



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 154 OF 2012

BETWEEN

JARED MARANGA ANYONA

..... CLAIMANT

VERSUS

TARI SINGH THETHY

.....

RESPONDENT

Rika J

CC. David Kipsang'

Jared Maranga Anyona the Claimant in Person

Mr. Litoro instructed by Kaplan and Stratton Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

DATE CLAIM FILED: 3RD FEBRUARY 2012

DATE PROCEEDINGS CLOSED: 16TH MAY 2013

DATE OF DETERMINATION: 1ST JULY 2013

AWARD

1. Jared Maranga Anyona filed this Claim against his former employer Tari Singh Thethy, alleging his contract of employment was irregularly terminated. He asks the Court to grant him terminal benefits; compensatory damages; costs; interest; and any other discretionary reliefs.
2. The Respondent filed a Statement of Reply, pleading that the Claimant was initially employed by a company called Fitness Matters Kenya Limited as a Guard or Helper, on 2nd January 2007. He stopped working for the company in February 2010, and was taken in by the Respondent, in the same capacity, around March 2010. He deserted work on 9th August 2011. His Claim is unwarranted.

3. Hearing opened and closed on 11th February 2013. Anyona gave evidence in support of his case, while Thethy gave evidence and called one other witness, his Co-Director at Fitness Matters Limited, Edward Ndwiga. The matter was last mentioned on 16th May 2013, when the Parties confirmed they had filed their closing arguments, and the Court advised its decision would be given on 1st July 2013.

4. The Claimant testified that he was employed by Thethy as a Guard, on 1st January 2000, at a monthly salary of Kshs. 4,000. The salary was later raised to Kshs. 7,560, which was the last rate enjoyed by Anyona. On 9th August 2011, Thethy told Anyona that Anyona had become a madman. The Claimant was asked to leave. Thethy did not want to have a madman roaming his compound. The Claimant worked continuously. There was no break in the service. He was not issued a letter of employment until 2006.

5. On cross-examination, the Claimant told the Court that his employer was Thethy. There was a Gym called Fitness Matters, within Thethy's residence. Anyona cleaned the Gym. The Claimant conceded he signed a letter of appointment with Fitness Matters Limited, dated 2nd January 2007. He is conversant with the contents of that letter. He could not tell how long he worked as a cleaner at the Gym. He was working there immediately before termination. The Gym closed in 2010, but Anyona testified that he continued working there. He did not know the details of the computations contained in his prayers to the Court; these were done for him by the KITUO CHA SHERIA, where he sought assistance from, before coming to Court. Anyona asks the Court to grant him:-

- a. 1 month salary in lieu of notice at Kshs. 7,560;
- b. Accrued leave at Kshs.57,750;
- c. Service pay at Kshs. 16,562;
- d. Unremitted N.S.S.F deductions at Kshs. 15,200;
- e. House rent allowance at Kshs. 155,250;
- f. 12 months' salary in compensation at Kshs. 90, 720;

TotalKshs. 342,982

- g. Costs;
- h. Interests; and,
- i. Any other relief the Court may find fit to grant.

6. Thethy told the Court he came to know Anyona when the latter worked for Fitness Matters Limited, a Company where Thethy was Co-Director with Ndwiga. Thethy owned the property from where the business operated. When the Health Club closed in 2010, Thethy employed Anyona. His contract with Fitness Matters was signed on 2nd January 2007. His salary was Kshs. 5,600. He was a Guard-cum-Cleaner. He was signed by Thethy's son, who was assisting Ndwiga with the Health Club. He may have cleaned the Gym after it closed. There was no business running at the Gym however. Thethy denied that he employed Anyona in 2000. The Claimant was paid a consolidated monthly salary of Kshs. 7,000. Thethy did not remit N.S.S.F dues, because Anyona was trying to collect the previous dues paid by Fitness Matters. He was paid his salary and signed the vouchers in full and final settlement. He left employment on 9th August 2011, never to return. Thethy did not have his contact. In cross-examination, Thethy testified he did not employ Anyona in the year 2000.

7. Edward Ndwiga testified that he runs a Sale of Motor Vehicle Business, and a Health Club. He started the Health Club in 2007. The Health Club was called Fitness Matters. He gave Anyona a letter of appointment dated 1st July 2007. His role was that of a watchman and helper. The Health Club was at Westlands. Thethy was a Co -Director. There was no other business. Anyona worked from 2007 to 2010. He was paid Kshs. 5,600 which was later adjusted. The Company has not been sued. Ndwiga was informed by Thethy about this Claim. The Club closed around 2010. Its employees left. N.S.S.F and other statutory benefits were paid. Thethy has never been a Managing Director. Ndwiga told the Court on cross-examination that he had no idea where Anyona went after the Health Club closed. The witness emphasized that he, and not Thethy, was the engine driving the Health Club. Anyona was Guard/ Helper. He carried no other duties.

The Respondent urges the Court to dismiss the Claim with costs.

