



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 317 OF 2012

PETER JOHN MWANGI KAMAU.....CLAIMANT

VS

AUTOLITHO LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 21st February 2012, the Claimant sued the Respondent for failure to pay terminal dues. The Respondent filed a Memorandum of Reply on 21st May 2012 and the matter was heard on 15th May 2013, with Mr. Wanjama instructed by Wanjama & Co Advocates appearing for the Claimant and Mr. Okao instructed by Okao & Co Advocates appearing for the Respondent. The Claimant testified on his own behalf and the Respondent called its Accountant, Moses Mugo Njuguna. Both parties filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent on 6th October 2008 in the position of Sales Executive at a gross monthly salary of Kshs. 100,000. By a letter dated 1st November 2011, the Claimant gave the Respondent a one month's notice of termination of employment. The notice was to run between 7th November and 7th December 2011. At the time the Claimant issued the termination notice to the Respondent, he was on annual leave and was scheduled to resume duty on 7th November 2011, which was the effective date of the notice period.

3. The Respondent did not respond to the Claimant's notice and did not pay him his terminal dues. The Respondent also withheld the Claimant's salary for October, November and December 2011. The Claimant testified that when he resumed duty on 7th November 2011, he was refused entry into the Respondent's premises and was therefore unable to serve his notice.

4. The Claimant therefore claimed the following:

- a. Salary for October and November 2011.....Kshs. 200,000
- b. Salary for 7 days in December 2011.....25,000
- c. Payment in lieu of leave (47 days).....156,670
- d. Severance pay.....150,000

- e. Refund of expenses incurred on Respondent's behalf.....25,000
- f. Refund of late payment charges on SACCO loan and credit card...50,000
- g. Costs and interest
- h. Any other relief the Court may deem just to grant

The Respondent's Case

5. In its Memorandum of Reply, the Respondent accused the Claimant of seeking employment from the Respondent's competitors contrary to the terms of his employment. According to the Respondent, since the Claimant resigned while on leave, he was not entitled to terminal dues. Further, the Claimant had exhausted all his leave days and was therefore not entitled to pay in lieu of leave.

Findings and Determination

6. The first issue for determination in this case has to do with the circumstances surrounding the termination of the Claimant's employment. It was the Claimant's case that while on leave, he gave due notice to the Respondent of his intention to terminate his employment. The notice was to run from 7th November to 7th December 2011 and the Claimant resumed duty on 7th November 2011 to begin serving his notice. He was however prevented from serving notice by the Respondent who refused him entry into his place of work. The Claimant testified that he made eight visits to the Respondent's premises but he was denied access and thus denied the opportunity to serve his notice.

7. The Respondent did not controvert the Claimant's evidence but maintained that since the Claimant resigned while on annual leave, he was not entitled to any terminal dues. The Respondent however admitted in final submissions that the Claimant is entitled to two months' salary subject to statutory tax.

8. The Court does not find any legal basis for the Respondent's position that the Claimant is not entitled to terminal benefits because he issued his resignation notice while on leave. The Court also finds the Claimant's evidence that he was denied the opportunity to serve notice credible. Apart from its statement that the Claimant had exhausted his leave, the Respondent did not produce any leave records in support of its statement that the Claimant had exhausted his leave. The claim for 47 days' pay in lieu of leave is therefore allowed.

9. The Claimant testified that he used to use the Respondent's motor vehicles to perform his duties. The claim for refund of fuel and related expenses is consistent with the duties of a Sales Executive. I therefore allow a refund of Kshs. 23,630. The claim for airtime refund was not proved and is disallowed. The Court found no basis for the claims for severance pay and late payment charges on SACCO loan and credit card, which claims are also dismissed.

10. The final effect of this Award is as follows:

- a) Salary for October and November 2011.....Kshs. 200,000
- b) Salary for 7 days in December 2011.....23,333
- c) Payment in lieu of leave (100,000x47 days).....156,667

d) Refund of expenses incurred on Respondent's behalf.....23,630

Total.....403,630

The Respondent will pay the costs of this case.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JULY 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....**Claimant**

.....**Respondent**