



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 124 OF 2013

PATRICK MUTUA MAUNDUCLAIMANT

VERSUS

GILFILIAN AIR CONDITIONING LTDRESPONDENT

J U D G M E N T

BACKGROUND

The claimant brings this suit against respondent alleging unlawful termination of his employment and prays for ksh.683,423/ as terminal dues. The respondent has denied the alleged lawful termination and contented that the termination was done through a fair process and for a justifiable reason. The suit was heard on 19/9/2013 when the claimant testified as CW1 but the respondent called no witness.

CLAIMANTS CASE

CW1 stated that he was employed on 12/11/2002 as a Refrigeration Technician. He worked diligently on weekdays from 8am to 5pm and on Saturday from 8.00am to 1.00pm. From 2010 to 2012 he was assigned work at Nakumatt city mall but also did some duties at Airtel and Barclays Mombasa Region. On 15/12/2012, he went for leave upto 28/1/2013. On 28/12/2012, he was called to Nakumatt city mall by his manager Mr. Ron who showed him a scanned invoice in his ((Ron's) phone bearing the letter head "The Cool Power Engineers Ltd". Mr. Ron then verbally dismissed the CW1 summarily without payment of any dues.

After handing over the respondents working tools, CW1 went to instruct his lawyers who served a demand letter dated 18/1/2013 upon the respondent. No response was made to the lawyers' said demand letter. On 19/2/2013, CW1 found ksh.192000/ credited on his bank account by the respondent. When he went to the office to enquire he was told that it was his terminal benefits and he was given some papers to sign for the money but he declined because firstly it was not accurate sum and secondly he had already instructed lawyers to handle the matter.

He produced a payslip for January 2013 to prove that his basic salary was ksh.37000 plus house allowance of ksh.3000 and transport allowance of ksh.2000. He admitted that he owned a business name known as "The Cool Power Engineers" and produced a certificate of registration. He admitted that he did personal business of installing and repair of Air conditioners but only during his private time after 5pm. Example of such private work was done in July 2012 at Naivas supermarket Nyali after his supervisor Mr. Mutai requested him to assist.

CW1 maintained that he did the said work between 5pm and 7pm after working official time and denied ever raising a written invoice. He prayed for terminal benefits for his 10 years service plus 12 months salary for unfair termination.

On cross examination, he maintained that the appointment letter only barred him from doing any personal work that would interfere or conflict with his duties as a full time employee of the respondent. According to him it was normal for a technician to do private work during his private time outside official working hours. He maintained that the invoice scanned on Ron's phone bore his signature but denied ever writing the same and denied the letterhead upon which it was written.

He maintained that the respondent deposited money in his account after the demand letter by his lawyers. He maintained also that during his service he was never served with any warning letter. After the close of the hearing the parties filed written submissions.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings, evidence and submissions are:

- a. **whether the termination of the claimants employment was unfair.**
- b. **Whether a compensation of 12 months salary should be paid to the claimant for unfair termination.**

In answer to the first issue, the claimant contended that he was dismissed summarily by Mr. Rono. He was not given any opportunity to defend himself. The foregoing is corroborated by paragraph 13-14 of the respondents defence which is to the effect that on 28/12/2012, a director of the respondent found the claimant engaging in private business during working time and after consulting the other directors decided to dismiss the claimant by the letter dated 14/1/2013. No evidence was called by defence to prove that the claimant was found absenting himself from place of work. The uncontested evidence by the claimant is therefore that he never breached the employment contract by absenting himself from work at the appointed working hours and therefore the dismissal was based on unproven and invalid reason within the meaning of Section 43 and 45 of the Employment Act.

In addition to the foregoing the procedure followed to dismiss him was unfair. The Board of Directors received a report from a fellow director and dismissed the claimant without affording him an opportunity of being heard as provided for under Section 41 and 45 of the Employment Act. Had he been heard he would explain that he was on leave on 28/12/2012 and that he did his private work during his private time. Consequently the answer to the first issue for determination is in the affirmative.

As regards the second issue, of the relief sought it is clear that under Section 49 of the Employment Act the court has a variety of awards to make once a determination is made that the dismissal was unfair and unjustifiable.

After considering the submissions filed by the claimant, it seems that he was only pursuing an award of 12 months salary for unfair termination. He prayed for ksh.440000/ which seems to be calculated from a salary of ksh.36,666.66. The uncontested payslip for July 2012 indicates that the basic salary was ksh.37000/ and possibly that is the figure contemplated. This court will not correct the claim by enhancing it. Section 49 of the Act provides for a maximum of 12 months gross salary and not basic. I will award the claimant the ksh.440000/ as prayed although lower than the statutory gross pay.

As regards the alleged erroneous payment of service pay, this court is alive to the fact that Section 35 of the Employment Act does not bar an employer from paying service pay to employees who were members of the NSSF. The payment was not paid through fraud or misrepresentation or duress on the part of the claimant. No counter claim was filed against the claimant in respect of the alleged erroneous service pay. Consequently the respondent has only herself to blame for what she paid gratuitously to the claimant after the unfair dismissal.

As a way of parting shot, the court has considered the submissions made by the defence regarding the procedure of conciliation before filing suit to this court. The court is however not satisfied with the allegation that a suit is *abintio* incompetent if filed before conciliation process before the labour office. The Industrial Court (Procedure) rules, 2010 do not limit the right of the litigants to access this court but rather grants option to attempt conciliation.

DISPOSITION

By reasons of all the findings above judgment is entered for the claimant against the respondent for the payment of ksh.440000. The said sum shall be in addition to any other sum paid to the claimant by the respondent on or about 1-2-2013. The claimant will also have costs and interest. The claimant will also be issued with a certificate of service.

It is so ordered.

Signed dated and delivered this 6th day of December 2013

ONESMUS MAKAU

JUDGE