



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO 57 OF 2013**

**BERNARD KAZUNGU .....CLAIMANT**

**VERSUS**

**MAMBO ITALIANO LTD .....RESPONDENT**

**J U D G M E N T**

The claimant has sued the respondent, his former employer claiming terminal benefits for unlawful termination of employment on 6/11/2009. The respondent has denied liability and accused the claimant for terminating his own services without notice to her after going for his annual leave.

The case was heard on 16/7/2013 when the claimant testified as CW1 and the respondent was represented by her General Manager Mr. Peter Huthu as RW1. CW1 told the court that he was employed by the respondent on 10/11/2004 orally but in 1/11/2005 he was given a written contract which he produced as Exhibit 1. That after the lapse of the contract he continued working upto 2008 when the respondent gave him a written contract for permanent employment effective from 1/6/2008 but like other workmates, he declined because it did not take into consideration the period before then.

He however continued serving until 6/11/2009 when he was dismissed without notice. That on the said date the manager called him into his office and told him not to report to work during his shift until further notice. That no reason for and disciplinary hearing was given for the termination of his employment and he was not paid any terminal dues even after several demands through Kituo Cha Sheria.

That his starting salary was ksh.15000 per month which was increased to ksh.22000 as at the time of termination. He prayed for service pay, six days salary for November 2009, 3 months notice pay, compensation for 17 days holidays worked and any other relief the court deems fit to award.

On cross examination he averred that his salary for 2007 to 2009 was ksh.22000 but no payslips were given to him. He denied signing any employment contract in 2008 but confirmed seeing a permanent employment letter. He also confirmed that he had nothing to prove that he worked on 17 holidays as alleged in the suit. He also denied signing any discharge voucher to the effect that he had been paid all his dues by the respondent. He denied signing the letter dated 5/5/2008 and contended that it was a forgery. He also denied signing the voucher dated 30/4/2009 and contended that the same was also a forgery. As regards the 6 days worked in November 2009, he maintained that the evidence of his work attendance is the gate registers which are in the custody of the respondent.

RW1 was the respondent's general manager since 2004 and he knew the claimant as a friend and workmate between 1/6/2008 to 4/5/2009 and he commended him for good work.

That on 4/5/2009, the claimant went for his annual leave after he had signed his discharge voucher dated 30/4/2009(exhibit D.2) but he never returned after leave. That he met the claimant after leave and he told him that he had secured another employment at Kilifi. According to the RW1, the claimant was never dismissed by the respondent but it is he who sacked himself.

That the claimant was employed as a cook for a salary of ksh.11500/- per month to serve for one year starting from 1/6/2008. That the claimant signed the appointment letter and availed his NSSF and NHIF cards in 2008. He produced NSSF contributions return forms for 2004 (exhibit D.3) to show that the claimant was not employed by the respondent before 2008. He could not however deny whether the claimant worked between 1st-6th November 2009 or for 17 holidays since 2008.

On cross examination he denied calling the claimant to his office to dismiss him on 6/11/2009 and contended that shift matters were within the mandate of the departmental head Mr. Kilifi Biryia. He maintained that the discharge voucher was the prove that the claimant went for leave. He denied the authenticity of the appointment letter dated 1/11/2005 (exhibit 1) contending the signature on it was not by Antonio, the Director of the respondent.

He could not however produce the gate register to confirm whether or not the claimant worked between 1st-6th November 2009. He denied that the claimant was entitled to any relief sought because the respondent had paid for his NSSF in 2008. After the close of the hearing the parties filed written submissions.

I have carefully perused the pleadings and considered the evidence and the closing submissions filed. It is no doubt that the dispute before me concerns employment and labour relations. It is therefore obvious that the court has jurisdiction to determine the same by dint of Section 12 of the Industrial Court Act and Article 162(2) of the constitution. The issues for determination are:

- a. **whether or not the employment of the claimant was terminated by the respondent.**
- b. **If (a) is in the affirmative, whether the termination was unlawful.**
- c. **Whether in the circumstances of (a) and (b) above the claimant is entitled to the relief sought in the suit.**

In answer to the first issue, the court has weighed the claimant's evidence that he was dismissed after being called to the Manager's office against the RW1's evidence that the claimant deserted work after going for his annual leave. The issue of leave and desertion was introduced during defence hearing and it was not pleaded. The claimant was therefore not able to contest the issue of leave. Indeed paragraph 4 and 6 of the response confirm that the claimant did not desert work but was terminated.

