



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 713(N) OF 2009**

*(Before D.K.N. Marete)*

**JOSEPH KANG’ETHE KAMANDE .....CLAIMANT**

**VERSUS**

**STAREHE PETROL & SERVICE STATION.....RESPONDENT**

**JUDGEMENT**

By a memorandum of claim dated 16th September, 2009 and filed on the following day, this matter was brought to court. The issue in dispute is cited as follows,

**Refusal by the respondent to pay terminal dues to J. K. Kamande.**

The respondent in a Reply to the Claimant’s Claim and Counter-Claim dated 24th May, 2010 and filed on the same date denies the claim *in toto* and prays that the same be dismissed with costs. He also floats a counter-claim for Kshs. 28,527.00 being the value/price of full products sold and dispensed by the claimant and which sum the claimant failed to remit to the respondent.

The claimant’s case is that in December, 2006, he was employed by the respondent at a basic salary of Kshs.4,800.00. He was designated pump attendant. On 2nd March, 2009, he was verbally terminated by the respondent’s manager and told to surrender all company property and leave the station. No letter of termination of employment was issued and neither was he given the reasons for termination.

The claimant in his claim submits that he applied for the position of pump attendant and was interviewed by Mr. Caleb Mungatia whereby he was hired. He issued a guarantee of Kshs.50,000.00 through a Mr. Kamande of P. O. Box 52428-00200 Nairobi. He was also a member of the NSSF.

The claimant further submits that he was wrongful and unlawfully terminated without observance of the law, no termination letter or even reasons for termination. Again, he was not awarded an opportunity to be heard. He also submits that he worked continuously for one year and two months in which time he did not take a break. He was also neither awarded leave or paid in lieu thereof nor was he paid for working during public holidays or even overtime. This he submits is a violation of the Employment Act.

He also submits that the respondent has continued to taunt him on his disability to overcome his financial muscle and therefore the fatality of seeking justice. He prays for;

- 1. Notice One (1) month Kshs. 9,120.00
- 2. Public holidays worked 11days x9,120 x 2

3.	House Allowance(9,120 x15%)=1,190x13months	Kshs.15,470.00
4.	Outstanding Leave(2) 9,120 x2	Kshs. 7,931.00
5.	Underpayments as per wages order (9,120-8100)x13months	
		Kshs. 13,260.00
6.	Certificate of service	
7.	12 months maximum compensation for wrongful termination as per the employment act.	
	12x9,120	= <u>Kshs.109,440.00</u>
	<b>GRAND TOTAL</b>	<b>=<u>Kshs. 162,937.00</u></b>

The respondent on the other hand denies the claim and prays that he same be dismissed with costs to himself. He also raises a counterclaim for Kshs. 28,527 being the value price of full products sold and dispensed by the claimant and which amount the claimant failed to remit to the respondent company/employer.

Whereas the respondent admits the facts of the employment contract, he submits that it was on express and an implied term of the contract of this employment that the claimant would perform his work diligently and ensure that he (respondent) was promptly paid for all fuel products sold and indeed remitted the sale products to the respondents coffers which was not often the case. This also implied timelines in reporting to work and no absenteeism.

It is the respondent's submission that during the tenancy of the claimant's employment, he sold and dispensed fuel products but did not remit the sale proceeds thereby leading to cash deficits on the part of the claimant. Particularly, on 2nd March, 2010, the claimant failed to remit and or explain the whereabouts of Kshs. 10,889.00 being value of such products sold. As at 2nd March, 2009 the claimant had an accrued deficit of Kshs. 39,277.00 which monies he had not remitted to the respondent. He (claimant) would not explain this cash shortfall but requested for time off to repay the deficit amount which he was granted. On 11th March, 2009, he repaid Kshs. 10,700.00 leaving a balance of Kshs. 28,527.00 which remains unpaid to date.

The respondent further states that he paid the claimant one month's salary whereby the claimant signed a discharge but the claimants employment records with the respondent mysteriously disappeared from the respondent's office.

Further, the claimant salary was Kshs. 7,000.00 and a house allowance of Kshs. 1,100.00 all totaling to Kshs. 8,100. On the issue of continuous service, this is denied. The respondent submits that the claimant worked during normal working hours and was given off duty in accordance with the law. He would at times report to work later and even absent himself from work without cause and that his NSSF deductions were remitted thereto.

The respondent at paragraph 21 of the statement of defense and counter claim disapproves a case for wrongful and unlawful termination of the claimant's employment as follows;

- a. *The claimant was paid 1 month's salary and he signed a discharge.*
- b. *The claimant was entitled to and actually took one rest day in every period of 7 days. The claimant took off duties as required by law during the time he worked for the respondent.*
- c. *The respondent paid the claimant a house allowance of Kshs. 1,100/- per month which is more*

*than 15% of the claimant's basic salary during the period the claimant worked for the Respondent.*

*d. The claimant took his leave with full pay during the period he worked for the respondent. The claimant has no outstanding leave days.*

*e. There was no underpayment of the claimant's wages.*

*According to the regulation of wages (General) (Amendment) Order 2006 which was operational as at the time the claimant left the respondent's employment, the claimant's monthly wages (exclusive of house allowance) ought to have been Kshs. 6,721/=. The respondent paid the claimant a salary of Kshs. 7,000/= plus a house allowance of Kshs.1,100/=*

*f. The claimant's salary of Kshs. 7,000/= plus a house allowance of Kshs. 1.100/= was mutually agreed with the respondent.*

*g. The termination of the claimant's services was not wrongful and therefore he is not entitled to 12 months compensation or any other compensation.*

In the penultimate, the respondent makes a Counter-Claim for Kshs. 28,527.00 to himself on grounds cited in the foregoing parts of this judgement.

