



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT MOMBASA
CAUSE NO. 138 OF 2012

JAYESH M. SUTARIACLAIMANT

VERSUS

JAMBO BISCUITS [K] LTDRESPONDENT

J U D G M E N T

BACKGROUND

The claimant has brought this claim against the respondent claiming ksh.505,000/ as his accrued employment terminal dues. The respondent on the other hand has partly denied liability and counter claimed for ksh.613,500/, being 3 months salary in lieu of notice and cash lost while in the custody of the claimant in August 2006.

The case was heard on 7/5/2013 and 5/9/2013 when the claimant testified as CW1 and Mr. Natin P. Dawuda testified for the respondent as RW1.

CLAIMANT'S CASE

CW1 was employed as Depot Manager vide letter of appointment dated 15/8/2005. His salary was ksh.55000 per month during probation but was to be increased by ksh.5000 after probation period effective January 2006. The letter further provided that during the probation period the respondent could terminate his services by a week's notice while the claimant could terminate by serving one month notice. According to the claimant no other letter of employment was given to him despite his various verbal demands. His salary was however increased in January 2006 as per the agreement in the letter dated 15/8/2005.

On 23/4/2010 the claimant served the respondent with a notice to terminate his service with effect from 23/5/2010. The reason he chose to resign was frustration by the respondent through non-payment or delayed payment of salaries. He prayed for ksh.120,000 as the salary arrears for April and May 2010, ksh.144000 as service pay, ksh.35000 being accrued leave days and ksh. 200000/ being cash allowance for two years.

He denied ever being served with any confirmation letter dated 15/12/2005 and denied signing

same. He maintained that without any further agreement he was entitled to serve only one month notice to the respondent before termination as per the employment letter dated 15/8/2005. As for the claim for cash allowance of ksh.200,000 he maintained that it was based on oral promise by the Managing Director of the respondent.

On cross examination he maintained that he saw the confirmation letter dated 15/12/2005 after his lawyer was served with defence to this claim by the defence lawyer. He also vehemently denied the signature thereon. On further cross examination he admitted that money was lost from his office of which he undertook to pay and even overpaid by ksh.40000/-. He maintained that he got the initial ksh.285000 to repay from his parents.

DEFENCE CASE

RW1 is the MD for the respondent. He admitted that CW1 was engaged by letter dated 15/8/2005 at a salary of ksh.55000/ per month during the 4 months of probation. The letter provided for increase of the salary by ksh.5000/ after confirmation. The confirmation was by letter dated 15/12/2005 which increased the salary by ksh.5000 and increased the notice period to 3 months or salary in lieu of notice.

The claimant resigned by letter dated 23/4/2010 which the RW1 only saw when he was served with court papers. As at the time the claimant resigned there was no salary arrears due to him. He denied promising the claimant any cash allowance of ksh.100,000/ per year.

RW1 however confirmed receipt of the letter dated 17/5/2010 from CW1 and even talking to him over the phone and again on 14/5/2010 when CW1 went to Nairobi to discuss other matters but not resignation. RW1 confirmed that CW1 was a member of NSSF and was not entitled to service pay.

RW1 however admitted that CW1 was entitled to ksh.35000 for leave and ksh.120,000/ being salary arrears for April and May 2010. He however counter-claimed ksh.166000/ being the unexpired notice period of 2 months and 23 days because CW1 resigned on 23/5/2013 which was only 7 days notice instead of 3 months notice. He also counterclaimed for ksh.447,350/ being money stolen when it was left in the depot over the weekend due to the claimant's negligence.

He Maintained that CW1 admitted to pay the ksh.450,000 but he never did so. On cross examination he admitted that there was a personnel office in the respondent dealing with all staff but he (RW1) personally dealt with the senior managerial staff. He did not know whether Goetz the Administrative Manager had received the CW1's resignation letter dated 23/4/2010. He admitted that there were email correspondences between CW1 and Goetz saying that CW1 had given 30 days instead of 90 days notice. RW1 also admitted that he was not present when the claimant signed the confirmation letter dated 15/12/2005. He could not therefore confirm that the signature on the said letter was by the CW1.

He contended that by letter dated 26/9/2006 the claimant was allowed to pay the lost money by installment starting with a deposit of ksh.285000. RW1 admitted that a deposit of ksh.285000 was deposited by the claimant but denied that it was not the claimant's money but respondent's money. RW1 was also not aware that the claimant forfeited his leave as part of the repayment of the lost money.

RW1 admitted that there was over payment of the lost money to ksh.486000 but maintained that money was still respondents money not from the CW1. After the close of the hearing, the parties filed written submissions.

ANALYSIS AND DETERMINATION

Upon perusing the pleadings and considering the evidence and submissions, the issues for determination are:

- a. whether the notice period for terminating the employment contract herein was three or one month.**

- b. Whether the claimant was entitled to any dues upon termination by resignation.**
- c. Whether the respondent is entitled to the amount counterclaimed.**

In answer to the first issue the court was provided with two letters one dated 15/8/2005 by the claimant and another one dated 15/12/2005 by the respondent. The former letter was issued to the claimant by the respondent when he was engaged. The termination clause in the said letter was with respect to termination during the probation period. This letter is recognized by the both CW1 and RW1. The CW1 contends that because he was never issued with any other letter governing the contract after the probation period, the termination clause in the letter dated 15/8/2005 continued to apply until 23/4/2010 when he resigned.

