



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1016 of 2011

Ferdinand Mudi Beti

Claimant

John Muiruri Kimani

Respondent

AWARD

Background

1. Mr. Ferdinand Mudi Beti (the Claimant) filed a Memorandum of Claim against Mr. John Muiruri Kimani (the Respondent) on 24 June 2011. The issue in dispute was stated as '**wrongful and unfair termination of the claimant's services and failure by the Respondent to pay terminal benefits of the Claimant.**'
2. I heard the parties on 27 July 2012 and on 2 October 2012. Both the Claimant and his witness and the Respondent gave sworn testimony.

Claimant's case

3. The Claimant's case was that he was employed by the Respondent on 16 August 2001 at a monthly salary of Kshs 7,000/- as a watchman. He was not issued with a written appointment letter as required by law.
4. Sometime in 2004, the Claimant testified, he was added additional roles as a caretaker and house help after two persons who were working with him were terminated. He produced a schedule from the Respondent with these added responsibilities.
5. It was also the Claimant's case that the Respondent was out of the country most of the time and therefore his salary would be paid late. In 2006 he was paid overtime arrears, advance and bonus. But these details are not material to the determination of the Cause and I will not concentrate on them.
6. According to the Claimant, he served the Respondent with loyalty and diligence until 21 October 2008, when the Respondent wrongfully and unlawfully terminated his services without notice. His household property were thrown out and he was not informed of the reason for his termination, though sometime in 2008, the Respondent's dogs were poisoned by thieves and died as a result.
7. He testified that from 2006 to 2008, he never went on annual leave and he was therefore seeking Kshs 9,800/-. He was also seeking severance pay of Kshs 24,500/- for his 7 years service and one month salary in lieu of notice.
8. In cross-examination the Claimant admitted that he was away from work for 19 days between January and May 2008. He further informed the Court that he was paid some Kshs 306,000/- as overtime

and other allowances and that this money was not a loan advanced to him by the Respondent to buy land.

9. Regarding the poisoning of the Respondent's dogs, the Claimant informed the court he was responsible for cooking for the dogs and that when the dogs were poisoned he called a veterinary doctor who could not assist.

10. Claimant's witness Augustine Lihugu confirmed that the Claimant's properties were thrown out and he kept these properties for him. He also stated that the Claimant served as a shamba boy, cleaner and watchman. At times he would stand in for the Claimant who would pay him.

11. Regarding the Respondent, the witness stated that he knew him and that he did not respect his workers and would dismiss them at will.

Respondent's case

12. The Respondent admitted employing the Claimant as pleaded but as a casual employee.

13. The Respondent further denied that the termination of the Claimant was wrongful or unlawful but asserted that the termination was for gross misconduct in that he had reasonably suspected the Claimant of poisoning his pedigree dogs which caused him financial loss. The Respondent pleaded he provided the Claimant with housing, food, free water and electricity on top of giving him Kshs 37,000/- as gift.

14. According to the Respondent, the Claimant was employed as a watchman with the responsibility of cooking and taking care of the dogs. At the time of termination, he admitted he was paying the Claimant Kshs 7000/- per month through petty cash voucher.

15. Regarding the termination of the Claimant, the Respondent testified that while on a trip in Uganda in August 2008, he received information that two of his dogs had been poisoned and died. He cut short his trip and returned to Kenya. According to the Respondent it is the Claimant who had poisoned the dogs. His reasons for this suspicion were that his compound had a chain link fence buttressed with *kei-apple*, *the dogs had been trained not to eat raw food* and therefore it was not possible for the dogs to have been poisoned by thugs.

16. The Respondent had a counterclaim against the Claimant for Kshs 306,000/-. The basis for the counterclaim was that the Respondent had advanced to the Claimant some Kshs 330,000/- for the purchase of land out of which the Claimant had repaid only Kshs 24,000/-

Issues for determination

17. Both parties relied on several documents which I have not made reference to in giving the parties' contentions. This is so because they are of not much relevance to the three heads of claim /relief sought by the Claimant.

18. Consequently, the main issue which arises for determination is whether the termination of the services of the Claimant was wrongful and unfair if the answer is in the positive whether the Claimant is entitled to the three heads of relief sought.

Whether the termination of the Claimant was wrongful and unfair

19. I have perused the Employment Act, 2007 but I have not come across the use of the term '**wrongful termination**'. The terms which have variously been used are '*unfair termination*' in sections 45 and 47, '*summary dismissal*' in section 47 and '*wrongful dismissal*' in the side note to section 49.

20. For purposes of this case I would understand the Claimant, a lay person acting for himself to be saying that his termination was wrongful because the Respondent violated the provisions of the Employment Act, 2007.

21. In paragraph 5 of the Memorandum of Claim, the Claimant had pleaded that he was not given notice. In this case therefore section 35(1) (c) of the Employment Act, 2007 becomes implicated. The section requires the giving of notice in writing. But section 35 should not be interpreted in isolation from section 36 of the Employment Act, 2007. Section 36 gives the option of payment in lieu of notice.

22. But the Respondent in paragraph 6 of the Respondent asserted that the conduct of the Claimant amounted to gross misconduct warranting summary dismissal and therefore no notice was required.

23. Summary dismissal is governed by section 44 of the Employment Act, 2007. Section 44(4) of the Act has set out the matters which would amount to gross misconduct leading to summary dismissal. These matters include absence without leave, intoxication in the workplace, wilful neglect to perform one's work, use of insulting language or commission (suspicion) of commission of a criminal offence etc. The Respondent submitted that regarding the poisoning of the dogs, the Claimant was reasonably suspected of committing a criminal offence and carelessly and improperly performed his duties.

