



Case Number:	Cause 4 of 2018
Date Delivered:	11 Feb 2019
Case Class:	Civil
Court:	Employment and Labour Relations Court at Malindi
Case Action:	Judgment
Judge:	Linnet Ndolo
Citation:	Azim Jusab Sumar v Auto Express Limited [2019] eKLR
Advocates:	Mr. Gicharu for the Claimant Miss Lughanje h/b Mr. Mucheru for the Respondent
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 4 OF 2018

AZIM JUSAB SUMAR.....CLAIMANT

VERSUS

AUTO EXPRESS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Azim Jusab Sumar, the Claimant in this case was an employee of Auto Express Limited, the Respondent herein. He brought this claim seeking payment of salary arrears, severance pay and pension. The claim is documented by a Memorandum of Claim dated 18th January 2018 and filed in court on even date. The Respondent filed a response on 13th February 2018.
2. When the matter came up for hearing on 3rd December 2018, the Claimant testified on his own behalf and the Respondent called its Corporate Customer Service Executive, Maria Makanga.

The Claimant's Case

3. The Claimant worked for the Respondent from 16th March 2007 until 3rd April 2017 when he voluntarily resigned. At the time of leaving employment he held the position of Branch Manager, Malindi.
4. By its letter dated 30th June 2017, the Respondent accepted the Claimant's resignation. In the said letter, the Respondent intimated that the Claimant would be paid his terminal dues upon clearing and handing over.
5. The Respondent did not process payment of the Claimant's dues and on 12th July 2017 the Claimant's Advocate wrote to the Respondent inquiring about the dues. The Respondent subsequently paid the Claimant the sum of Kshs. 165,524 in terminal dues. The Respondent however failed to pay the Claimant salary deductions from his April 2017 salary amounting to Kshs. 91,690 plus service pay for the reason that the Claimant had extended unauthorized credit to two customers who had since defaulted on payment.
6. On the issue of service pay, the Claimant states that the Respondent had deducted from his monthly salary Kshs. 200 payable to the National Social Security Fund (NSSF) and Kshs.6, 926 on account of pension. The Claimant concedes that the Respondent duly remitted his NSSF dues but avers that this did not bar him from accessing service pay. He further states that the pension scheme established and operated by the Respondent had less favourable terms than those contemplated under Section 35 of the Employment Act.
7. The Claimant now seeks the following:
 - a) A declaration that the salary deduction made by the Respondent from his April 2017 salary is unlawful
 - b) Salary for the month of June 2017.....Kshs. 121,335
 - c) Unjustified salary deduction from his May 2017 salary.....57,330
 - d) Unjustified salary deduction from his April 2017 salary.....91,600

e) Severance/service pay @ ½ month per year.....605,000

f) Pension from the date of employment to March 2012

g) Costs

The Respondent's Case

8. In its reply dated 12th February 2018 and filed in court on 13th February 2018, the Respondent admits that the Claimant was its employee and that at the time he left he held the position of Branch Manager. The Respondent states that the Claimant was not an honest and diligent employee as he extended unauthorized credit to two customers which was in contravention of the Respondent's policy.

9. The Respondent further states that the Claimant's net salary for the month of June 2017 in the sum of Kshs. 109,994 was duly paid to him.

10. The Respondent admits deducting Kshs. 57,330 and 91,600 from the Claimant's salary for April 2017 and May 2017 respectively on account of money owed by two customers to whom unauthorized credit had been extended by the Claimant, contrary to company policy. The customers defaulted on payment of the amounts owed hence recovery from the Claimant.

11. The Respondent pleads that the Claimant is not entitled to severance pay as he resigned on his own accord. Further, the Claimant was a member of NSSF as well as a company pension scheme. The Claimant could access and withdraw his pension dues as per the applicable trust deed regulations of which he was aware.

Findings and Determination

12. The Claimant claims the total sum of Kshs. 148,930 being deductions made from his salary in the months of April and May 2017. It is not in contest that said deductions were made. What is in issue is whether the Respondent's action in this regard was justifiable.

13. The Claimant told the Court that he had advanced credit to two of the Respondent's customers in the ordinary course of business. On its part, the Respondent maintains that the credit advanced by the Claimant was in contravention of existing policy.

14. Further, the Respondent states that the credit control policy provided for recovery of unpaid debts from employee salaries. The Respondent's witness, Maria Makanga however admitted that the credit control policy came into effect in 2015 while the credit in issued had been advanced in 2014. The logical conclusion therefore is that the credit control policy which the Respondent sought to rely on was not applicable to the Claimant's case.

15. More importantly, the action to surcharge the Claimant being disciplinary in nature and import ought to have been subjected to the procedural fairness requirements established under Section 41 of the Employment Act, 2007. This was the holding by this Court in *Kenya National Library Services v Beatrice Ayoti [2014] eKLR* and I have no reason to depart from it.

16. Apart from notification to the Claimant that deductions would be made from his salary, there was no evidence of any opportunity afforded to him to challenge the deductions. The surcharge against the Claimant therefore amounts to disciplinary action without regard to due procedure and the said deductions were consequently unlawful.

17. The Claimant did not provide any particulars of his claim for pension and as held by the Court of Appeal in *Kenya Ports Authority v Fadhili Kisuwa [2017] eKLR* a claim for pension must be supported by proof of membership and terms of payment of benefits. In the absence of such evidence, the claim for pension fails and is dismissed. No basis was laid for the claim for severance/service pay which also fails and is dismissed.

18. The claim for salary for June 2017 was abandoned during the trial.

19. In the end, I enter judgment in favour of the Claimant in sum of **Kshs. 148,930** being unlawful salary deductions.

20. This amount will attract interest at court rates from the date of judgment until payment in full.

21. The Claimant will have the costs of the case.

22. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF FEBRUARY 2019

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JUDGE

Appearance:

Mr. Gicharu for the Claimant

Miss Lughanje h/b Mr. Mucheru for the Respondent



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