



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 188 of 2011**

**BERNARD MUNGUTI MUTISYA.....CLAIMANT**

**-VS-**

**WEI HONG JO.....1ST RESPONDENT**

**KENYA YUNCHENG PLATE MAKING LIMITED.....2ND RESPONDENT**

**JUDGMENT**

By a memorandum of Claim dated 10th February 2011 and filed in court on 14th February 2011, the Claimant **BERNARD MUNGUTI MUTISYA** alleges that he was employed by the Respondents **WEI HONG JO** and **KENYA YUNCHENG PLATE MAKING LIMITED** the 1st and 2nd Respondents respectively as a designer on 30th April 2010 at a salary of Kshs. 11,700/- per month. On 14th September 2010 he was redesignated to salesman. He alleges that he was terminated from employment on 30th November 2010 when he asked for his salary to be adjusted or to be transferred back to be a designer after the company employed a qualified salesman. He alleges his termination was unlawful and prays for payment of Salary for November 2010 at Kshs. 11,700/- plus house allowance of Kshs. 1,755/- totaling 13,455/-. He further prays for 5 days leave, underpayments of Kshs. 24,612/- and Kshs. 243,599.60 being house allowance underpayment and compensation for loss of employment.

The Respondents filed their Reply to the Memorandum of Claim on 23rd March 2011 in which they deny wrongfully terminating the employment of the Claimant. The Respondents aver that the Claimant was employed as a trainee designer but did not demonstrate sufficient skill prompting the Respondent to redeploy him as a salesman. He was warned severally and his employment was terminated after he requested to be terminated and that his terminal dues were assessed by the Labour Officer at Kshs. 9000/- and deposited at the Labour Office but the Claimant has not collected the same. The Respondents further aver that the Claimant was paid his salary for November 2010 as confirmed by the payslip which he received and acknowledged payment by signing.

The parties were heard by Hon. Justice Mukunya (Retired) on 27th March and 27th June 2012. The Claimant was represented by **Mr. Oyiembo** of Oyiembo & Co. Advocates while the Respondent was represented by **Mr. Muchoki** of Muchoki Kangata & Co. Advocates. The Claimant gave evidence in support of his case while the Respondent called **HEZRON MUNANGA SAMUEL**, a supervisor.

No evidence was submitted in respect of the 1st Claimant. The case against **WEI HONG JO**, the 1st Respondent is therefore dismissed and the case is deemed to have been filed against the 2nd Respondent alone.

The Claimant's evidence was that he was employed on 30th April 2010 as a graphic designer and was transferred to sales after 4 months and left employment on 30th November 2010. He denied that he asked the company to terminate him. He averred that he was not given any notice or paid terminal dues. In cross examination he denied that he was a trainee designer. He admitted having received 2 warning letters as a salesman. He also admitted having been called by the Labour Office but stated he was not given a breakdown of the payments due to him.

DW1 **HEZRON MUNANGA SAMUEL** gave evidence for the Respondent and stated that he worked for the Respondent as a supervisor from 2008, that he knew the Claimant who joined the company as a trainee graphic designer but was redesignated assistant salesman after 4 months due to unsatisfactory work. DW1 further stated that the Claimant worked as a salesman for 2 months during which he received 2 warnings. After termination the Claimant lodged a dispute with the Labour Office Industrial Area which calculated his terminal dues at Kshs. 9000. He further stated that before leaving employment the Claimant had been paid his November 2010 salary.

In the Claimants written submission, only the facts of the case have been summarized. No attempt has been made by the Claimant to explain the basis of the prayers in the memorandum of Claim. The Respondents in the final submissions have urged the court to dismiss the claim by the Claimant on the grounds that he is the one who asked to be released from employment and was therefore not terminated by the Respondent. The submissions rightfully point out that there is no evidence of the basis of the claims and how such figures were arrived at and further that the claims were not supported by the Claimants oral testimony. The Respondent relied on section 107 (1) of the Evidence Act which provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

In the present case the Claimant has not given a breakdown of the claim either in his oral evidence or in the submissions.

The court therefore decides on each of the prayers as follows:

**1. November 2010 salary**

The Claimant's employment was terminated on 30th November 2010 so he is entitled to the salary for November 2010 at Kshs. 10471.41 as per pay slip annexed as Appendix D in Respondents Reply to Memorandum of Claim.

**1. Kshs. 11,700 per month**

No evidence was submitted to support the claim nor has the Claimant explained the legal basis for the same. The claim is dismissed.

**1. Kshs. 243,599.60**

No evidence was submitted by the Claimant in support of the claim. The claim is dismissed.

**1. Underpayments**

No evidence was submitted in support of the claim for underpayments. The claim is dismissed.

**1. Notice**

The court notes that the Respondent calculated the Claimant's notice for 6 days only. Since his payslip shows a monthly pay, he is entitled to 1 months gross salary in lieu of notice, in accordance with Section 35 [1] [c] of Employment Act. The court grants him Kshs. 11,700 as salary in lieu of notice.

**1. Leave**

The Respondent has admitted in the letter of termination that the Claimant is entitled to 5 days leave at the rate of Kshs. 450.00 per day. This is the same as what is claimed by the Claimant. The claim is therefore granted at Kshs. 2250.00.

In summary, the Claimant is granted Kshs. 25,650 being salary for November 2010, one months' salary in lieu of notice and 5 days leave. All the other prayers are dismissed. If any payment has been made to the Labour Office, the Respondent may deduct the same upon giving the Claimant a copy of the receipt from the Labour Office to enable him collect it.

**Orders accordingly**

**DATED AND DELIVERED AT NAIROBI THE 8TH DAY OF OCTOBER 2012.**

**HON. LADY JUSTICE M. ONYANGO**

**JUDGE**

**In the presence of-**

**For Claimant:**

**For Respondent:**