



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 1454 OF 2010

PIUS KINYUA GICHOHICLAIMANT

-VERSUS-

FONES DIRECT LIMITEDRESPONDENT

Mr. Oronga for Claimant.

M/s. Olajo for Respondent.

JUDGMENT

The suit was lodged by way of a Memorandum of Claim dated 7th October, 2010 claiming various reliefs for alleged unlawful and unfair termination of employment to wit;

1. *Declaration that the termination of employment was unlawful hence null and void;*
2. *Respondent to re-engage the Claimant to comparable work to which the Claimant was engaged prior to the termination or any other reasonable work with no loss of benefits together with salaries and allowances in arrears for the period the Claimant has been working and out of office work.*
3. *Reinstate the Claimant and treat him in all aspects as if the Claimant's employment had not been terminated; and*
4. *In the alternative payment of terminal benefits including*
 0. *unpaid salary for the month of March, 2009 in the sum of Kshs.23,000/=;*
 0. *one month's salary in lieu of notice in the sum of Kshs.10,420/;*
 0. *unremitted NSSF deductions for 9 months in the sum of Kshs.3,600/=;*
 0. *unlawful NHIF deductions for 10 months in the sum of Kshs.3,200/=;*
 0. *service gratuity for 4 years in the sum of Kshs.41,680/=; and*
 0. *maxim compensation of 12 months in the sum of Kshs.125,040/=.*

The summary of facts in support of the claim are as follows;

That on 4th October, 2005, the Respondent employed the Claimant as a shop assistant in its Meru Branch by a letter of appointment of the same date which was produced as exhibit 1.

The employment was on permanent and pensionable basis at a monthly basic salary of Kshs.7,270/= and house allowance of Kshs.1,090/=.

He was entitled to twenty one (21) days leave, was registered with NSSF and NHIF and termination of the agreement would be by either party giving thirty (30) days notice or payment in lieu thereof.

Payment of severance allowance was expressly excluded in the letter of appointment.

A provision for warning letters in case of unsatisfactory work or misconduct states that an employee shall be given first and second warning. On commission of a third offence, the employee “*shall be liable to summary dismissal*”. Such warnings will be valid for a period of twelve months. Dismissible offences are listed in the letter.

The Claimant testified in support of his case and told the court that he was now engaged as a businessman in Meru after he stopped working for the Respondent on 31st March, 2009.

That his hours of work were from 8.30 a.m. to 9 p.m. in the evening and he worked seven (7) days a week. He was paid overtime.

That sometimes in the month of March, he was called by the Human resource Manager **Mrs. Faisa** who told him that he had been transferred to Tuskom in Rongai but upon discussion he was transferred to Nakumat, Nyayo Stadium.

This discussion was on a Friday and he was asked to report to the new station on the following Monday. The Claimant felt that the notice was short because he had a son in school in Meru and he requested for an extension of time. Mrs. Faisa told him to await a letter of termination.

His employment was terminated verbally and he was told to go home and wait for his dues. The transfer was also verbal.

According to the Claimant, the Respondent deals in electronic equipments such as phone accessories within the various supermarkets. The Claimant’s work was to maintain branches as a senior staff. He was the face of the company and was responsible for the sales.

The following morning, the Claimant returned his uniform, and a stock take was done and he left.

He told the court that he had no warnings for poor performance or misconduct and had not been subjected to any disciplinary action prior to this incident.

Upon termination, he was not paid the salary for the month of March, 2009. He discovered that though statutory deductions for NSSF and NHIF were deducted from his salary, the same had not been remitted in full and prays the court to direct that the salary for March, 2009 be paid and the statutory dues be remitted and or be paid to him.

That though he applied for leave, he was not granted the same for four (4) years and was not paid in lieu thereof. He therefore claims payment in lieu of 84 days leave. He only got 14 days leave in the year 2008.

He told the court that, he was summarily dismissed for no reason at all. That he was not charged with any offence nor was he subjected to a disciplinary hearing prior to the termination contrary to the Employment Act 2007.

That he had not committed any offence at all to warrant the summary dismissal from his employment.

He explained that in the four (4) years he had served the Respondent in Nairobi, Kisumu and Meru, and therefore had no problem with the transfer but had only requested for a longer notice to enable him make schooling arrangements for his son.