24. All these are very well, but summary dismissal under section 44 on the ground of *misconduct, poor performance or physical incapacity* is subjected to the procedural fairness provisions in section 41 of the Employment Act, 2007.

25. According to the Respondent, he explained to the Claimant the reasons for the termination. The Claimant denies that the Respondent gave notice or reasons for the termination. It is the word of one against the other. However I find no difficulty in determining this issue. It was incumbent upon the Respondent to inform the Claimant that he was terminating his services. The requirement to put in writing the termination is not only applicable in cases of termination under section 35 of the Employment Act, 2007. Although it is not expressly stated under section 44 that summary dismissal should be in writing, I don't understand it to have been the intention of the Legislature to require written notice of termination under section 35 but no written notification in summary dismissal cases.

26. I therefore do find that the termination of the services of the Claimant was unlawful.

Appropriate relief

One month salary in lieu of Notice

27. Considering what I have endeavoured to lay out above, it is my considered opinion that the Claimant succeeds in his prayer for one month salary payment in lieu of notice in the sum of Kshs 7,000/-.

Severance pay

28. The Claimant cannot legitimately claim or get severance pay. It was not pleaded nor even suggested that he was declared redundant. Under the Employment Act, 2007 severance pay is a relief in cases of redundancy. I dismiss this head of claim.

29. The appropriate relief in these circumstances would be service pay as provided for in section 35(5) of the Employment Act. But the award of service pay as a remedy is dependent on an employee not being a member of the National Social Security Fund, a gratuity pay scheme established under a collective agreement, registered pension/provident scheme or other more favourable scheme operated by an employer.

30. The only handicap in this case is that the Claimant did not seek payment of service pay. The question therefore is whether the hands of the Court is tied by the provisions of section 35(6) of the Employment Act.

31. The Court has been given the jurisdiction and power to make any other appropriate relief as the Court may deem fit to grant. Further the Court is a court of equity. It must do justice to both parties. The Claimant was a layman acting for himself, most probably with some semi-professional advice behind the

scenes.

32.To do justice and be fair, I think it is only fair that I award him service pay at the rate of 15 days for each of the 7 years worked calculated using the formula of 15 days multiplied by Kshs 7000/- divided by 30 multiplied by 7 which gives a sum of Kshs 24,500/-.

Leave Allowance

33.The Claimant sought leave allowance of Kshs 9,800/- for the period 2006-2008.He stated in his testimony that he did not go on leave from 2006-2008, when he was terminated.

34.Section 74 of the Employment Act, 2007 has placed an obligation upon an employer to keep certain records. The record should contain particulars of an employee's annual leave entitlement, days taken and days due. No such record was produced by the Respondent who only submitted that the Claimant actually went on leave and there was no actual outstanding leave at the time of dismissal. In fact it was the case of the Respondent that whenever the Claimant proceeded on off, casual employees were hired. The Respondent buttressed this case with documentary evidence indicating payments made to these casual employees.

35.Specific reference was made to a petty cash voucher dated 9 January 2008 in which one Augustine Lihugu Amaiza who happened to be the Claimant's witness was paid Kshs 2,600/- for standing in for him for 13 days and another petty cash voucher dated 14 May 2008 in which the said Augustine was paid Kshs 1,200/- for standing in for 6 days for the Claimant. These would make a total of 19 days.

36.I need to note that section 28 of the Employment Act, 2007 has not made any entitlement to payment of leave allowance. It provides for entitlement to 21 days annual leave with full pay. Going by the testimony of the Claimant he would have been entitled to 42 days leave with full pay for the period 2006-2008.Therefore for the period 2006-2007, I would award the Claimant Kshs 7,000/- accrued leave and for the period 2007-2008, I hold that the Claimant took 19 days out of the 21 days he was entitled to leaving a balance of 2 days. I would therefore award him the equivalent of 2 days leave using the formula of 2 days multiplied by Kshs 7000/- divided by 26 days totalling Kshs 538/-. I use 26 days because that is the practice which has been adopted due to the fact that an employee is entitled to at least one rest day per week and a month has an average of 30 days. I therefore would award Kshs 7538/- accrued leave for the period 2006-2008.

37.Before concluding I wish to draw the attention of the Respondent and other employers to section 9 of the Employment Act,2007 which has placed an obligation upon an employer to reduce into writing a contract of employment amounting to in the aggregate three or more months or in respect of work which cannot be completed within three months, section 10 on employment particulars and more particularly section 10(7) on failure to produce a written contract and particulars and section 74 on the requirement to keep records. The Respondent did not produce in Court the requisite records an employer should keep to assist the Court in the determination of this Cause.

Conclusion and orders

38.I do therefore find and hold that the termination of the Claimant to have been unlawful and do award him:

(i)	One Month salary in lieu of Notice	Kshs 7,000/-
(ii)	Service pay	Kshs 24,500/
(iii)	Accrued leave for 2006-2008	Kshs 7,538/-
(iv)	TOTAL	Kshs 39,038/-

39.The prayer for severance pay is declined.

40.There will be no order as to costs.

Dated and delivered in open Court in Nairobi on this 16th day of November 2012.

Justice Radido Stephen
Judge

Appearances

Ferdinand Mudi Beti

in person

Mr. Malonza instructed by Sisule Kilonzo &
Associates Advocates

for Respondent