The respondent's only evidence to support the leave issue is the discharge voucher according to RW1. Regrettably however the voucher does not mention leave any where. The voucher is not original but a photocopy which the court treats with suspicion after it was objected on its authenticity. I dismiss the respondents evidence that the claimant sacked himself after going for leave. There is no evidence of leave records to support the allegation.

On the other hand there is no evidence to disprove the allegation that the claimant was called from home to the RW1's office to be given the notice of his summary dismissal other than gate register for the 6/11/2009. I also observe that the respondent did not produce any employment or gate registers for the period between April 2009 and 6/11/2009 to disprove the claimant allegation that he was on duty until 5/11/2009. The court therefore finds that the only evidence necessary to disprove the claimants allegations was the employment and leave records which were in the custody of the respondent as per section 74 of the Employment Act. The court believes the claimant's evidence that he was dismissed without notice when he was told not to report to his shift until further notice. He was never called back henceforth.

As regards the second issue the factors to consider in determining whether termination was unlawful are the reason(s) and the procedure followed before termination is made. Section 43 of the Employment Act

puts the burden of proving the reason for termination on the employer while Section 41 of the Act provides the procedure for fair hearing before termination. Any default in the above statutory obligations by the employer renders the termination unlawful and therefore unfair.

In the present case the respondent did nothing to prove the reason for the termination or to justify the procedure followed in arriving at the decision to terminate the employee. All what she said in reply to the claimants allegations of unlawful termination was that the claimant sacked himself after going for leave. There was no effort made even to call any other person for example workmates or at all to prove that indeed the claimant deserted the respondent and secured a job elsewhere. The court is satisfied on a balance of probability that the respondent unlawfully and unfairly dismissed claimant without notice not in April 2009 but on 6/11/2009.

Lastly the court has considered the claim for terminal dues. In view of the findings by the court on the 1st and 2nd issues above, the claimant's prayer one is granted by declaring his summary dismissal as unfair termination. As a consequence of the above declaration the court awards the claimants the terminal dues sought save for slight alterations to conform to Section 35,49 and 50 of the Employment Act. He will get 3 months salary in lieu of notice as per the letter of appointment dated 5/5/2008 (exhibit D.1).

The claimant will also get his 6 days salary for November 2009 plus service pay at the rate of 15 days pay per year of service. Although the RW1 alleged that NSSF dues were paid on behalf of the claimants, there is no evidence whatsoever adduced to support that. The claimant was also not cross examined on the NSSF issue in order to contest his allegation that NSSF contribution were never paid for from 2004 to 2009. The award on service pay will be backdated to 10/11/2004 when the claimant was verbally employed by the respondent. Save for the NSSF contribution Returns produced for the year 2004, no other evidence of employment records were produced by the respondent to disprove the allegation that the claimant joined her in 2004. In my view NSSF return forms are only in respect of the contributors whom the employer had chosen to pay for and not the only evidence of employment. Gate registers, leave records, payrolls or duty schedules could have been better evidence.

The claimant has also in his evidence asked me to award compensation for unlawful termination. He was not represented by counsel and possibly that is why he did not seek amendments of the claim. Had he done so, the court would have granted the leave. I will therefore grant the request for unfair termination in view of Section 12(e) of the Industrial Act. In my view it is fit to grant the request but only for 3 months. I grant 3 because it may be possible that he got another job at Kilifi shortly after dismissal as per the allegations of RW1.

The question in my mind is which of the various salary figures cited by the parties do I apply in assessing the quantum of the dues payable. The claimant says his initial salary was Ksh.11,500/ which was reviewed to ksh.15000 in 2005 and then 22000/- in 2007. The respondent talked of Ksh.11500/ and supported it by exhibit D.1. In my view that letter is not the conclusive proof of payment of salary to the claimant. Payslips, payroll or payment vouchers could have been more convincing. I will however apply the salary of Ksh.11500/- because in view of the chronology of contract letters, Exhibit D.1 was the latest and should be the probable salary agreed for permanent employment in 2008 as opposed to kshs.15000 for temporary employment.

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

- a. **3 months salary in lieu of notice 3X11500.....34,500**
- b. **6 days pay for November 2009 ..... 2,300**
- c. **service pay of 15 days per year for 5 years .....28,750**
- d. **3 months for unfair termination .....34,500**

**100,050**

The claimant will have certificate of service, costs and interest.

Orders accordingly

**signed dated and delivered this 30th August 2013**

**ONESMUS MAKAU**

**JUDGE**