



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 1041 OF 2011

KENYA UNION OF JOURNALISTS AND ALIED WORKERSCLAIMANT

-VERSUS-

SUNDAY EXPRESS NEWSPAPER LTD.RESPONDENT

Mr. Hezron Onwonga for the Union.

Mr. Bundotich for the Respondent.

JUDGMENT

The Claimant filed a Memorandum of claim dated 24th June, 2011 seeking the following reliefs on behalf of the Grievant ***Deo Omondi***;

Declaration that the Claimant's termination was unlawful and unfair and thus seeks reinstatement to his job and in the alternative;

- i. Compensation for unfair dismissal; and
- ii. Payment of underpayments in the sum of Kshs.960,000/=;
- iii. Mileage allowance Kshs.804,000/=;
- iv. Night out allowance Kshs.804,000/;
- v. Media scan column Kshs.3,850,000/; and
- vi. Service gratuity Kshs.70,000/=.

The Claimant testified in support of his case and told the court that he was employed by the Respondent on 8th December, 2008 as a News Editor.

He was not given a written contract but was promised a monthly salary of Kshs.70,000/=. That himself and his employer had quit employment of the Standard Newspaper and so he accepted to initially take Kshs.30,000/= per month for two months to allow the business to get root but would be paid the full

salary and arrears thereafter.

That they were friends and the arrangement was on mutual trust. That he worked for two years without the employer paying him the correct salary and arrears.

On 23rd November, 2010, the Managing Director wrote a letter stating that he will effect a salary increment effective February, 2010. On 1st November, 2010, the Grievant wrote a letter asking for the salary arrears to be paid.

The salary was however not paid and his persistent demands led to the termination of his services.

On 23rd November, 2010, the Grievant was suspended on account of persistent late coming. He had been served with a warning letter dated 23rd September, 2010. The Grievant responded to both letters.

The Grievant testified that in the newsroom, there were no reporting and departure times. It was a flexible system.

He told the court that he did his work diligently and the newspaper was produced on a daily a basis. That for the 24 months he worked he was underpaid and claims the balance of his salary.

The Claimant further stated that he used his car and incurred expenses while doing sales of the newspaper and was promised payment verbally. That it is not denied that he was entitled to mileage in any event. He has stated the figure in his Statement of claim.

Furthermore he told the court that he travelled all over the country at his own expense and claims night-out allowance.

The Grievant told the court further that he published a media scan column which was extra work. That he was to be paid Kshs.50,000/= per week but this did not happen.

For the period he worked he was not registered with National Social Security Fund (NSSF) and therefore is entitled to service gratuity as claimed.

The Respondent filed a Memorandum of Response dated 3rd August, 2011 wherein it is denied that the Grievant was owed any salary arrears. No letter of appointment has been provided but Respondent states that the Claimant was employed at a basic salary of Kshs.30,000/=. He denies any other promises were made to the Grievant.

He also denies that the Grievant did any extra work or worked over and above his duties as an Editor.

The Respondent avers that the Grievant was a perennial late comer and absentee as well as a careless editor who exposed the Respondent to ridicule by outright plagiarism. He annexed minutes marked "SPLI" wherein he expressed his outrage over this matter.

The Respondent accused the Grievant of Publishing defamatory articles without authentication and has annexed as "SPLII" a letter of demand from Oraro & Co. Advocates to sue the Sunday Express.

That he issued the Grievant together with other staff who were perennial late comers with warning letters on 20th September, 2010 and 10th November, 2010. These are attached as annex III.

It is averred that the Grievant persisted in his late coming and not attending work.

In the light of this, the Respondent states that the Grievant breached his terms of service hence the suspension and eventual termination.

The Respondent prays that the claim be dismissed with costs as the dismissal of the Grievant was justified and no evidence to the contrary has been adduced.

Furthermore, no evidence has been tendered to prove the terminal benefits claimed by the Grievant including arrear salary, mileage allowance, night-out allowance, service gratuity and payment in respect of extra work done to produce medial scan column.

The Respondent did not call **Mr. Greg Okuogo**, the Managing Editor to counter any of the evidence adduced by the Grievant.

Since the averments in the Memorandum of reply do not amount to evidence, it is the court's finding that the evidence by the Grievant remains completely uncontroverted.

No one was called to speak to the photocopied annexures to the Statement of reply and by themselves, the documents do not constitute evidence admissible as against the best evidence adduced in court by the Grievant.

No explanation was given as to why the employer of the Grievant was not available to respond to extensive allegations made against him. In the circumstances the court has made an adverse presumption that he had no justification for the termination of the employment of the Grievant and has in the circumstances failed to rebut the evidence of unlawful termination adduced by the Grievant.

Consequently the Claimant has discharged the burden of proof placed on it under **Section 47 (5)** of the Employment Act, 2007 by showing that the termination was wrongful and unfair contrary to **Section 45 (2) (a)** and **(c)** of the Act.

In fact, it is clear that the Grievant was not given opportunity to explain himself over the allegations that led to his dismissal. Accordingly the dismissal was substantively unlawful and procedurally unfair.

The Grievant had served two years. He had good prospects as a News Editor which was cut in the bud unlawfully.

He was promised higher pay but this was not fulfilled and his persistent demand for the payment led to his dismissal.

I find that the Claimant has proved the claim for under payment of Kshs.40,000/= per month for two years in the sum of Kshs.960,000/=.

The Claimant has also proved that the Grievant was not registered with NSSF and therefore in terms of **Section 35 (5)** as read with **Subsection (6)**, he is entitled to service gratuity for two (2) years which the court tags at 15 days salary for each completed year of service in the sum of Kshs.70,000/=.

The claim for mileage allowance, night-out allowance and media scan column payment are special damages that must be specifically proved. They are neither statutory nor was any contract produced to prove them. The claims are consequently dismissed.

Regarding compensation, the Grievant had served for a relatively short period. He had good prospects of advancing his career in the media industry.

The circumstances of dismissal indicate that it is not practical to reinstate the Grievant though there was a specific prayer for that. The court awards him five (5) months salary as compensation for the unlawful termination in the sum of Kshs.350,000/=.

The final award is therefore as follows;

- a. Kshs.350,000/= compensation;

- b. Kshs.960,000/= as unpaid salary arrears; and
- c. Kshs.70,000/= being service gratuity for two years.

Total award Kshs.1,380,000/=.

The Respondent is to pay costs of the suit and interest on the decretal amount from date of filing this suit to date of payment.

Dated and delivered at Nairobi this 6th day of November, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE