



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 73 OF 2013

JAMES ODERO MWANIKA.....CLAIMANT

-VERSUS-

N. M. SHAH.....RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 28.03.2013 through M.G. Ntabo & Company Advocates. The amended memorandum of claim was filed on 27.05.2013 and the claimant prayed for:

- a. **Wages for 14 days worked in March 2013 – Kshs.4,454.80.**
- b. **One month salary in lieu of the termination notice – Kshs.9,545.00.**
- c. **Prorate leave due and not taken for the three months worked – Kshs.1,909.20.**
- d. **Overtime worked and not paid – Kshs.77,371.20.**
- e. **12 months compensation – Kshs.114,540.00.**
- f. **Total claim – Kshs. 207, 820.20.**
- g. **Letter of termination and reasons detailing the termination.**
- h. **Certificate of service.**

The respondent filed the reply to the statement of claim on 23.04.2013 through Sheth & Wathigo Advocates to which the claimant filed the reply on 02.05.2013. The amended reply to the statement of claim was filed on 17.06.2013. The respondent prayed that the claimant's claim be dismissed with costs.

The case was heard on 18.06.2013 when both parties gave evidence to support their respective cases and the respondent called one witness, Richard Kipkoech Langat, the respondent's day guard.

The respondent employed the claimant with effect from 1.07.2009 at the respondent's distributorship shop at Kenyatta Avenue in Nakuru town as per the letter of appointment attached on the memorandum of claim. The claimant was employed as a general labourer with duties entailing but not restricted to loader, off-loader, cleaner, sweeper, messenger, turn-boy, receipt and delivery. The claimant served at the shop and in the field on long goods' distribution journeys. The claimant worked from 9.00 am to 6.00 pm with a one hour lunch break. On field work, the journey started at 5.00 am and the claimant could spent nights out or be back in Nakuru as late as 10.00 pm. The respondent paid a night-out allowance of Kshs.400.00. It was the claimant's case that he had not been paid the overtime served.

On 14.03.2013, the respondent assigned the claimant the task of clearing and cleaning the respondent's undeveloped parcel of land within Nakuru town near a supermarket called Woolmart. The work entailed cutting of marauding weeds on the parcel and gathering the same to keep the parcel hygienic and plain.

At about 4.00 pm, the respondent summoned the claimant at the respondent's shop. The respondent had visited the parcel of land earlier in the day and was not happy with the claimant's quality of performance of the task as assigned. The respondent engaged the claimant in a fiery discussion about the respondent's dissatisfaction about the claimant's performance.

The claimant's evidence is that the respondent then asked him to leave employment because there was no more employment for the claimant. The claimant testified that the respondent told him three times in Swahili that there was no job, thus "**Hakuna Kazi**".

The respondent testified that he never terminated the claimant's employment but that the claimant walked away from employment after the performance meeting and encounter on the evening of 14.03.2013 at which the respondent told the court he had explained to the claimant the areas for improvement. The respondent stated that if he intended to terminate the employment, he would have issued a letter of termination but which he had never issued. The respondent testified that he had not terminated the employment and he was therefore not liable to pay the one month pay in lieu of the termination notice. The respondent said he was surprised that the claimant walked away in disobedience during the performance meeting on the material evening and which was a serious misconduct but he did nothing about it.

The first issue for determination is whether the claimant was dismissed verbally or not. There is no dispute that the respondent leveled accusations of poor performance against the claimant. It is not disputed that after 14.03.2013, the claimant never reported to work. The alleged poor performance and the subsequent alleged misconduct of absence from duty without leave or reasonable or lawful cause, in the opinion of the court, amounted to sufficient grounds for the respondent to initiate disciplinary action as envisaged in section 41 of the Employment Act, 2007. The respondent failed to invoke his authority under the section and such failure, in the opinion of the court, renders credence to the claimant's evidence and assertion that he had been orally terminated on the evening of 14.03.2013. The respondent cannot be trusted in stating that the claimant walked away on him at the performance meeting and subsequently was consistently absent without the respondent invoking the employer's inherent and statutory authority to terminate the employment relationship in view of such otherwise gross misconducts on the part of the claimant. The court upholds its opinion in Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru at page 7 to 8 of the judgment where it was stated:

“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.”

Thus, to answer the first issue for determination, the court finds that the claimant's employment was verbally terminated at the meeting of the evening of 14.03.2013.

The next question for determination is whether the termination was fair. It is obvious that the claimant was not afforded the notice of the poor performance and a hearing as envisaged in section 41 of the

Employment Act, 2007. The court finds that the termination was unfair and in the circumstances of this case, six months salaries being **Kshs.57,270.00** at the rate of the last monthly pay of Kshs.9,545.00 will meet the ends of justice. In making that finding, the court has taken into consideration the otherwise cordial relationship between the parties as demonstrated by the respondent's friendly loan of Kshs.8,000.00 in favour of the claimant shortly prior to the termination date.

The next issue for determination is whether the claimant is entitled to the other remedies as prayed for in the amended memorandum of claim. The court makes the following findings:

- a. The Wages for 14 days worked in March 2013 is not disputed and the court finds that the claimant is entitled to **Kshs.4,454.80** as prayed for.
- b. For one month salary in lieu of the termination notice being **Kshs.9,545.00**, the court finds that the claimant is entitled as prayed for because the termination was without the agreed one month termination notice.
- c. The prorated leave due and not taken for the three months worked is not disputed and the court finds that the claimant is entitled to **Kshs.1,909.20** as prayed for.
- d. The claimant prayed for overtime worked and not paid being Kshs.77,371.20. For the respondent, it has been submitted that the claimant testified that he worked from 9.00 am to 6.00 pm with a one hour lunch break. The court finds as much and the claim for overtime has not been established. It will therefore fail.
- e. The claimant admitted that he owed the respondent Kshs.6,000.00 and the court finds that the respondent is entitled to recover that money as the court shall deduct the same in arriving at the dues payable by the respondent to the claimant.
- f. The court finds that the claimant is entitled to the certificate of service as provided for in section 51 of the Employment Act, 2007.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. The respondent to pay the claimant **Kshs.67,179.00** by 1.09.2013 and in default the respondent to pay interest at court rates from the date of the judgment till full payment.
- b. The respondent to pay costs of the case.
- c. The respondent to deliver to the claimant the certificate of service by 1.09.2013.

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

BYRAM ONGAYA

JUDGE