



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 638 of 2012

PETER GICHANA MWAMBA.....CLAIMANT

VERSUS

M/S EASY COACH LTD.....RESPONDENT

JUDGMENT

The Claimant is Peter Gichana Mwamba. The Respondent is Easy Coach Limited. The Claimant filed the memorandum of claim on 4<sup>th</sup> July 2012 through Omboga & Company Advocates. The Respondent filed the Memorandum of Reply on 11<sup>th</sup> July, 2012 through Eliphias Ombati & Associates Advocates. The case came for hearing on 10<sup>th</sup> October, 2012 when the Claimant gave evidence to support his case.

The Claimant was employed as a Project Manager in charge of booking tickets for Respondent's transport business and he was responsible for tickets issued at Uchumi Supermarkets. Later, he was promoted to the position of Area Manager up to the time of the termination when he was earning a gross monthly income of Kshs.50,000/= comprising of basic pay of Kshs.35,000.00, house allowance of Kshs.5,000/=, fixed overtime of Kshs.5,000.00 and special allowance of Kshs.5,000.00.

As the area manager the Claimant was deployed to serve in Eldoret on two occasions, once in Nakuru, once in Kisii and in Nairobi.

On 5<sup>th</sup> March, 2012 the Respondent wrote to the Claimant terminating the contract of employment. The letter stated as follows:-

***"March 5<sup>th</sup> 2012.  
Dear Gichana,***

***Kindly receive cheque No.001974 and No. 002014 totaling to Kshs.164,316.00 as your full and final settlement in respect of your employment with us.***

<b><i>Gross pay, leave pay, plus service pay (Pay slips attached)</i></b>	-	<b><i>Kshs.233,000/=</i></b>
<b><i>Less statutory deductions -</i></b>		<b><i>Kshs. 68,684/=</i></b>
<b><i>Net pay</i></b>	-	<b><i>KShs.164,316/=.</i></b>

***Acknowledge acceptance of the same on the copy of this letter***

***Yours faithfully  
SIGNED***

**Kassamali Hirani**

***I Peter Gichana I.D. No. 1595688 confirms receipt of Kshs..... being full and final settlement with respect to my employment with Easy Coach Ltd. I also confirm that Easy Coach Ltd does not owe me anything.***

**SIGN..... (Signed) Date: 6<sup>th</sup> March, 2012.”**

The Claimant testified that he was forced to sign the above letter to discharge the Respondent from liability. The letter was annex III on the memorandum of Claim.

The Respondent pleaded that the Claimant was paid all his retirement or terminal dues including service pay from the six completed years of service, leave pay, notice and salary for due days worked as per annexure 10 on the memorandum of reply. The annexure is the claimant's pay slip for March, 2012 and includes the service pay of Kshs.105,000.00 and leave pay of Kshs.28,000. It does not include the notice pay as alleged in the pleadings. The Claimant testified that he was given some cheque of Kshs.105,000/=.

The preliminary issue for determination is whether the Claimant effectively discharged the Respondent from any further liability following the signing of the letter dated 5<sup>th</sup> March, 2012. The Claimant's evidence that he was forced to sign the document by the Respondent has not been rebutted by the Respondent. The pay slip for final settlement by the Respondent being annexure 10 on the memorandum of reply shows a net entitlement of Kshs.133,708/= plus an endorsement of February 2012 salary of Kshs.30,608 making a sum of Ksh.164,316. This tallies with the figure in the discharge voucher but the Claimant stated that he received only one cheque of Kshs.105,000/= for service pay.

In absence of any evidence from the Respondent, the Court finds that the evidence of the Claimant is credible and further notes that the alleged discharge voucher does not show the amount of money the claimant had received as full and final settlement. It is therefore, not an effectual discharge voucher for want of express and unambiguous consideration for the Claimant's promise to have been binding to both parties. Accordingly the Court finds that there was no effective discharge voucher between the parties in this case.

The issues that remain for determination are whether the termination of the contract of employment was fair and whether the Claimant is entitled to the remedies as prayed for.

To explain the termination the Respondent has alleged poor performance. The Respondent has referred to the letter dated 2<sup>nd</sup> October, 2010 by the Claimant being annexure 6 on the memorandum of reply and the Respondent's letter annexure 7 on the memorandum of reply.

