



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1542 OF 2011

JOHN WITABA LUBULELA..... CLAIMANT

VERSUS

DR. ANDREW MEYERHOLD..... RESPONDENT

JUDGMENT

By a Memorandum of Claim dated 8th September 2011 and filed in court on 12th September 2011 the Claimant alleges that he was unfairly terminated by the Respondent. He prays for the following orders

1. (a) One month notice
 - (b) Leave accrued for 41 months
 - (c) Severance pay for 10 years
 - (d) 15% house allowance
 - (e) 12 months compensation.
2. Costs.
 3. Interest
 4. Any other relief the Honourable court considers appropriate.

The Respondent filed a Reply to the Memorandum of claim dated 12th October 2011 and filed in court the same day. He admits employing the Claimant and dismissing him after a sum of Kshs.113,500 went missing, having been removed from small amounts over a period of time. He denies that the termination of the Claimant's employment was unlawful and illegal and further denies owing the Claimant shs.404,641 as prayed in the claim. He prays that the Claim be dismissed with costs.

The case was heard on 4th April 2013. The Claimant testified on his behalf while the Respondent did not call any witness but relied on his Reply to the Claim and written submissions.

The Claimant testified that he was employed by the Respondent as a gardener/shamba boy from 1st October 2000 to 27th February 2011. He worked from 8 am to 4 pm from Monday to Saturday. His Salary was shs.11,160 and a house allowance of shs.530 per month. He was also paid travelling allowance of shs.1,000 per month. He used to go on leave only when he got a replacement. He did not take leave for 2 and a half years because he was unable to get anybody to replace him. He worked without any problem for the Respondent who is a medical doctor and did not receive any warning. On 4th February 2011 he went to work as usual. He opened the gate for the Respondent at 9.00 am. The Respondent came back at 2 pm, took coffee and left around 3pm. He came back at 3.45 with 2 policemen to arrest the Claimant for being a suspect as the Respondent had reported loss of money. He was arrested, taken to Kileleshwa Police Station where he was questioned and his phone confiscated to check his mpesa which had no money. He was confined at the station from 4th and released on 6th February 2011 which was a Sunday. On Monday 7th February 2011 he went to work as usual but was told by the maid that he had no permission to work. He was told to see the Respondent on 28th February 2011 when he was given the termination letter and his salary for February 2011. The Police did not take any action against him because there was no sufficient evidence against him. He was not informed why he was being terminated. The house maid was not arrested or questioned by police. He was never given an opportunity to defend himself. He was not paid notice and leave days. He is asking for payment of notice, leave, house allowance and costs.

On cross examination the Claimant said the Respondent lived with a child and a housemaid, he did not work from 7th February 2011 but was paid for the full month. He was also paid additional salary of 3 days. He said he has never complained about house allowance. The letter of termination stated that the reason for termination was loss of trust. He said he could not recall which days or which years he did not go on leave, that he used to take leave every year for the first 7 years.

I have considered the pleadings, the evidence of the Claimant and the written submissions.

The issues for consideration are the following;

1. Whether the Claimant was unfairly dismissed.
2. Whether the Claimant is entitled to the payers sought.

On the first issue the Claimant was never given an opportunity to defend himself. The Respondent relied on the action of the police who arrested but later discharged the Claimant without preferring any charges against. Having not carried out his own investigation, the Respondent had no grounds to terminate the employment of the Claimant without further investigations and giving the Claimant an opportunity to defend himself.

The Respondent himself admitted in the letter of termination that the police had not been able to find sufficient evidence to charge either the Claimant or the housemaid. The Respondent states in the letter that he suspected the Claimant and could not continue with the employment. He did not state the grounds of his suspicion or give the Claimant an opportunity to clear himself from the suspicion.

I find that the termination of employment of the Claimant was unfair.

The Claimant has prayed for the following prayers.

a. 1 months salary in lieu of notice.

Section 49 (1) (a) of the Employment Act provides that where an employee is unfairly terminated he is entitled to the wages which he would have earned had he been given the period of notice to which he was entitled under the Act or his contract of service.

The Respondent has argued that the Claimant was paid for February and 3 days in March, that this constitutes notice. This would have been the case had he issued the letter of termination on the date when

he declined to allow the Claimant to work or had he stated so in the letter of termination. Since this was not the case, I find that the Claimant is entitled to one months salary in lieu of notice and award him Kshs.11,690 as claimed.

b. Unpaid Leave of 71.75 days.

