



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 61 OF 2013

(Formerly Cause No. 1971 of 2012 at Nairobi)

MAURICE ODHIAMBO OTWOMA.....CLAIMANT

-VERSUS-

AKSHAR AUTOSPARES

HARDWARE LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th November, 2013)

JUDGMENT

The claimant is **Maurice Onyango Otwoma**. The respondent is **Akshar Autospares Hardware Limited**. The claimant filed the memorandum of claim on 2.10.2012 through Orina and Company Advocates. He prayed for:

- a. **One month's pay in lieu of notice Kshs.10,000.00.**
- b. **2 years' and 6 months' annual leave Kshs.19,638.30.**
- c. **Underpayments Kshs.2,602.50.**
- d. **Overtime Kshs.75,692.30.**
- e. **Public Holidays Kshs.10,051.20.**
- f. **Compensation under section 49(1)(c) of Employment Act, 2007 Kshs.113,384.30.**
- g. **Total claim Kshs.231,384.30.**

The respondent filed the reply to the memorandum of claim on 21.11.2012 and prayed that the cause be dismissed with costs.

The case was heard on 7.10.2013. The claimant gave evidence to support his case. He stated that he was employed by the respondent in 2009 as a customer care officer at Kshs.8,000.00 per month. Later, it was his testimony that he was deployed to sale spares as a salesman at Kshs.9,000.00 per month and promoted to Kshs.10,000.00 per month. The claimant testified that he was terminated from employment on 8.08.2011 after a service of 2 years and 6 months.

On 5.8.2011, a customer came to the respondent's shop with an accelerator cable which the claimant described as a long cable. The customer wanted a replacement with a similarly long cable. The claimant testified that he checked at the stores and found a shorter cable which he showed to the customer to express suitability as per customer's needs. The customer was of the view that the shorter cable was not fit for his purpose. The claimant explained that he had performed his duty in explaining to the customer about the available cable and he had been honest throughout the process.

On 8.08.2011, the claimant reported at work, was informed that he had been terminated and was paid Kshs.8,330.00 for his terminal dues and without any breakdown. Upon receiving the money, he signed on a plain paper without any writing or content. He was not given any termination letter or given a hearing in self defence. He testified that he knew that the reason for the termination was the honest explanation he gave to the customer on 5.08.2011. His testimony was that he was not paid in lieu of annual leave due but not taken for the 2 years and 6 months he had served as the respondent's employee.

The claimant testified that on weekdays he worked from 7.30 am and sometimes left work at 6.00 pm while on Saturday, he worked from 7.30 am to 3.00 pm. The claimant stated that the appointment letter provided for a one hour lunch break but was not honoured in practice. He denied that he had been given 21 annual leave days and had not been given any termination letter of 5.08.2011 as filed for the respondent. His evidence was that he was not a loader but was a salesman. The claimant testified that the pay of Kshs.8,000.00 per month was an underpayment and he did not know the amount of pay he was fairly supposed to earn. His testimony was that he thought the work was too much compared to the earnings he was paid by the respondent. The claimant admitted, in a contradictory testimony, that he worked 8 hours every week day and 5 hours on Saturdays; as he signed for the hours worked.

The court has considered the pleadings, the evidence and the submissions filed for the parties. The main issue for determination is whether the claimant is entitled to the remedies as prayed for.

The court has considered the claimant's evidence and finds that the claimant has failed to establish overtime and underpayment as claimed. It is clear that the claimant worked for 8 hours on weekdays and 5 hours on Saturday and rested on Sundays. The claimant in his evidence failed to show basis for the alleged underpayment. He failed to demonstrate that on a particular date he was engaged as a salesman and the due fair pay in that event. His evidence was that he was employed as a customer care officer (general labourer) and that designation was not shown to have ever changed. The claims for overtime and underpayment will therefore fail.

The court makes the following findings on the other prayers:

- a. The court finds that the claimant did not establish the public holidays he allegedly worked and the prayer will fail. The court did not find any good reason to doubt the evidence by Ketan Kumar Arvindbhai (**RW1**), a supervisor in the respondent's establishment, that the respondent closed business on all public holidays.
- b. The claimant prayed for pay in lieu of the annual leave. The respondent's second witness Samuel Nduati (**RW2**), the accountant, relied on exhibits **MFI 3**, **MFI 4** and **MFI 5** as filed for the respondent. The court has considered the evidence and on a balance of probability finds that the claimant's evidence that he was not paid leave throughout his service is incredible. The claim will therefore fail.
- c. The claimant has prayed for compensation for unfair termination. The claimant testified that he knew the reason for the termination related to the cable a customer had wanted to purchase on 5.08.2011. RW1 testified that on that material day, the claimant advised the customer that the accelerator cable was not available in the shop. The advice was outside the claimant's authority and duties because the claimant ought to have informed the boss called Patel about such predicament. RW2 testified that the claimant was not allowed to go to the stores and he had no genuine reason to advise the customer as he had done on that day. RW2 further testified that the claimant had refused to heed RW2's advice that the claimant had acted outside his authority and instead the claimant had abused RW2 by calling him, thus "**Stupid Donkey**". The court has considered that the claimant by his evidence knew the reason for the termination was the events of 5.08.2011. The court considers that in absence of any other material evidence, the claimant's misconduct would be gross and the respondent would be entitled to fire the claimant with a shorter notice than was agreed or as was prescribed in statute and on account of the gross misconduct. However, the court further finds that the termination was unfair to the extent that it was not shown that the respondent served any notice or accorded the claimant a hearing as envisaged in **section**

41 of the Employment Act, 2007. The court has considered the previous warnings issued against the claimant in view of his misconduct. The court finds that **Kshs.30,000.00** being 3 months gross salaries will serve ends of justice in this case.

- d. The claimant has prayed for one month pay in lieu of termination notice. It is obvious that the claimant was not served a termination notice and the court finds that he is entitled to **Kshs.10,000.00** as prayed for.

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

- a. a declaration that the termination of the claimant's employment by the respondent was unfair;
- b. the respondent to pay the claimant **Kshs.40,000.00** by 15.12.2013, in default interest at court rates to be payable till full payment; and
- c. the respondent to pay 50% of the costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 29th November, 2013.**

BYRAM ONGAYA

JUDGE