



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1851 of 2011

RAPHAEL WELLINGTON OKONJI.....CLAIMANT

VS

SUNTHESIS LIMITED.....RESPONDENT

AWARD

The Claimant has sued the Respondent, his former employer seeking employment terminal dues for wrongful and unfair termination of services.

The Respondent has admitted the contract of service between the Claimant and herself. She however denies the allegation of wrongful and unfair termination and instead blames the claimant for the wrongful termination of contract. She also avers that all the terminal dues have been paid to the Claimant through his representatives.

The case was heard on 25-9-2012 when the Claimant testified as CW1 and the Respondent called Catherine Aleyo Jadeya to testify as RW1.

CW1 testified that he was employed by the Respondent on 17-6-2002 at a salary of Kshs.7,500/= per month and dismissed on 15-5-2011 while earning a monthly salary of Kshs.26,079/-.

That on 15-5-2011 he went to work and found another person on his desk. He stayed outside the office waiting for his boss who returned at 3.00 or 4.00 p.m. and called him to his office. That the boss referred him to RW1 who took him through a document called "Performance Improvement Plan Report". Thereafter, he went back to see his Boss because the report had recommended his dismissal and the boss had accepted the recommendation on 6-5-2011 even before hearing the Claimant.

That one of the accusations against him was failure to pay NHIF yet he had already paid. That had he been given a hearing he could have explained himself out. He prayed for reinstatement or payment of terminal benefits plus costs.

On cross-examination he said that he learnt of his dismissal on 16-5-2011. That a new person had already taken his position. He agreed that he was given money to pay NHIF but delayed due to power black out at the NHIF offices.

In defence RW1 confirmed that she was the supervisor of the Claimant. That the Claimant was not reaching the performance targets forcing her to put him on a Management Plan with his consent. That the

said plan was like a warning. That he was taken through the agreement and given a daily journal to fill and which was used to monitor him. The journal was then compared with the weekly schedules to get the result of the Performance Improvement Plan. That out of the said plan she made a Performance Improvement Report.

The Report showed that the Claimant was late in executing certain duties due to slow pace in doing other duties. As such he delayed in making 10.00 o'clock tea, delayed in cleaning the Boss's car, delayed in delivery and collection of mails, documents, and bills. That in total he failed to meet targets in 18 out of the 25 days in the Plan.

He did not show interest in other duties other than his own. On the issue of NHIF, RW1 did not find him honest in the manner he concealed it from her and the fact that he took it upon himself to deal with NHIF Branch Office at Ongata Rongai and not Head Office.

She contended that neither the dismissal letter nor Certificate of Service was ever given to the claimant by the Respondent. On cross-examination she confirmed that the official working hours for the Claimant was between 8.00 a.m. – 5.00 p.m. but due to the nature of the work he used to report at 7.30 a.m. and extend beyond 5.00 p.m. for which he was paid overtime.

That tea break was 10.00 a.m. but tea was being served between 10.30 a.m. and 11.15 a.m. That she was no longer trusting the Claimant because of keeping NHIF Money in his pocket before paying it.

She confirmed that the Claimant served for nine years. She confirmed that the Claimant was never given any hearing after her Report on the Performance Improvement Plan to respond to any of the allegations contained therein.

After the close of the hearing, the parties asked me to make my judgment without their closing submissions. I have carefully perused the pleadings and considered the evidence adduced in the testimonies of the witnesses for the two parties. It is not in dispute that the parties had a contract of service between 17-6-2002 and 15-5-2011.

The following are the issues for determination:-

- (a) who terminated the aforesaid contract and whether the termination was fair.
- (b) whether the claimant is entitled to the remedy sought in his claim.

To answer the first issues, the claimant says that he received an SMS from his boss on 15-5-2011 requesting for a meeting. On the following morning he attended work only to find a new officer had taken up his office. He was kept waiting outside the boss's office until 3.00 – 4.00 p.m. when the boss referred him to the RW1. RW1 showed him her report on his Performance Improvement Plan which she had recommended his dismissal and which the boss had approved on 6-5-2011. The Claimant returned to his boss who responded to the report.

In my view the foregoing points a clear picture of one party to the contract terminating the contract unilaterally Hiring of another person to fill the vacancy previously occupied by the Claimant and failing to deploy him spoke louder than words. The same was confirmed when the Claimant was kept waiting outside the office without any charges of misconduct being preferred against him.

The report with recommendation of dismissal and remarks by the boss of acceptance of the recommendation being shown to the Claimant after being replaced in his office was full proof of his dismissal by the Respondent.

As regards whether the dismissal was unfair and unlawful, the answer is obvious. First, a report on his performance is prepared by RW1 in confidence wherein she recommends his dismissal.

Secondly, the report is taken to the boss to make a decision on the recommendations made by RW1. The boss accepts the report and the recommendations by RW1 without giving the Claimant an opportunity to explain himself out.

Thirdly, the boss employs another person to fill the vacancy left by the discreet dismissal of the Claimant.

Fourthly, he sends the Claimant away without any termination letter or Certificate of Service or terminal dues.

In my view even if the reason for termination was given and explained to the Claimant by RW1 on 16-5-2011, the same was only an afterthought coming after the decision had been sealed on 6-5-2011 without notice or any hearing. Consequently, it is my finding that the Claimant's contract of service was unfairly terminated by the Respondent within the meaning of Section 45 of the Employment Act.

As regards the issue of remedy available, the answer is under Section 35, 49 and 50 of the Employment Act 2007. The dues provided for include:-

- (a) Salary in Lieu of Notice
- (b) Accrued entitlements necessitated by the dismissal
- (c) A maximum of 12 months' salaries for unfair dismissal
- (d) Service pay for every year of service subject to the employee being a member of NSSF or any other scheme with employment terminal dues.

The Claimant has prayed for:-

- (a) Service pay at 15 days per year for 4 years service - Kshs.52,158/-
 - (b) Leave pay for 21 days for 2 years - Kshs.36,511/-
 - (c) 3 months' salary in Lieu of Notice - Kshs.78,237/-
 - (d) House Allowance - Kshs.39,119/-
 - (e) 13 days worked for in May, 2011 - Kshs.21,957/-
 - (f) Medical Benefit - Kshs.101,287/-
 - (g) Motor cycle mileage claim 41km at 18/- per km - Kshs. 738/-
- Sub-Total** = **Kshs.330,007/-**

In addition he prays for 12 months for wrongful

dismissal - Kshs.312,948/-
TOTAL = **Kshs.642,955/-**

Let me say that no evidence was adduced with respect to the medical benefit and motorcycle mileage claim and as such I disallow them.

I will however award a one month's salary in Lieu of Notice as per the letter of Contract produced by the Claimant. As regards the item on accrued leave days, the Claimant prayed for 42 days being leave for 2 years. The RW1 produced the Claimant's leave application form dated 16-3-2011 which shows that as at that date, he had accrued 37 leave days. That he took 5 days leave due to bereavement, leaving a balance of 32 leave days. The Respondent who is the custodian of the employees' records did not avail any other evidence to the contrary. I will therefore, award cash pay for the 32 accrued leave days.

As regards service pay, the Claimant prayed for 15 days per year for 4 years. He did not identify which of the 9 years of service he was claiming service. I take notice of the fact that he was not represented by counsel and may be he made typographical error to show 4 years instead of 9 years.

The RW1 admitted in evidence that the Claimant served for 9 years from 17-6-2002 to 16-5-2011. I will, therefore award service pay at the rate of 15 days per year for the 9 years served by the Claimant. There was no evidence under Section 35 of the Employment Act to warrant denial of the Claimant this item. I will also award salary for half month worked in May 2011, which is not in dispute.

I will, however not award the claim for house allowance as prayed. The reason being that the letter of Contract adduced by the Claimant indicates that the salary shall be gross pay.

As regards the prayer for 12 months' salary for unfair dismissal, I see no good reason for awarding the maximum compensation. Although the law does not give the criteria for assessing the quantum for unfair termination, I believe that, the consequences of the dismissal, circumstances for the dismissal, the difficulty with which to secure another job and the embarrassment suffered by the victim of the unfair dismissal are among the key factors for consideration.

In the present case, the Claimant suffered serious embarrassment at his place of work. He found a new person at his desk without Notice. He was kept outside his office for a whole day in the full glare of his colleagues and clients whom he had dealt with for 9 years.

Secondly, the dismissal was a blow to his financial commitment and that is why he wrote the letter dated 20-5-2011 to the Respondent demanding terminal dues to enable him meet the demands of rent and school fees. In addition to that, he was now in the cold in terms of medical expenses because his cover was terminated abruptly. There is no evidence that he has any other employment. The demeanor of the Claimant was that of a bitter hustler. Consequently, I will award him six (6) months' salary for the unfair dismissal.

In sum the Claimant is awarded:-

(a)	Accrued leave pay (37 days)	-	Kshs. 32,164.10
(b)	Service pay 15 x 9 years	-	Kshs.117,355.50
(c)	Half month's salary for May, 2011	-	Kshs. 13,039.50
(d)	Six (6) months' salary for unfair dismissal	-	<u>Kshs.156,474.00</u>
	TOTAL	=	<u>Kshs.319,033.10</u>

The Claimant will also have costs and interests.

Orders accordingly.

DATED and DELIVERED at Nairobi this 16th day of November, 2012.

Onesmus N. Makau

JUDGE