The Claimant's letter stated as follows:-

***“2<sup>nd</sup> October, 2010  
The Managing Director,  
Easy Coach,  
P.O. Box 3185  
Nairobi  
Dear Sir,***

**RE: RETIREMENT**

***After considering the number of years I have put in working with you in this transport business and the cordial relationship I personally have had with you I would first of all wish to thank you very much for your support, guidance and encouragement you have always accorded me. Not forgetting the Uchumi Project we initiated together against other people's wishes, which turned out to be a success and still in doing well up to now.***

*As a pioneer of this project I feel very happy that I have also given the company my contribution which I do hope the management will remember me and appreciate even after I leave the company.*

*However, it makes me sad to go by the company's option of retiring me. But considering all that I have already done for the company I wish to indicate that I would not mind to retire as long as the company gives me some retirement benefits of One Million Kenya shillings (Kshs.1,00,000) as token of appreciation for my services over the years to the company. This will enable me to see my kids finish the college and enable me to survive on.*

*On the other hand I strongly feel already that I will very much miss Easy Coach and all who worked with me.*

*Thanks so much in advance for all your support.*

*Yours faithfully,*

**SIGNED**

**PETER GICHANA MWAMBA.”**

The Respondent replied the above quoted letter by its letter dated 12<sup>th</sup> October, 2010 addressed to the Claimant and stating as follows:

***“Dear Mr. Gichana,***

***RE: RE-APPOINTMENT***

***We are happy to inform you that you have been re-appointed to the post of Area in-charge to cover Kisii, Migori and Sirare branches.***

***This re-appointment takes effect on Thursday 14<sup>th</sup> October, 2010. You are expected to carry out your duties respectfully and diligently as you will be responsible for the above mentioned branches. Ms. Amina will hand over to you on the morning of October 14<sup>th</sup> 2010 at the Kisii office.***

***Please be informed that we have respected your plea for a final chance to prove your worth to the company. The management therefore expects to see positive outcomes from the above branches under your watch.***

**SIGNED**

**AD**

**C.C. Payroll master**

***Personnel file***

***Chief Accountant***

***Chief Manager”***

The Respondent pleaded that after deployment to Kisii, the Claimant did not improve in his performance and he was recalled to Nairobi head office pending his retirement on 5<sup>th</sup> March, 2012. The Court finds that the main alleged reason for termination of the Claimant's employment by the Respondent was poor performance. The procedure for termination on account of poor performance is provided for in Section 41 of the Employment Act, 2007. The Respondent was required to explain to the Claimant, in a language the Claimant understood, the reason for which the Respondent was considering termination and the Claimant was entitled to have another employee present during that explanation. The Court finds that the Respondent did not comply with the statutory provisions and the termination was unfair.

The final issue for determination is whether the Claimant is entitled to the dues as claimed in the

memorandum of claim. The Court makes its findings as follows:-

(a) Under Section 35(1) (c) of the Employment Act, the Claimant was entitled to at least 28 days termination notice. The Respondent failed to serve the requisite notice. Accordingly the Court finds that the Claimant was entitled to a termination notice failing which he was entitled to pay in lieu of notice. The parties having not agreed on the notice period and the Respondent having terminated the Claimant allegedly on account of retirement, the Court finds that a payment of three months' salary in lieu of notice is reasonable in the circumstances of this case. The Claimant is awarded **Kshs.105,000/=** at the rate of Kshs.35,000/= per month.

(b) The Court finds this was not a case for redundancy and the claim for severance pay is unfounded. Further the Court finds that the Claimant failed to prove the claim for Kshs.240,000/= for the six transfer in disturbance allowance.

(c) The Court has found that the Claimant was unfairly terminated. The Court awards him **Kshs.600,000/=** being twelve months gross salary for unfair termination.

(d) The Court finds that the Claimant has failed to establish and prove the claim of Kshs.21,000/= being alleged balance for house allowance.

In conclusion, judgment is entered for the Claimant against the Respondent for:-

- (a) a declaration that the Claimant's termination of employment by the Respondent was unfair;
- (b) the Respondent to pay the Claimant a sum of Kshs.705,000/= plus interest at Court rates until full and final payment; and
- (c) the Respondent to pay costs of the cause.

Signed, dated and delivered in Court at Nairobi this 16<sup>th</sup> November, 2012.

**BYRAM ONGAYA**  
**JUDGE**