



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 857 OF 2016

BETWEEN

1. MUMO MNAO

2. KIMANZI MNAO.....CLAIMANTS

VERSUS

BID TRADING.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kituo Cha Sheria , Advocates for the Claimants

Muthee Soni & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimants filed their Statement of Claim on 8th November 2016. The 1st Claimant states, he was employed by the Respondent around 7th September 2003 as a Carrier. The 2nd Claimant, a Brother to the 1st Claimant, was employed by the Respondent as a Salesman.
2. On 31st September 2016, the 1st Claimant, accompanied by his Supervisor, removed some goods from the warehouse. The Managing Director alleged removal was without authorization. He terminated 1st Claimant's contract without a hearing and notice.
3. The 2nd Claimant's contract was terminated at the same time, for no other reason, other than being a Brother to the 1st Claimant who according to the Managing Director, must have aided in removal of goods.
4. The Claimants were paid salary for days worked through m-pesa. The 1st Claimant earned a monthly salary of Kshs. 16,620 while the 2nd Claimant earned Kshs. 15,600 at the time of termination.
5. The Claimants seek Judgment against the Respondent, declaring that termination was unfair, and for:-
 - a. Notice pay.
 - b. Unpaid leave.
 - c. Service pay.
 - d. Unpaid public holidays.

e. 12 months' salary in compensation for unfair termination.

f. Certificate of Service.

6. The 1st Claimant seeks a total of Kshs. 491,362, the 2nd Claimant a total of Kshs. 331,240. They seek costs, interest and any other suitable remedy.

7. The Respondent filed its Statement of Response on 16th December 2016. Its position is that the Claimants deserted work, after stealing from the Respondent. Their contracts were not terminated by the Respondent. The Respondent does not owe any terminal benefits to the Claimants. The prayer for compensation has no merit. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

8. The Claimants gave evidence, and closed their case, on 16th October 2019. The Respondent applied to have its Witness Statement admitted on the date the Claimants closed their case. The application was rejected, prompting the Respondent to close its case, on the same date.

9. The 1st Claimant told the Court he was instructed by his Supervisor to carry some goods from the warehouse. His Supervisor spoke with the Warehouse Clerk, in their native Hindu tongue. They then called their boss, also Indian, and advised the Claimant to return the goods to the warehouse. The following day, he was advised by the boss that the goods he carried the previous day were stolen from the warehouse. He was fired. He was not heard. He was told he should make his demand for terminal benefits from the Police Station.

10. Cross-examined, the 1st Claimant denied that the Respondent made a report about the incident at Makupa Police Station. It is not true that the Claimant was reported and pardoned. He was not involved in stealing. He was not issued termination letter. He did not sign the Witness Statement on record. It is not his Witness Statement. Redirected, he testified that his Supervisor directed him to carry the goods from the warehouse.

11. The 2nd Claimant told the Court that the Respondent alleged he was involved in theft of goods from the warehouse. He was asked to go home. The 2nd Claimant reported the matter to the Police, on hearing about the allegation. The boss was called to the Police Station. He did not report. The 2nd Claimant was advised by his boss to keep away from the workplace. The 2nd Claimant adopted his Witness Statement as his evidence. Cross-examined, the 2nd Claimant told the Court he was taken to the Police Station in February 2016 on allegation of stealing. It is not true that he was pardoned after a member of his family intervened. There was no letter of termination. The 2nd Claimant told the Court that the 1st Claimant signed his own Witness Statement. Redirected, the 2nd Claimant told the Court he did not report at the Police Station in February 2016. He reported in September 2016, because allegations were swirling around him. His boss was called by the Police, but did not show up. He was never charged in Court. He was not heard by the Respondent. He did not know the reasons for termination.

The Court Finds:

12. The Claimants, who are Brothers, were employed by the Respondent. The 1st Claimant was a Labourer, the 2nd a Salesman.

13. In his evidence, the 1st Claimant denied making the Witness Statement attributed to him, filed on 8th November 2016. Essentially, he, like the Respondent failed to file a Witness Statement. The Witness Statement attributed to the 1st Claimant filed on 8th November 2016, is therefore expunged from the record.

14. His oral evidence and pleadings, do not assist his case. Paragraph 5 of the Statement of Claim states goods were removed from the warehouse without authorization. If the 1st Claimant was aware there was no authorization, why did he participate in removal of the goods? The Respondent had reasonable ground to suspect the 1st Claimant was involved in attempted theft of goods from its warehouse. There was valid reason justifying termination.

15. There is no evidence, linking the 2nd Claimant to attempted theft. He was not involved in removal of the goods. He appears to have been condemned because of his family links with the 1st Claimant. There was no valid reason to justify termination against the Claimants.

16. In either case, there was no hearing before termination. The Respondent did not present any formal charges against the Claimants, and require them to defend. There is no evidence that the Claimants deserted, fearing the repercussions of attempted theft. No communication calling upon the Claimant to return to work, or requiring them to defend themselves against the offence of desertion, has been availed to the Court by the Respondent.

17. For the 1st Claimant, the Court returns a finding that termination was based on valid reason, but flawed procedure, and to that extent, unfair.

18. For the 2nd Claimant, it is the finding that termination was unfair both in substance and procedure.

19. The 1st Claimant worked for 13 years. He did not disclose how long he expected to go on working, had his contract not been terminated by the Respondent on 31st September 2016. He played a major role in circumstances leading to termination. There was substantial ground justifying termination. Procedure was flawed. **He is granted compensation equivalent of 3 months' salary at Kshs. 49,680.**

20. Termination in the case of the 1st Claimant was based on ground which would warrant summary dismissal. Notice pay is not merited.

21. He has not established the prayer for unpaid leave and public holidays. The Respondent offered no evidence of 1st Claimant's subscription to any Social Security Plan. **He merits service pay, under Section 35 [5], at granted at 15 days' salary for each of his 13 years of service, based on a 26 day working month, at Kshs. 124,650.**

22. Termination of the 2nd Claimant's contract was deficient on both substance and procedure. He had worked for 7 years. He is not shown to have contributed to circumstances leading to termination. He did not tell the Court how long he expected to go on working if termination did not take place at the time it did. **He is allowed compensation equivalent of 6 months' salary at Kshs. 92,400.**

23. He is allowed the prayer for notice pay at Kshs. 15,400, as there was no reason which would justify summary dismissal.

24. Like the 1st Claimant, he did not establish the prayers for unpaid leave and public holiday.

25. The prayer for service pay is allowed for the same reason it has been granted to the 1st Claimant, over a period of 7 years, at Kshs. 62,192.

26. Certificates of Service to issue.

27. No order on the costs and interests.

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the 1st Claimant: equivalent of 3 months' salary in compensation for unfair termination at Kshs. 49,680; and service at Kshs. 124,650- total Kshs. 174,330.

c. The Respondent shall pay to the 2nd Claimant: equivalent of 6 months in compensation for unfair termination at Kshs. 92,400; notice at Kshs. 15,400; and service at Kshs. 62,192- total Kshs. 169,992.

d. Certificates of Service to issue.

e. No order on the costs and interest.

Dated and delivered at Mombasa this 26th day of March 2020.

James Rika

Judge