The matter severally came before court for hearing and mention until the 18 October, 2010 when the claimant testified at the onset of the hearing. He stated that he was employed as a pump attendant by the respondent on 1 December, 2006 but on 20 March, 2009, he was instructed to leave work by Mr. Yasin. He denies taking any money from his employer or owing any or at all. He submits that he was paid Kshs. 8000.00 salary and Kshs. 1,100.00 house allowance and states that the claim for Kshs. 9,200.00 was on the advice of his counsel. In cross examination, the claimant in a curious manner denies all allegations against him by the respondent.

At a further hearing on 7 June, 2011, DW1, Yasin Mohamed Jamal testified in favour of the defense. He submitted that he is a businessman and runs the respondent's petrol station. He knew the claimant who was his employee with effect from December, 2006 as a pump attendant. His duties were to sell petrol and lubricants and immediately surrender the proceeds of such sale to the respondent's office. He was not to handle sums of more than Kshs. 5,000.00. The respondent's witness further reiterated his defense on the issue of salary and denied any underpayments. The claimant was not an honest person and always incurred cash deficits culminating in Kshs. 39,227.00 as at the date of termination of employment on 2nd March, 2009. On this particular date, he had a cash shortfall of Kshs. 10,899 and would not satisfactorily explain the same. He on insistence paid or refunded this leaving a deficit of Kshs. 28,527.00.

On termination the claimant was issued with a termination letter explaining why his services were terminated and paid for two (2) days of March, 2009. He was also paid Kshs. 8,100,00 being salary in lieu of notice and signed a discharge voucher which he conned away with himself.

The claimant enjoyed paid leave. He also refused to work during the night shift and occasionally absented himself from work. He was issued with several and brings but to no avail. He prayed for the counterclaim amounting to Kshs. 28,527 which he submitted was acknowledged by the claimant.

On cross examination, DW1 comes out in his testimony of the eventualities of the employment of the claimant. He comes out as a reliable witness as opposed to the claimant who does not seem reliable.

The issue for determination arising hereof are:

1. Was the termination of the claimant's employment wrongful, unfair and unlawful?

2. Is there a refusal of payment of terminal dues to the claimant?
3. Is the claimant entitled to the relief sought?
4. Is the respondent entitled to the Counter-Claim?
5. Who bears the costs of this case?

The 1st issue for determination is whether the termination of the claimant's employment was wrongful, unfair, and unlawful. The claimant denies the issue of a termination letter but the respondent indeed submits that this was had and also that the claimant acknowledged and did a discharge for payments but those records thereafter disappeared from the custody of the respondent. This is annexed at page 22 of the respondent's defense in reply to claimants claim and counter-claim.

The respondent's testimony demonstrates a case of a miscreant employee who is dishonest, duty less and careless as is expressed in the various annexure on cash shortfalls/deficits and absence and or lateness to duty. The claimant in rebuttal of this overwhelming evidence only issues outright denials of the same. This is not it.

I therefore find the termination of the claimant's employment legitimate and lawful and hold as such. The claimant has been ably depicted as an unreliable employee who was all this time a liability to the respondent and therefore the ultimate off loading by the respondent.

The 2nd and 3rd issues from the foregoing fall by the wayside. On a balance of probabilities, the issue of payment of terminal dues favours the respondent's version as against the claimant. It would appear that he was paid his terminal dues and could have been instrumental in the loss of records on himself held by the respondent. Why would we not have other case of lost employee records? There is therefore no refusal to pay the claimant his terminal dues and neither is he entitled to the relief sought. He only comes out as a smart Alec out to treat the entire world in disguised melodrama.

The respondent in evidence and documentation demonstrates a case for the counter claim amounting to Kshs. 28,527.00. He should even count himself lucky to have squeezed Kshs. 10,700.00 out of the claimant on the 11th March, 2009. This was indeed a miracle.

I am therefore inclined to dismiss this claim with costs to the respondent. Costs shall ordinarily follow the event. So is the instant case.

The respondent's Counter-Claim for Kshs. 28,527.00 is therefore allowed.

Dated, delivered and signed this 12th day of June, 2013.

**D.K. Njagi Marete**

**JUDGE**

**Appearances**

1. John Obure instructed by Kenya Petroleum Oil Workers Union for the claimant.
2. Kefa Ombati instructed by Kefa Ombati & Company Advocates for the respondent.