
- c. The respondents to pay costs of the case.

Signed, dated and delivered in court at **Nakuru** this **Friday, 12th July, 2013.**

BYRAM ONGAYA

JUDGE