



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

**CAUSE NO.122 OF 2013**

**(FORMERLY CAUSE NO. 1305 OF 2012 AT NAIROBI)**

**FANUEL OGUTU AKALI.....CLAIMANT**

**-VERSUS-**

**WAMEER WHOLESALERS AND DISTRIBUTORS LIMITED.....1<sup>ST</sup>  
RESPONDENT**

**MR. FARU AZAD (DIRECTOR).....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 20<sup>th</sup> September, 2013)

**JUDGMENT**

The Claimant **Fanuel Ogutu Akali** filed the memorandum of claim on 02.08.2012 in person and praying for terminal dues of Kshs.2,090,436.40, the certificate of service and costs.

The respondents filed the response to the memorandum of claim on 11.10.2012 through Mukite Musangi & Company Advocates and counterclaimed for Kshs.10,000.00, costs, interest and prayed for dismissal of the claimant's suit with costs.

The claimant opted to rely on the documents on record to urge his case without giving oral evidence and without calling any witness.

The respondents' witness was Inspector of Police No. 232975, Earnest Khaemba (**RW2**) and the 2<sup>nd</sup> respondent (**RW1**).

The claimant was employed by the respondents as a salesman and driver by the oral agreement of 4.03.2001 until his termination on 5.6.2009. The claimant's case was that at the time of termination, he was earning Kshs.10,000.00 which was underpayment and without the due house allowance. He raised a grievance and the respondents instead of addressing the grievances decided to prefer a criminal complaint against him. The claimant was arrested and locked up at the police station and later released without any criminal charges being preferred against him. The claimant filed civil suit No. 88 of 2010 at Nakuru but was dismissed by the magistrate on a preliminary objection that the magistrate's court lacked jurisdiction to hear and determine the employment dispute. The conciliation proceedings before the labour officer collapsed and the claimant filed this suit.

RW1 testified that the claimant had been served with various warning letters on account of shortages he incurred as a salesman. The shortages, according to RW1, tested RW1's patience to a breaking point. On

2.06.2009, the shortages of Kshs.17,686.00 was reported to the police and the claimant was arrested from the respondents' premises and charges of theft by servant were to be preferred against the claimant. On 4.06.2009, the police released the claimant upon the understanding that he would refund the Kshs.17,686.00. The respondents' case was that the claimant did not report to work, he did not refund the money and six months later came to the respondents asking for a letter to enable him claim the NSSF dues. RW1 testified that he wrote the letter because, **"....the little theft had not affected his business adversely"**. RW1 further testified that he was only interested in recovering his money and not getting the claimant convicted of the alleged crime of stealing by servant.

RW2 testified that the claimant was arrested and was to refund the respondent's dues.

The court has considered the evidence, the pleadings and the submissions and considers the following as the key issues for determination:

- a. **Whether the claimant was unfairly terminated.**
- b. **Whether the claimant is entitled to the remedies as prayed for.**

On the first issue, it is clear that the respondents' caused the arrest of the claimant on account of alleged shortages. The evidence shows that the respondents had no genuine intention of invoking the criminal justice process but the sole focus of the arrest was to intimidate the claimant into refunding the alleged losses in view of the alleged shortages. The court holds that it is unfair labour practice for the employer to invoke the criminal justice process in matters which properly fall within the administrative grievance management or disciplinary process as parties may have agreed or as prescribed in the relevant statutes. The court further holds that such matters are civil disputes to be resolved through the statutory conciliation processes and appropriate suits before the court.

The court finds that in this case, the claimant was entitled to consider himself terminated after the arrest and after the respondents' refusal to invoke the usual employer's authority to resolve the grievances about the alleged underpayment and disciplinary process in view of the alleged shortages. The court finds that the claimant's employment was constructively and unfairly terminated. The termination was unfair because the respondents failed to accord the claimant a notice and a hearing as envisaged under section 41 of the Employment Act, 2007.

On the issue whether the claimant is entitled to the remedies as prayed for, the court makes the following findings:

- a. The claimant was unfairly terminated. The court has considered the circumstances of the case and finds that the respondents engaged in gross abuse of the criminal justice process and finds that the claimant is entitled to the maximum 12 months salaries being **Kshs.120,000.00** at Kshs.10,000.00, the claimant's last monthly pay.
- b. The court finds that the claimant is entitled to **Kshs.10,000.00** being one month salary in lieu of the termination notice.
- c. The court finds that the claimant is entitled to **Kshs.2,660.00** as prayed for being pay for 5 days worked in June 2009.
- d. The court finds that the claimant is not entitled to severance pay because it was not a case of redundancy.
- e. The claimant did not provide the evidence for the claims of house allowance arrears, underpayments, rest days, public holidays and overtime. Accordingly the claims shall fail.
- f. The court finds that the claimant is entitled to the certificate of service.
- g. The claimant is entitled to costs of the case and taking all the circumstances into account together with the proceedings on record the costs are fixed at **Kshs.100,000.00**.

The respondents filed a preliminary objection on 11.10.2012 urging that the suit was filed outside the prescribed three years from the date of the cause of action as per section 47 of the Employment Act, 2007. The court directed that the objection be taken up substantively in the final submissions. Counsel for the respondents did not submit on the objection and the court deems that the preliminary objection was abandoned. In any event, the claimant's case was that the suit was filed following failure of the conciliation proceedings ending with the Ministerial letter of 10.06.2011 being **exhibit AP IV (a)** on the claimant's verifying affidavit. The case having been filed on 02.08.2012, the court finds that it is not time barred as the preliminary objection would fail with costs.

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

- a. A declaration that the claimant's employment was constructively and unfairly terminated.
- b. The respondents to pay the claimant Kshs.232,660.00 by 1.11.2013, failing interest to be payable at court rates from the date of this judgment till full payment.
- c. The respondent to deliver to the claimant the certificate of service by 1.11.2013.

**Signed, dated and delivered in court at Nakuru this Friday, 20<sup>th</sup> September, 2013.**

**BYRAM ONGAYA**

**JUDGE**