The RW1 however contends that the CW1 was served with the confirmation letter dated 15/12/2005 which provided for 3 months termination notice. He maintained that the CW1 accepted the said letter by signing on it. The CW1 has however denied the signature on the said letter. The RW1 was not present when CW1 allegedly signed acceptance but maintains that the signature belongs to the CW1 because it resembled the one on the letter dated 15/8/2005.

No document examiner was called by the respondent to prove that the signature on the letter dated 15/12/2005 belonged to the CW1 and indeed no eye witness was called by the respondent to support the allegation by the RW1 that the signature belonged to CW1. It is therefore this court's finding that the signature on the letter dated 15/12/2005 does not belong to the CW1. Even at a glance, the signatures in the two letters do not share any resemblance. The allegation by the defence that the termination notice period had been agreed to 3 months is therefore not proved and must fail.

Likewise the allegation by the claimant that the termination notice period remained one month as provided for under the letter dated 15/8/2005 is also not correct because it only provided for termination during the probation period. The purpose of the court is only to interpret the intention of the parties from the documents as it is without importing anything into the documents. The court therefore finds that the two letters produced as exhibits are not the answer to the first issue for determination.

The court must therefore resort to the Employment Act Section 35 (1) which provides that where a contract of service is to pay wages at intervals of not less than one month, the contract shall be terminable by either party by a notice of one month in writing. It is not disputed that the claimant was a manager whose salary was paid in intervals of one month. Consequently, this court holds that the contract was terminable by either party serving a 30 days notice in writing as it happened in this case. By a coincidence.

As regards the second issue, the claimant has prayed for service pay, cash allowance, leave days and salary arrears. There is no evidence adduced to prove the claim for ksh.100,000 per year after RW1 denied any oral agreement on the subject with the claimant. This prayer fails for lack of evidence. As regards the service pay, the RW1 contended that the claimant was a member of the NSSF and therefore disqualified from claiming service pay. RW1 produced respondent's NSSF records to show that CW1 was among the staff members on whose behalf remittances were made starting July 2009. He did not prove that the remittances were made between 2005 and 2008. No NSSF statement was produced by the defence to prove that the remittances were made for the entire period of service. The burden of proving the allegation of NSSF remittances was on the respondent and as such a one page statement from the NSSF would have solved the issue. In addition, the obligation of keeping employment records rests with the employer and as such the respondent should have produced the relevant records to prove that CW1 was barred from claiming service pay.

Consequently the court resolves the issue by awarding to the claimants service pay for the period between 15/8/2005 and July 2009 which approximately is 4 years. The award shall be at the rate of 15 days for each completed year of service which adds to ksh.120000/-. The claim for leave of ksh.35000/ and salary arrears for April and May 2010 of ksh.120000 is not in dispute as the same was admitted by RW1 on oath. The answer to the second issue is therefore that the claimant's lawful terminal benefits due from the respondent is ksh.275000/ subject to the counter claim.

The last issue to consider is whether the respondent's counterclaim has merits. Obviously from the findings of the court in respect of notice period, the basis of the claim for ksh.166,000/ being salary in lieu of unexpired notice partly fails. The reason being that the claimant was bound to serve only one month notice or pay salary in lieu. He however did not serve the whole notice period. He left on 17/5/2010 instead of 23/5/2010 and therefore breached the contracted by about 6 days. He will forfeit wages for that period which is 12000/

As regards the claim for money lost in August 2006, it has been alleged by CW1 that he paid the whole debt and even exceeded by ksh.40,000/. The claimant mentioned that the initial deposit of ksh.285,000/ being money from his parents. RW1 admits that money was banked by the CW1 but maintained that such were not personal money from the CW1 but respondent's money CW1 collected in the course of his duty as the branch manager.

RW1 did not provide any evidence to support his allegation that the money used to repay the lost money was allegedly respondent's money. No audited report of the respondents accounts were tendered as exhibits to show that what the CW1 alleged to be his money was indeed not true. RW1 did not have any evidence to dispute the allegation that the CW1 got money from his parents and paid by cheque from his joint accounts with his wife. The court finds that the claim for ksh.447,500/ has no merits. One wonders why it had to be made in November 2011 yet it happened in August 2006. The court reads malafide in the said claim especially because of the timing.

Consequently, save for the ksh.12000 in respect of the unexpired notice period, the rest of the counterclaim is dismissed.

DISPOSITION

For the reasons stated above judgment is entered for the claimant against the respondent for ksh.275000/ less ksh. 12000 = 263,000/ plus interests from the date of termination. The claimant will also have costs and interest.

Signed, dated and delivered this 6th day of December 2013

ONESMUS MAKAU

JUDGE