



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1079 OF 2010

**BETWEEN**

FRED MAKORI ONDARI .....  
CLAIMANT

**VERSUS**

THE MANAGEMENT COMMITTEE OF THE MINISTRY  
OF WORKS SPORTS CLUB

..... RESPONDENT

*Rika J*

*CC. Leah Muthaka*

*Mr. Nyabena instructed by Nyabena Nyakundi & Company Advocates for the Claimant*

*Mr. Moimbo State Counsel instructed by the Attorney-General for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed the initial Statement of Claim through Kituo Cha Sheria, on 17<sup>th</sup> September 2010. He then appears to have amended the Statement of Claim in Person, while retaining the Kituo Cha Sheria as his address of service. He lastly instructed the Law Firm of Nyabena Nyakundi and Company Advocates.
2. He claims he was employed by the Respondent as a Gardener/ Cleaner, in January 1998, at a salary of Kshs. 2,345. He was transferred to the kitchen as a Cleaner in 2001. On 28<sup>th</sup> February 2006, he was awarded a certificate of appreciation.
3. On 28<sup>th</sup> July 2009, his contract of employment was terminated by the Respondent without warning or notice. The Respondent did not pay him terminal dues. He claims that the termination was unfair and unlawful. He asks for terminal dues calculated at Kshs. 363,853; compensation for unfair termination at Kshs. 88,113; exemplary damages; costs; interest; and any other reliefs the Court may deem it fit to grant.
4. The Respondent filed its Statement of Reply on 20<sup>th</sup> September 2011. It concedes the Claimant was employed by the Respondent on 1<sup>st</sup> November 1998 as a Cleaner/ Gardener, at a monthly salary of Kshs.

2,345 per month. He was not a model employee; he was involved in unscrupulous activities such as altering of official documents; making of illegal electric connections; and absenteeism. He applied for compassionate leave of 36 days contrary to the CBA. The application was not approved, but the Claimant decided to proceed on leave anyhow. The Respondent denies owing the Claimant any terminal dues, except a sum of Kshs. 8,050, which the Claimant rejected. The Respondent prays for dismissal of the Claim.

5. The Advocates agreed on 19<sup>th</sup> November 2012, to have the dispute determined on the basis of their pleadings and submissions, under Rule 21 of the Industrial Court [Procedure] Rules 2010.

6. The Claimant submitted his letter of appointment shows he was appointed on 1<sup>st</sup> January 1998, not 1<sup>st</sup> November 1998 as alleged by the Respondent. He was not given an opportunity to explain the allegations of unscrupulous behaviour, contrary to Section 41 of the Employment Act 2007. The Respondent surcharged the Claimant Kshs. 1,000 for illegal electricity connection. The Claimant had explained that the Staff Quarters had electricity even before the Claimant was employed. The Claimant agreed that he took un-approved compassionate leave. The Respondent had not indicated to him that the application for compassionate leave had not been approved.

7. The Respondent did not follow the procedure prescribed under the CBA in the dismissal process. No warning issued as laid down in the CBA. At the time of termination, the Claimant earned Kshs. 6,385. He prays for compensation at 12 months' salary adding up to Kshs. 78,620.

