



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 372 OF 2011

(Before D.K.N. Marete)

BONVENTURE WANJALA KIMASISCLAIMANT

Versus

SHANGA ENGINEERING LIMITEDRESPONDENT

RULING

This matter was brought to court vide a memorandum of claim dated the 11th March, 2011 and filed on 14th instant. It does not cite the issue in dispute on its face.

The respondent in a Reply to Statement of Claim dated 4th April, 2011 opposes the claim and prays that the same is dismissed with costs.

The claimant’s case is that on 1st September, 2010, the claimant was employed as a Filter by the respondent at an agreed monthly salary of Ksh.32,500.00. He was also entitled to a travelling allowance of Kshs.2,000.00 and annual leave. The respondent in breach of the Employment Contract on 15th December, 2010 terminated the claimant’s employment. He prays for:-

- | | | |
|---|---|-----------------------------|
| 1. <i>Income denied for nine (9) months</i> | - | <i>Ksh.297,567.00</i> |
| 2. <i>Salary in lieu of notice</i> | - | <i>Ksh. 33,063.00</i> |
| 3. <i>Unpaid leave allowance</i> | - | <i>Ksh. 33,063.00</i> |
| 4. <i>Payment of 15 days</i> | - | <i>Ksh. 16,575.00</i> |
| 5. <i>Transport allowance</i> | - | <i><u>Ksh. 2,000.00</u></i> |

<i>Total</i>	-	<i><u>Ksh.398,843.00</u></i>
--------------	---	-------------------------------------

The respondent on the other hand denies the claim and posits that the termination of the employment of the respondent, if at all, was lawful and that the claimant was duly notified. This was due to persistent economic uncertainty and unfair competition prevailing in the business which made it difficult for the respondent to meet operating overloads and was forced to reduce operating the number of employees, the claimant being one of these.

The matter came for hearing variously until the 28th August, 2012 when the parties agreed to dispose of the matter by way of written submissions on agreed timelines.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?

2. Is the claimant entitled to the relief sought?
3. Who bears the costs of the case?

In the claimant's written submissions, he opens up by stating that his claim against the respondent is for lost wages as a consequence of breach of contract, unpaid leave allowance, severance pay, and salary in lieu of notice and transport costs. He had entered into a written employment contract that was to commence on 1st September, 2010 and ended on 31st August, 2011. This contract was however, unilaterally terminated by the respondent on 15th December, 2010, hardly three months into the contract on grounds of economic uncertainty and unfair competition. The claimant submits that this was a guise and a façade instituted to shield the respondent against claim for breach of contract. He therefore prays that the court finds in his favour and awards him compensation as prayed.

The respondent denies the claim. He submits that the termination of employment was lawful in that the claimant was informed of termination vide a letter dated 15th December, 2010 and paid a sum of Ksh.51,593.48. He further submits that despite the written contract of employment for twelve months, all parties had an option of termination of contract by giving a month's notice in lieu of notice. The claimant was offered his terminal dues amounting to Ksh.51,593.48 which he declined to accept. The claimant is therefore only entitled to his terminal dues of Ksh.51,593.48 only.

On the basis of the pleadings and submissions of the parties this matter tilts in favour of the claimant. His evidence is that his employment contract was terminated mid course, three (3) months from its inception. The contract of employment as is clearly displayed in the pleadings and evidence was intended to last one year with effect from 1st September, 2010 to 31st August, 2011. This was not to be. The respondent cites economic uncertainty and unfair competition as the grounds for termination. He does not demonstrate this in evidence. I therefore find a case of unfair termination as the respondent has failed to establish that the reason for termination is valid. The termination therefore offends the entirety of S.45 and particularly and S.45 (2)(a), employment Act, 2007.

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

- a. ***that the reason for the termination is valid;***
- b. *that the reason for the termination is a fair reason-*
 - i. *related to the employees conduct, capacity or compatibility; or*
 - ii. *based on the operational requirements of the employer; and*

(c) *that the employment was terminated in accordance with fair procedure.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

- a. *the termination is for one of the reasons specified in section 46; or*
 - (b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

(5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the*

Industrial Court shall consider-

- a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*
- (b) *the conduct and capability of the employee up to the date of termination;*
- (c) *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*
- d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*
- e. *the existence of any previous warning letters issued to the employee.*

This is clearly a case of unfair termination of the employment of the claimant.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. Having established a case of unfair termination of employment this flows like a river. He is so entitled. I therefore allow the claim and order compensation for the claimant as hereunder;

1. Income denied for nine (9) months	-	Ksh.297,567.00
2. Salary in lieu of notice	-	Ksh. 33,063.00
3. Unpaid leave allowance	-	Ksh. 33,063.00
4. Payment of 15 days	-	Ksh. 16,575.00
5. Transport allowance	-	<u>Ksh. 2,000.00</u>
Total	-	<u>Ksh.398,843.00</u>

The cost of this claim shall be borne by the respondent.

Dated, delivered and signed the 20th day of December, 2013.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Olonde instructed by Odero-Olonde & Company Advocates for the claimant.
2. Mr. Omwankwe instructed by S.M. Korongo & Company Advocates for the Respondent.