



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1097 OF 2012

BETWEEN

ANTHONY MWANGI CHEGE.....
CLAIMANT

VERSUS

SHAZMEER JIWAN

t/a

BODY EXECUTIVE HEALTH CENTRE.....
RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Macharia instructed by Macharia, Odongo and Kosgei Advocates for the Claimant

Omondi, Waweru and Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 26th June 2012. The Respondent filed his Statement of Reply on 23rd August 2012. The Parties' respective Advocates agreed on 14th March 2013, to have the hearing proceed on 23rd May 2013. On the 23rd March 2013, only Mr. Macharia and his Client Anthony Mwangi Chege were in attendance. The Claimant proceeded with his Claim *ex parte*.

2. The Claimant testified he was employed by the Respondent as a General Manager at Mombasa, at the Respondent's Gymnasium known as Bodyworks Executive Health Centre, on a monthly salary of Kshs. 77,704. His contract of employment was terminated at the initiative of the Respondent on 29th October 2011. This was after the Respondent became agitated by the Claimant's demands to be paid arrears of salaries arising from the Claimant's employment with two other companies belonging to the Respondent. The Claimant had also demanded that the Respondent pays him his salary through one consolidated pay slip, instead of splitting the salary and paying one through the pay slip, the other being unstated on the pay slip. The Respondent had prior to terminating the Claimant's contract of employment, intimidated the

Claimant using CID Officers at Mombasa, alleging the Claimant had engaged in financial impropriety. The CID found the allegation to have no foundation. The Respondent issued the Claimant a suspension letter dated 7th November 2009, days after he had already terminated the Claimant's contract.

3. The Claimant seeks orders for the following-:

- a. Unpaid salary for October 2011 at Kshs. 77,704;
- b. One month salary in lieu of notice at Kshs. 77,704;
- c. Public Holidays worked but unpaid [30 days' pay x 2] at Kshs. 155,408;
- d. Payment in lieu of leave [2 years] at Kshs. 155,408;
- e. Proportionate leave pay of 4 months at Kshs. 18,130;
- f. House allowance at 15% of the monthly salary for 28 months at Kshs. 326,356;
- g. Service pay at 15 days' salary for each year completed in service at Kshs. 77,704;
- h. Proportionate pay for 4 months at Kshs. 12,950;
- i. 12 months' salary for unfair termination at Kshs. 932,448

Total: Kshs. 1,833,814

He prays for costs, interest and any other suitable relief the Court may deem fit to grant.

4. The Respondent in his Statement of Reply conceded he employed the Claimant as his General Manager, on an all inclusive monthly salary. The Claimant worked well for the first few months. He then became an incompetent General Manager and deteriorated rapidly, to the detriment of the Respondent's business. The Respondent did not terminate his contract at all. He was suspended on 7th November 2011 pending investigations and disciplinary proceedings. He was not issued any letter of termination of employment. The Respondent denied he owes the Claimant Kshs. 1,833,814 or any other sum at all. The Claimant did not submit himself to any disciplinary process, and filed the Claim prematurely. The Claim is premature as the Respondent did not issue any letter of termination. In sum the Respondent urged the Court to find that the Claimant is still an employee of the Respondent who remains under suspension; the Claimant's contract was not terminated by the Respondent; the claim is premature; and the Claimant is not entitled to the prayers listed in his Statement of Claim.

The Court Finds and Awards-:

5. It is difficult to disagree with the Statement of Reply filed by the Respondent, in the absence of a letter of termination issued by the Respondent. The Claimant was suspended on 7th November 2011, and the letter suspending him is clear he was to report to the workplace to attend a disciplinary process. He was not asked to hand over office, as alleged in his evidence, but asked to cede his duties to another officer pending the investigations and disciplinary process. It was not logical that the employer would be issuing a letter of suspension on 7th November 2011, after dismissing the Claimant on 28th October 2011. The Claimant alleges his contract was terminated on 29th October 2011; there is no evidence at all that this was true. The Respondent has asked the Court to find the Claimant is still his employee who is under suspension. The Court does not see any reason why it should treat the employment relationship as terminated, when the employer has stated the employee is still in employment. The law of unfair termination, and the payment of terminal benefits, would only come into play where there is a clear case of termination of employment, or constructive dismissal from employment. An employee who is suspended, and who is requested to submit himself to a disciplinary process, has no reason to consider his employment at an end, more so when the employer categorically states the contract is still alive. The Court agrees with the Respondent that the Claim was filed prematurely. In the circumstances, the Court Orders-:

[a] The Claimant shall report back to his employer Shazmeer Jiwan, within 30 days of the delivery of this Award;

[b] The Respondent shall give written and express advice to the Claimant on the Claimant's

suspension; pending investigations and disciplinary process; accrued salaries from the date of suspension; and the status of the contract of employment;

[c] Parties may revert to the Court under the same Cause Number 1097 of 2012, upon the exhaustion of the workplace grievance and dispute resolution mechanisms; and

[d] The Claimant to serve the Respondent with a copy of this Award.

Dated and delivered at Nairobi this 9th day of December 2013

James Rika

Judge