8. He claims the following terminal benefits:

- Unpaid salaries for March 2009 at Kshs. 1,850, and for April 2009 at Kshs. 6049, total Kshs. 7,899. The Respondent did not answer this claim in its pleadings, and has the obligation under Section 74 of the Employment Act to keep custody of the employment records;
- The CBA allowed the Claimant to receive accrued earning during the period of suspension from duty. Clause 29 of the CBA enabled him to earn up to a maximum of 15 days, pending investigations. This was not paid to the Claimant when he was placed under suspension. He claims Kshs. 9,577.50 from May to July 2009;
- The Claimant states he was not paid his leave entitlement for the last 7 months of his service, running from January to July 2009. He seeks pro-rata leave of Kshs. 3,724; and pro-rata leave traveling allowance of Kshs. 583.
- He worked for more than 10 years, and was entitled to 3 months' termination notice, or 3 months' salary in lieu of notice, under the CBA Clause 19. The Claimant was not heard after suspension, but only slammed with the letter of summary dismissal dated 28<sup>th</sup> July 2009. He claims 3 months' salary in lieu of notice at Kshs. 19,155;
- The Claimant prays for overtime compensation for work done over the public holidays, from January 1998 to June 2005. The claim adds up at Kshs. 28,243. In support of this, the Claimant relies on minutes of a meeting held between Management and the Shop Stewards, in which it was suggested overtime pay, normal and holiday, was an outstanding item, to be dealt with in the future;
- Clause 6[c] of the CBA provided for leave traveling allowance of Kshs. 1000 to employees whenever they went on annual leave. The Claimant was not paid for the period 2008/2009 and prays for an amount of Kshs. 1000;
- Clause 27 of the CBA granted long service award to employees who had served more than 10 years, at Kshs. 350. This was not paid to the Claimant. He served more than 10 years. He asks for the sum of Kshs. 350 under this head;

- The Claimant prays for normal overtime of 4,166 hours, worked from January 1998 to April 2009 at Kshs. 284,004. He again points out that the issue was discussed at the meeting between the Respondent and Trade Union Representatives;
- For the period May to July 2009, the Respondent did not remit the Claimant's N.S.S.F statutory contributions totaling Kshs. 600. The Claimant prays that this be refunded to him;
- Likewise the Claimant did not receive his medical allowance for the period of suspension between May and July 2009. This is computed at Kshs. 600;
- The Claimant seeks severance pay of Kshs. 36,713;
- Ondari claims he was surcharged Kshs. 2000 for illegal electricity connections. He seeks refund of Kshs. 2000; and
- The Claimant makes a separate claim of Kshs. 5,403 for 11 public holidays worked.

9. The Claimant has added these amounts to Kshs. 363,853. He then pleads somewhat cryptically under paragraph 5 [a] and [b] ‘ ‘ *M.O.W. Sports United Worker's Society, hold:-Kshs. 24,300 illegally, and [b] Ministry of Works, Welfare and Sports Associations hold:-Kshs. 21,950 No dispute.*’ How is the Court expected to decipher such pleadings? The submissions filed by the Claimant's Advocates, did no assist in the least in such an undertaking. He however prays for the Orders set out under paragraphs 3, 7 and 8 above.

10. The Respondent did not expound on its pleadings as summarized in paragraph 4 above. The questions that the Court needs to answer in resolving this dispute are these-:

- a. Whether termination was preceded by valid reason or reasons, and whether it was carried out fairly;
- b. Whether the Claimant is entitled to compensation; and
- c. Whether the Claimant merits the terminal benefits serialized in paragraph 8 above; exemplary damages; costs; interest; and any other suitable remedy.

#### *The Court Finds and Awards-:*

11. The Respondent appears to have had valid reason in terminating the Claimant's contract of employment. Although there were several allegations made against the Claimant by the Respondent mostly in the year 2009, the letter of summary dismissal picked one reason. The Respondent alleged in the letter dated 28<sup>th</sup> July 2009, that the Claimant absented himself from duty without lawful cause. He was given a chance to cultivate interest in his work, which he did not take.

12. The Claimant conceded that he took his annual leave between 24<sup>th</sup> February 2009 and 27<sup>th</sup> March 2009. He was expected back on duty on 28<sup>th</sup> March 2009. He had similarly applied for compassionate leave of 36 days, commencing at the end of his annual leave. The application for compassionate leave was not approved. He did not return to work, taking the liberty to extend his leave, apparently having taken the compassionate leave for granted. His don't-care attitude is well captured by the events that followed immediately after 28<sup>th</sup> March 2009.

13. His Employer wrote to him on 15<sup>th</sup> April 2009, informing the Claimant that as he did not report to work on 28<sup>th</sup> March 2009, he was deemed to have deserted. The Claimant reported 7 days after he received the letter, and left once again without the leave of his employer on 29<sup>th</sup> April 2009. It was after this that the Respondent suspended the Claimant, and eventually dismissed him on 28<sup>th</sup> July 2009. The evidence from both Parties is in agreement that the Claimant absented himself from work without the leave of the Respondent. The Respondent had valid reason under Section 44[4] [a] of the Employment Act 2007, to summarily dismiss the Claimant.

14. The Respondent did not however, go about doing so, following the minimum statutory procedure. After suspending the Claimant, the Respondent did not show any evidence that it granted the Claimant a hearing. There was no hearing in the manner contemplated under Section 41 of the Employment Act 2007. The letter of dismissal does not allude to any form of hearing. The Respondent just told the Claimant: “ *Please refer to the Employment Act 2007, Section 44[4][a]. You are affected by this Act for absencing yourself from duty without lawful cause, even after being given a chance to show interest in your work....*” The letter of summary dismissal is more like the formal charge that should have been read to the Claimant at the disciplinary hearing. Fair procedure was absent from the process. To this extent, termination was unfair and the Claimant is entitled to ***compensation which the Court Awards to him at 4 months gross salary at Kshs. 25,540.***

15. What terminal benefits does the Claimant merit? The Court does not think he is entitled to 3 months’ salary in lieu of notice. He was an employee given to absenteeism, and contributed in no small way, to the decision by the Respondent to terminate the contract of employment. The claim for salary in lieu of notice is refused. The Court did not understand the Claimant’s submission and evidence on unpaid public holidays, and public holidays worked. There was no clear evidence to support these two claims. The Court is not able to grant these two prayers. The prayer for overtime pay dating back from 2001, of 4,166 hours is not backed by evidence. The Claimant prepared for himself a document indicating the number of hours allegedly worked in excess from 2001 to April 2009. He does not give details of the overtime work done, whether it was authorized by his employer; whether he ever demanded for payment while on duty; and why he would wait until termination to claim overtime pay that accrued from as early as 10 years prior to termination. He did not even explain to the Court why the amount claimed as overtime pay, is different from the overtime pay contained in his letter of demand before filing of the Claim. The prayer for overtime pay is rejected. Ondari claims severance pay of Kshs. 36,713. He did not leave employment through redundancy to merit severance pay. If he intended to pursue service pay under this head, he would not be entitled to service pay as he was registered under the National Social Security Fund. This prayer is rejected.

16. The other prayers on terminal benefits are fairly grounded in Law and under the CBA. The Respondent was unable to justify its surcharge of the Claimant for illegal connection of power supply. No reply was made to the explanation by the Claimant that Staff Quarters were connected with electricity, even before the Claimant was employed. The Court finds the Claimant is entitled to ***refund of the surcharge of Kshs. 2,000; payment of long service award of Kshs. 350; NSSF Contributions of Kshs. 600; medical allowance of Kshs. 600; pro-rata leave traveling allowance of Kshs. 583; pro-rata annual leave of Kshs. 3,724; leave traveling allowance of Kshs. 5,403; accrued earning during suspension of Kshs. 9,577; and unpaid salaries of Kshs. 1,850 and 6,049 for the respective periods indicated in the Statement of Claim..*** In sum-:

***[a] Termination was procedurally wanting, and therefore unfair;***

***[b] The Respondent shall pay to the Claimant 4 months’ salary in compensation at Kshs. 22,540;***

***[c] The Respondent shall pay to the Claimant terminal benefits amounting to Kshs. 30,736;***

***[d] In total the Respondent shall pay to the Claimant the sum of Kshs. 53,276; and***

***[e] Other claims are rejected.***

Dated and delivered at Nairobi this 17<sup>th</sup> day of **September, 2013**

James Rika

Judge