In his Memorandum of Claim the Claimant claims accrued leave of 41 months. In his testimony he stated that he had not taken leave for 3 and a half years. Under cross examination the Claimant stated he could not recall which days or which years he did not go on leave. The Respondent did not deny this fact in the Reply to the claim or submit any documents to controvert the allegation of the Claimant.

I therefore find that on a balance of probabilities and based on the provisions of Section 10(6) and (7) of the Employment Act which require an employer to keep records of prescribed particulars for 5 years and makes it the burden of the employer to prove or disprove facts for which no documents are produced, I find that the Claimant has proved his case.

The Claimant testified that he was paid but did not work from 7th February 2011. I will therefore deduct the days for which the Claimant was paid but did not work and treat those days as part of his leave. That would be 18 working days. This leaves a balance of (53.75 days x 11,690/30) Kshs.20945. I award the Claimant the said sum of Kshs.20,945 on account of leave.

c. Severance Pay.

The Claimant has prayed for severance pay for 10 years worked. During his testimony the Claimant did not mention anything about severance pay. He did not even pray for it.

In the written submissions it has been argued for the Claimant that the Respondent's relocation of his practice from Nairobi was a scheme designed to evade paying redundancy benefits. There is no evidence to support this fact. This fact was not pleaded in the claim and the Respondent was not given an opportunity to defend the allegation. In any event it would not make financial sense for a doctor to relocate his practice to evade paying Shs.67,500/= to an employee.

I agree with the Respondent's reply to this contention, that this is conjecture and theories which this court cannot be called upon to rely on to make a finding of redundancy.

The Claimant must also decide whether he is claiming unfair termination or redundancy. He cannot claim both.

I find that the claim for severance pay on account redundancy is without merit and it is dismissed.

d. Underpayment of House Allowance.

The Claimant's payslip shows that he was consistently paid house allowance at the rate of kshs.530 per month. It is submitted on behalf of the Claimant that he was underpaid. It is however not demonstrated how the Claimant arrived at the figure of Shs.152,875 claimed as underpayment of house allowance or how he arrived at one conclusion that shs.530 per month is an underpayment.

In cross examination the Claimant admitted that he never complained about his house allowance for the whole of the period he was in employment.

The Regulation of Wages (General) Order at Appendix A provides that monthly statutory minimum rates of pay are exclusive of 15% house allowance. This means that a person is underpaid when the salary he is paid is less than the statutory minimum monthly rate of pay plus 15% representing house allowance.

In the present case the Claimant was paid way above the consolidated basic and house allowance minimum rate of pay for his grade and in addition he was paid a house allowance of shs.530 per month.

The Claimant has however not based his Claim on the Regulation of wages (General) Order.

It has been submitted for the Claimant that the Respondent violated Section 31 (1) of the Employment Act by not paying the Claimant a reasonable house allowance. The Act does not define what a reasonable house allowance is. The Claimant has not given the basis of pegging house allowance at 15% to his monthly salary. He has also not shown that the figure of Kshs.152,875 is 15% of his basic salary less the figure actually paid.

I find that the Claimant has not proved that he was underpaid house allowance or that he is entitled to the amount claimed as underpayment of house allowance and dismiss the claim.

e. 12 months compensation

The Claimant has claimed maximum compensation based on Section 15(c) of the Labour Relations Act. It is instructive to point out that the section, indeed the whole part 111 of the Labour Relations Act consisting of Sections 12 to 30 were repealed by the Industrial Court Act 2011. In any event the Claimants case does not fall under the Labour Relations Act which only governs cases involving trade unions. The proper Section is 49 of Employment Act.

Section 49(1)(c) of the Employment Act provides that an employee who has been dismissed or terminated in an unjustified manner may be awarded compensation not exceeding 12 months gross monthly wage.

In the present case taking into account the circumstances under which the Claimant was terminated and all the other factors set out in Section 49(4) of the Employment Act it is my opinion that 10 months salary is reasonable compensation for the Claimant. I therefore award him kshs.116,900 as compensation.

f. Costs

The Claimant will have his costs for the case.

g. Interest

The Respondent is directed to pay the decretal sum granted to the Claimant herein within 30 days from the date of decree failing which the amount shall attract interest at court rates from date of Judgment.

In summary, Judgment is entered for the Claimant against the Respondent as follows;

1. The termination of employment of the Claimant is declared to be unfair.
2. Kshs.149534.
3. Costs

Orders accordingly.

Read in open Court this 18th day of September 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

IBRAHIM ONYATTA for Claimants

NO APPEARANCE for Respondent