The Court Finds and Awards-:

8. The Court is persuaded by the evidence of the Claimant that he was initially employed by Thethy effective from January 2000. The Respondent later opened a Health Fitness Business within his residence. Anyona, moved to work for the Health Club, which was run as a Limited Liability company, with two Directors, Thethy and Ndwiga. The Health Club opened in 2007. The Claimant was formally employed on 2nd January 2007 under the Health Club. The letter employing Anyona was signed by Thethy's son Arjan S. Thethy, not the Senior Thethy or Ndwiga. It was not even clear from the letter of employment if Anyona was to serve as the Gym Instructor, Guard or Cleaner. He appears to have been a handyman for Thethys. When the Health Club folded in 2010, Anyona continued to work. The Respondent conceded the Claimant worked after the Health Club closed, but wishes the Court to believe that, this was the first time Anyona worked for Thethy. He says that Anyona was employed by him, in 2010 and worked for 1 year up to 9th August 2011 when he deserted duty. This version by Thethy was given strong support by Ndwiga.

9. The Court prefers to believe the employee's version. Thethy remained the person behind the various business forms operating at his residence. The Respondent operated as a commercial, as well as family / domestic enterprise. Initially from 2000 to 2007, the Claimant served as a Cleaner / Guard, serving Thethys domestically. Thethy then opened the Health Club, operated by a Limited Liability Company, and took Anyona there to render the same services of Cleaner/ Guard. The Club closed and the Claimant continued working for Thethy, as Cleaner /Guard. Other employees left after the Club closed, but Anyona remained where he had always been from 2000. He left in August 2011, after some differences arose between him and Thethy. In the view of the Court, not much weight should be attached to the legal separateness of Thethy and Fitness Matters Kenya Limited, advanced cleverly by Ndwiga in his evidence. The two, Thethy and Fitness Matters Limited, were reincarnations of the same enterprise, the main employer at all times, being Thethy. The involvement of Arjan Thethy, buttresses the view that this was an enterprise running within a family domestic set up, with the incorporation of Fitness Matters Kenya Limited and involvement of Ndwiga, aimed at perhaps growing and strengthening the enterprise from its cottage roots, or aimed at avoiding regulatory burdens. In all circumstances, the senior Thethy was the employer with the strongest connecting factors to Anyona, and the man in control of all the business and domestic activities taking place at his residence, to which Anyona was called upon to participate as an employee.

10. Thethy states that Anyona just deserted on 9th August 2011. The Claimant had worked from 2001. He had remained behind when the Club closed. It is difficult to agree with Thethy that Anyona just woke up and left employment one day. Thethy testified he did not have Anyona's contact, and did not therefore seek him out, to find out why he deserted. On 17th August 2011, barely a week after the alleged desertion, the Ministry of Labour had written to Thethy on the instructions of Anyona. He replied on 24th August 2011 stating that Anyona's contract had not been terminated, but he had failed to attend to duty for over a month. This was not factually correct. The Respondent agrees the Claimant last worked on 9th August 2011, so that even if he deserted on this date, it would not be correct to say on 24th August 2011, that the Claimant had failed to attend duty for over a month. Secondly, it was open for Thethy to ask the Ministry of Labour to advise the Claimant to avail himself at the workplace for duty, or to face Thethy in a disciplinary process over the offence of desertion. Thethy's lack of the Claimant's contact was not an insurmountable barrier, in reaching Anyona. Thethys were invited to attend conciliation meetings with Anyona by the Labour Office. Lack of the Claimant's contact, cannot have been a barrier for Thethy in reaching the Claimant after the alleged desertion. The evidence by the Claimant that Thethy told him to make himself scarce from Thethys' residence, because Thethy did not wish to host a madman there, sounds more persuasive than the evidence of desertion. The Respondent did not justify termination of the Claimant's contract of employment, as demanded by Sections 43 and 45 of the Act. **The Claimant is entitled to compensation for unfair termination which the Court grants at 5 months' salary computed at the rate of Kshs. 7,560 per month, totaling Kshs. 37,800.**

11. **The Claimant is entitled to notice pay, which the Court allows at Kshs. 7,560.** The Respondent conceded he was not remitting the Claimant's N.S.S.F contributions at the time of termination. In some of the salary vouchers, the Respondent refers to the Claimant as a casual employee. There was no payment of N.S.S.F contributions, probably because the Respondent felt he had no obligation to pay N.S.S.F dues for an employee he considered to be casual. **The Claimant is eligible for service pay, which the Court grants at the rate prevailing in the Private Security Industry of 18 days' salary for each of the 10 completed years or service, at Kshs. 52, 338.** The claims for accrued annual leave, N.S.S.F refunds, and house rent allowance were not well articulated in the pleadings and evidence of the Claimant. These three claims are disallowed. In the end, the Court Orders:-

[a] Termination of the Claimant's contract of employment by the Respondent was unfair;

[b] The Respondent shall pay to the Claimant compensation, notice and service pay, added up at Kshs. 97,698, within 30 days of the delivery of this Award;

[c] No order on the costs

Dated and delivered at Nairobi this 1st day of July 2013

James Rika

Judge.