He told the court under cross-examination that he did not receive the letter of transfer produced by the Respondent dated 27th March, 2009 and he had seen it in court for the first time. The letter required him to transfer to Nairobi within 7 days from the date of the letter.

He also denied another letter produced by the Respondent dated the same date 27th March, 2009 which stated that, the Claimant was transferred to Meru on 16th July, 2007, and this was not intended to be his permanent station and that he was to report to Nairobi within seven (7) days from 27th March, 2009.

The letter goes on to say that the Claimant had failed to report to work in Nairobi. He was summoned to the Head Office on 4th April, 2009. The letter also says that if he did not report to the Head Office on 4th April, 2009, he shall be deemed to have resigned from work.

The Claimant also admitted under cross-examination that he had filed Civil Suit No. 235 of 2009 in the Chief Magistrate's Court at Meru and the same was dismissed with costs for lack of jurisdiction to entertain the matter following a preliminary objection by the Respondent. The matter was subsequently brought to the Industrial Court.

A Statement of Response and a counterclaim dated 17th January, 2011 was filed on 18th January, 2011 by the Respondent.

The Respondent while admitting that it had employed the Claimant denies that it had unlawfully and unfairly terminated his services.

Respondent submits that the Claimant was summarily dismissed lawfully in terms of **Section 44** of the Employment Act 2007 for insubordination in that he refused to take a transfer from Meru Branch to Nairobi contrary to his letter of employment and that Rules and Regulations of the Respondent signed by the Claimant on 14th March, 2008 which provide *inter alia* that "*The management has the right to transfer you to any of its branches at any time, in any town/city at short notice as deemed necessary.*" The Rules and Regulations were produced as appendix 1 to the Statement of Response.

That the Claimant was on 27th March, 2009 informed by the management to transfer from Meru to Nairobi within one week per letter marked Appendix 2 and that the Claimant failed to report as instructed and he was given a second letter of transfer and a request to report to the Head Office on the 4th April, 2009 which he failed to do. That in the letter he was warned that failure to report would be treated as resignation. The letter is marked Appendix 3 of the Response.

As noted earlier, the Claimant denies that he was served with the two letters or at all.

The Respondent relied on the two letters to find the Claimant guilty of insubordination and was similarly dismissed in terms of the said Rules and Regulations which did not require notice to be given or payment in lieu thereof.

A quick perusal of the two letters by the court shows that the two letters Appendix 2 and Appendix 3 bear the same date 27th March, 2009.

Both letters do not bear acknowledgement of receipt by the Claimant even though the 2nd letter Appendix 3, has provision for acknowledgment upon service.

If the court were for a moment to believe that the first letter Appendix 2 was written on 27th March, 2009, then the seven days notice within which to report would have expired on 3rd March, 2009 and therefore,

the Claimant would have reported to work on the morning of 4th April, 2009.

The letter itself bears no date on which the Claimant was to report to work.

The 2nd letter summoning the Claimant to the Headquarter allegedly for having failed to observe the seven days notice within which to transfer from Meru to Nairobi is also dated 27th March, 2009.

This letter completely discredits the version by the Respondent as to what took place.

The witness for the Respondent **Josiah Karanja**, Manager Retail Support and Customer Care testified under oath.

The witness was not able to explain the highlighted anomalies in the letter Appendix 2 and 3.

The witness also did not produce records to show that the Claimant had taken 21 days leave per year from the period he worked for the Respondent.

Equally, the witness did not produce records to show that the Respondent had remitted all the NSSF and NHIF dues to the Claimant.

He said though he handled human resource matters, he did not participate in the summary dismissal of the Claimant.

He admitted that the Claimant should have been paid one month notice upon termination.

He also admitted that there was no evidence the Claimant had received the letter dated 27th March, 2009. He was not aware if the Claimant was paid any terminal dues at all. He also was not aware if the Claimant had any prior warning letters and or whether he was given a hearing before the summary dismissal.

It is clear to the court that the evidence presented by the Respondent as to the circumstances leading to his summary dismissal is not only inconsistent but same lacks credibility completely.

The court has without hesitation accepted the version by the Claimant that he was summarily dismissed after requesting for more time to make arrangements to transfer from Meru to Nairobi because he had a son schooling in Meru.

