



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 76 OF 2013

MICHAEL ALOYO ULAGECLAIMANT

VERSUS

GITONGA STANLEYRESPONDENT

J U D G M E N T

The claimant has sued the respondent claiming employment terminal dues amounting to ksh.289,582/- plus costs and interest. The gravamen of his case is that he was unfairly terminated from his employment by the respondent after 9 years service.

The respondent has denied liability and accused the claimant of desertion of duty which led to the summary dismissal. The respondent had also accused the claimant of rudeness and stealing of the respondent's golden bracelet worth 200,000/-. The case was heard on 27/5/2013 and 4/6/2013 when the claimant and respondent testified as CW1 and RW1 respectively.

CW1 told the court that he was employed by the respondent in January 2004 and worked continuously until 11/6/2012. He did general duties including security duties during the day, groundsman, car cleaner and a messenger. That his starting salary was ksh.3000/ per month which was later increased to ksh 7000/.

That he never went for leave, holidays or off days for the 7 years he served. On 7/6/12 he asked for permission to travel home at Kisumu for funeral but the respondent refused and threatened to fire him and replace him with another person if he insisted on going for leave. That he continued with his duties and on 11/6/2012, on a Sunday he reported to work at 6.00am as usual to relieve the night guard only to find a new person having taken his job and who told him to wait outside the gate until the respondent woke up at 10.00a.m.

That he complied and at 10.00 a.m. the respondent send the new guard to usher in the claimant. That the respondent asked him whether he had not gone home and the claimant answered that he had no money enough for the journey's fare and that he had rescheduled the journey to end of June 2012.

The respondent then told claimant his job was over but upon enquiry he told the claimant that he was replacing the old workers and his word was final. That the respondent refused to pay the terminal dues to the claimant and ordered the guard to remove him from the premises.

He prayed for his dues and denied the respondents allegation that he stole his property. That according to him there is always security checks before one leaves the gate plus CCTV cameras which

could have provided the evidence of the stealing, if any. On cross examination the claimant maintained that the respondent was a good man until he was drunk when he changed drastically. He further confirmed that he suffered from TB before he was employed by the respondent and denied being hospitalized at the expense of the respondent. According to him he suffered Pneumonia while in the respondent's employment and the respondent's wife took him to hospital to check whether he had TB or HIV and none was found.

On further cross-examination he maintained that he worked for 9 years non stop without leave, off or holiday a fact that led to problems with his wife with whom they later parted.

RW1 told the court that the claimant was his employee on part-time basis between 2003 and 2009 and then full time basis from 2009 to 2012. That during his part time employment, the claimant was also working for an Israelite in the neighbourhood at Vescon Estate. That the Israelite had deserted the claimant without pay and while suffering from TB.

That in 2009 the Israelite sold his house and went away then the respondent fully employed the claimant as caretaker in his compound. That he also treated the claimant as a family member by giving him household goods, bicycle, and medication.

He further told the court that the starting salary for the claimant was Ksh3000 but later increased to ksh7000 per month. He also confirmed that in May the claimant sought leave but it was denied until a Mr. Franco returned home from where he had gone to take his wife to hospital. That when Franco delayed to return, the claimant disappeared for two days and when he returned he sat outside the gate demanding his salary and his belongings because he wanted to go home. That the respondent's wife convinced him to get into the compound and the respondent paid him the May 2012 salary plus another 7000/ because he was traveling far. That he however was not satisfied because he was demanding for an advance of ksh.20,000/-. That the respondent added him another ksh.4000 and the claimant left. That thereafter the claimant made calls to the respondent insulting him and threatening him with beating and with mobilizing of thugs to attack him.

The RW1 added that after two months the claimant send a friend Mr. Maraga to plead with the respondent for reinstatement to work but the respondent declined. According to the respondent, the claimant left job voluntarily and was paid all his salary plus salary advance for one month plus a further Ks.4000.

He denied that the claimant was working on Sundays and contended that whenever he worked on Sundays he was paid Ksh.1000/- per day outside his salary. That the claimant never worked continuously and indeed there are days he went off due to ill-health because of spitting blood.

RW1 however admitted that he owed leave to the claimant for the period between 2009 and 2012 when he served on full time basis.

On cross-examination he could not prove that he rent a residential house for the claimant. He could also not produce the medical bills and proof of payment on behalf of the claimant. He however admitted that he took the claimant to hospital to check whether he had TB or H I V. He also confirmed that Franco was constructing at the respondents farm at Kikambala. That Franco was still working for the respondent at Kikambala. That he confirmed being always armed with a pistol.

He confirmed that there was a CCTV camera in his compound but insisted that they cannot see inside a car. He further denied that his guard searches workers whenever they went out of the gate. He also confirmed that he did not report to the police to have the claimant arrested for stealing his property worth 180,000/-.

On further cross-examination the RW1 maintained that the claimant became rude after he became healthy. He confirmed that he also dismissed a Mr. Koome after a few months of service because he was rude. He however denied fighting another employee called Dickson. He insisted that he continued to

stay with the claimant despite being rude.

On the NSSF issue, the RW1 maintained that he used to pay for the claimant but could not prove with records. He denied liability to pay terminal benefits to the claimant because he is the one who deserted work. After the close of the hearing both parties filed closing submissions.

I have carefully gone through the pleadings and carefully considered the evidence plus the closing submissions. The jurisdiction of the court over the dispute is not in question. The issues for determination are:

- 1. whether the claimant was in the respondent's employment continuously between January 2004 and June 2012**
- 2. whether the respondent wrongfully and/or unfairly terminated the claimant employment on 11/6/2012.**
- 3. whether the relief sought ought to issue.**

The answer to the first issue is in the affirmative. The claimant's evidence is that he was verbally recruited by the respondent to do manual general duties in his compound for a monthly pay of Ksh.3000 since 2004 and worked until June 2012 when he was dismissed without notice and for what looks like his request for leave. The RW1 has confirmed that engagement save that he insists that the period between 2004 – 2009, the employment was part-time. There was no records produced to disprove the claimant allegation. Section 9 and 10 of the Employment Act 2007 puts the burden of preparing employment written contract on the employer and in default, the employer will be duty bound to disprove all allegations regarding a term of the contract of employment by the employee in court proceedings.

In my view the said burden was not discharged by the documentary evidence or otherwise. The court was only left with the claimants word against that of the respondent. Consequently, I hold and find that the claimant served the respondent continuously between January 2004 and June 2012.

As regards the second issue of wrongful or unfair termination, the evidence on record reveals that the claimant was never given his rights under Section 41 of the Employment Act. Even if he had indeed deserted work, the claimant ought to have given him a hearing on the matter before summary dismissal.

According to the claimant the respondent had threatened to fire him if he went on leave. That he could not have traveled to his home in Kisumu due to lack of money for fare and had therefore postponed it to end of June 2012. To him it was a drastic decision by the respondent to have replaced him without notice and denied him access to work place on 11/6/2012. The only reason given for termination was that the old employees were being replaced by new ones and the RW1's word was final on the matter. To that extend the termination was wrongful and unfair.

It was wrongful because considering the period of service and the fact that his salary was payable on monthly basis he was entitled to a one month notice before termination. Secondly the reason given was not justifiable and reasonable. The court has rejected the explanation by RW1 that the claimant deserted work. He did not call any other witness to prove that or at least produce some evidence to show that he had attempted to look for the deserted claimant.

I have also rejected the RW1's desperate attempt to show that he had done so much good deeds to the claimant to warrant him deny certain basic rights of an employee like leave and right to fair termination of employment. I have also rejected the RW1's effort to accuse the claimant for stealing and rudeness. In cross-examination the RW1's character was brought to question as a ruthless armed boss who cannot condone rude employees especially when drunk. One wonders with the claimant why would the respondent not report the crime of theft of ornaments worth Kshs. 180,000/? And how did the claimant steal from a compound with CCTV- cameras and 24 hours guards?

The court finds that the termination of the claimant's employment by the respondent was unfair within the meaning of Section 43 and 45 of the Employment Act. The RW1 cited different reasons for

termination from the ones he raised in his defence and failed to justify the same in his testimony.

Lastly I turn to the issue of reliefs sought. The claimant is awarded one month salary in view of my earlier findings. I will also award service pay for the 8 complete years of service between January 2004 and June 2012 at the rate of 15 days per year of service.

I decline to award any pay in lieu of holidays and rest days for want of particulars and evidence. The court finds it difficult to believe that a reasonable employee in a free society can work for close to 9 years without a rest day or holiday. I have however awarded pay in respect of the accrued leave for the entire period of service which is 8 years 6 months. The law provides for 21 days leave per year which works to 178.5 accrued leave days. The claimant will also receive salary arrears for the 11 days worked in June 2012.

In addition, I have considered and awarded prayer 5 of the suit by awarding the claimant a 12 month gross salary for unfair termination. The jurisdiction to award the same is derived from Section 12 of the Industrial Court Act 2011. I consider the said award fit because the summary dismissal was prompted by the claimant's pursuit of his employment right to leave. It is now trite that any dismissal which involves an employee asserting certain statutory rights or in claiming that his statutory rights as an employee have been breached amounts to unfair termination automatically. Section 46(b) specifically identifies the right to go for leave as one of such reasons which would render unfair a dismissal.

The last reason why the court has exercised the discretion to grant the relief for unfair termination is because the claimant was not represented by counsel and as such he was a deserving case in the context of social justice which is the core purpose for this special court.

In summary therefore I enter judgment for the claimant and against the respondent as follows:

- a. **D declaration that the claimant was employed by the respondent for a continuous period of 8 ½ years**
- b. **Declaration that the termination of the claimant's employment by the respondent was unlawful, wrongful and unfair.**
- c. **The respondent is ordered to pay to the claimant the following**

(I) one month salary in lieu of notice	7,000
(ii) Service pay for 8 complete years.....	28,000
(iii) accrued leave (178.5 daysx21/30x7000).....	41,650
(iv) Salary arrears for 11 days in June 2012.....	2,561.70
(v) 12 month salary for unfair termination	84,000
	<u>163,216.00</u>

The claimant will also have costs and interest.

Orders accordingly

Signed dated and delivered this 12th July 2013

ONESMUS MAKAU

JUDGE