The Claimant has proven that the summary dismissal was unfair in terms of **Section 47 (5)** of the Employment Act.

Due to the contradicting nature of the evidence by the Respondent, it has failed to show that the reason or the summary dismissal of the Claimant was a valid and fair reason to do so.

Accordingly the Respondent has failed the test provided under **Section 43 (1)** as read with **Section 47 (5)** of the Employment Act.

Accordingly the court finds that the summary dismissal of the Claimant was contrary to **Section 45 (1)** of the Act in that the termination was done unfairly.

Furthermore, the reason or the termination was contrary to **Section 45 (2) (a)** in that it was an invalid reason.

Also, the termination was contrary to **Section 45 (2) (c)** in that it was contrary to his letter of termination which provided for two written warnings for misconduct prior to summary dismissal. In addition, no opportunity was provided to the Claimant to explain why he should not be summarily dismissed contrary

to **Section 41** of the Act, and therefore the summary dismissal was contrary to **Section 45 (2) (c)** in that it was not in accordance with a fair procedure.

These statutory provisions are specially meant to bring fair play and equity at the work place in terms of the International Labour Organisation (ILO) conventions and declarations which bind member countries to implement them through national legislation.

It is in this light that Labour Laws have continuously moderated the master servant doctrine at common law which in the main proclaimed contractual doctrine which regarded contracts of employment just like commercial contracts. This approach belongs to medieval jurisprudence and has no place in Kenya today.

The Respondent provided no response at all to the claim for the salary of March, 2009 at Kshs.23,000/=. It is clear that though the monthly gross salary for the Claimant was Kshs.10,420/= he was regularly paid overtime as the payslips produced for February, 2009 shows.

The court finds that the Claimant is entitled to payment of Kshs.23,000/= for the month of March, 2009, which includes overtime earned during the month.

The Claimant in his testimony claims payment of leave for 84 days. However he claims only 56 days in his Memorandum of Claim. No amendment was sought in this respect. The court will hold the Claimant to the pleadings and finds that he is entitled to 56 days in lieu of leave in the sum of Kshs.29,270/=.

The court finds that he is entitled to a refund of statutory deductions made on his salary in the sum of Kshs.3,600/= (NSSF) and Kshs.3,200/= (NHIF) and directs the Respondent to refund accordingly as it did not provide any proof of remittance.

The contract of service clearly disallowed payment of service gratuity and the court finds that the Claimant is not entitled as he was registered with NSSF and is entitled to pension in respect thereof.

The court finds that the facts of this case present a familiar yet very sad story of how casually some employers continue to treat their employees.

Human capital is the most valuable resource at the work place. An employee is endowed with rights and freedoms aimed at ensuring fair and just treatment to uphold his/her human dignity.

The employer is enjoined by law and our Constitution to treat employees with empathy especially in situations where they make reasonable requests as in this case to take care of a child in school before undertaking a transfer.

The conduct of the employer was extremely unreasonable in the circumstances of this case and cost a young man his employment and consequent loss of income and dignity.

Production of clearly inconsistent letters, done after the facts to bolster the Respondent's case aggravates the circumstances of this case.

The court finds that this is a proper case to award maximum compensation for unfair termination in the sum of Kshs.125,040/=. Claimant was not given Certificate of Service. Though it is not prayed for the employer is obliged by the Employment Act, 2007 to provide the same and the court directs the Respondent to provide the same.

In the final analysis the Respondent is to pay the Claimant:

1. Kshs.23,000/= being unpaid salary including overtime for the month of March, 2009;
2. Kshs.10,420/= in lieu of one month notice;

3. Kshs.29,270/= in lieu of 56 days leave
4. Kshs.3,600/= being unremitted NSSF dues deducted from his salary for 9 months;
5. Kshs.3,200/= being NHIF dues deducted from his salary for 10 months and Kshs.125,040/- being compensation for unfair dismissal.
5. Total Kshs.194,530/=.
6. Respondent to provide certificate of service to the Claimant immediately.

With regard to the issue of costs, the Respondent has claimed by way of counterclaim the costs incurred with respect to Suit No. 235 of 2009 filed before the Magistrate Court in Meru but was dismissed for lack of jurisdiction. No order as to costs was granted in that matter. To balance the equation each party will bear its costs in this matter.

Dated and delivered at Nairobi this 19th day of September, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE