



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 862 OF 2010**

**JAMES ONYANGO NYANGOLO .....CLAIMANT**

**VERSUS**

**ENG KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

By a Claim dated 22<sup>nd</sup> July 2010 and filed in court on 29<sup>th</sup> July 2010 the claimant alleges that he was employed by the Respondent by letter dated 16<sup>th</sup> May 2008 as an Assistant Production Manager Operations and Service in its Mombasa branch office. A copy of the letter of appointment is attached as Appendix 1 to the Claimant's claim. That he was terminated without notice after working for 1 year 3 months by letter dated 8<sup>th</sup> September and served on him on 10<sup>th</sup> September 2009. He was not paid his salary for august and days worked in September.

That on 22<sup>nd</sup> April 2010 after several discussions with the Respondent during which the Respondent agreed to pay his terminal benefits in the sum of Kshs.119,257, he sent his wife to collect the said salary. The Respondent however failed or refused to release the payment cheque to the Claimant's wife.

The Claimant claims terminal dues as follows;

- i. Payment in lieu of notice.
- ii. Salary for August and 9 days of September 2009.
- iii. Leave for 1 year 3 months.
- iv. Severance for 1 year 3 months.
- v. The Claimant also claims costs and interest.

The Respondent filed its memorandum of Reply on 10<sup>th</sup> August 2010. The same is dated 9<sup>th</sup> August 2010.

The Respondent admits employing the Claimant but alleges that the Claimant was never confirmed to his position. The Respondent admits terminating the employment of the Claimant and avers that parties agreed on terminal dues of kshs.119,257.14 which after deduction of taxation was shs.166,608. That the Respondent prepared a cheque for payment of the same in the name of the Claimant's wife as agreed but the Claimant failed to collect the cheque. The Respondent is willing to release the said cheque to the Claimant and has advised the Claimant's advocates accordingly.

The Respondent prays that the Claim for shs.364,000 be dismissed and judgment be entered in the sum of shs.166,608.00 with no orders for cost.

The case was mentioned on 18<sup>th</sup> November 2010 and fixed for hearing on 3<sup>rd</sup> May 2011. The case was mentioned severally. When the parties appeared before me on 17<sup>th</sup> May 2013 they agreed to proceed by way of written submissions. On 17<sup>th</sup> June 2013 Mr. Babu for the Claimant informed me that both parties had filed their submissions and the case was fixed for Judgment on 19<sup>th</sup> September.

There is no dispute that the Claimant was employed by letter dated 16<sup>th</sup> May 2008 and terminated without notice by letter dated 8<sup>th</sup> September 2009.

The parties have in principle agreed on payment of salary for August and days worked in September 2009, pay in lieu of notice and pay in lieu of leave. What they have not agreed on is the sum payable.

The Claimant's submission are not on the file but in the Respondent's submissions it is stated that the Claimant has dropped the claim for severance pay. I do not have any reason to doubt this.

I however wish to state that severance pay is only payable where an employee has been declared redundant. Service pay on the other hand is only payable where an employee is terminated after working for at least one year where the employee is not a member of NSSF or other gratuity or retirement benefits scheme. These are provided for in section 40 and 35 of the employment Act respectively. For these reasons the Claim for Severance and/or service pay would not have succeeded even if the Claimant had not withdrawn the same.

The other issue I need to deal with before I consider the prayers of the Claimant is the issue of probationary terms of employment. The Respondent alleges that the Claimant was not confirmed to the position of Assistant Production Manager.

Section 42 of the Employment Act provides for termination of probationary contracts. The section however provides that a probationary contract shall not be for a period of more than 6 months and may be extended for a further period of 6 months.

The Claimant's contract provided that he was on probation for six months and the probation period may be extended. There is no letter of extension of the Claimant's probationary contract. The letter of termination states that the Claimant's probation was not successful and he is terminated with immediate effect.

The letter of termination offends the Claimant's contract on several grounds. First the probationary period was not extended after the expiry of the 6 months' probation. The Claimant is therefore deemed to have been confirmed into his employment upon expiry of the probationary period.

Secondly, even assuming the probation was still valid, the letter of termination does not mention that the Claimant has been given notice or will be paid in lieu of notice. Probationary contracts are terminated by notice. The Employment Act provides for 7 days' notice or pay in lieu.

Thirdly, the letter was written after the Claimant had worked for a period of more than 1 year 3 months. The maximum probationary period is 12 months. The Claimant could therefore not have been on probation at the time he was terminated.

The termination was therefore unfair. The Claimant however did not make any Claim for compensation for unfair termination and the court can only limit itself to finding that the termination was unfair.

I now consider the prayers by the Claimant.

### **1. Notice**

Both the Claimant and the Respondent agree that the Claimant is entitled to notice. They however do not agree on the sum payable.

Section 36 of the Employment Act provides that either party may terminate the contract without notice upon payment of the remuneration which would have been earned during the period of notice. Section 49 (1) (a) also provides for payment of salary in lieu of notice in similar terms as section 36.

The Claimant's contract provides for 1 month's notice or pay in lieu thereof.

The Claimant is therefore entitled to one month's salary in lieu thereof.

The Claimant is therefore entitled to one month's salary in lieu of notice in the sum of Kshs.80,000/= which I hereby award him.

## **2. Salary for August and Days worked in September 2009**

The parties agree on salary for August 2009 at Shs.80,000/= which I award accordingly.

The Claimant prays for 9 days salary worked in September. He states he was served with the letter of termination on 10<sup>th</sup> September, an allegation that has not been denied by the Respondent. He is therefore entitled to payment up to 10<sup>th</sup> September 2009. I accordingly award him salary for 9 days as prayed in the sum of Kshs.24,000.

I therefore award him a total of Kshs.104,000 on account for salary for August and 9 days worked in September 2009.

## **3. Pay in lieu of Leave**

The Claimant worked for a total of 15 months. His letter of appointment provides for 21 days leave. I do not understand the criteria used by the Respondent to calculate leave at 12.58 days as they have not stated that the Claimant took any leave.

I therefore award the Claimant Kshs.70,000/= being payment in lieu of annual leave at the rate of 1.75 days a month for 15 months worked based on his salary of Kshs.80,000 per month.

I therefore award the Claimant kshs.70,000/= being payment in lieu of annual leave at the rate of 1.75 days a month for 15 months worked based on his salary of Kshs.80,000/= per month.

I have noted from the letter of appointment that the Claimant was also entitled to leave allowance of 2% of basic salary per annum. This would have worked out at Shs.15,000/= for the 15 months worked. However since there was no prayer for the same I make no award in respect thereof.

In Summary I give Judgment to the Claimant against the Respondent in the total sum of Kshs.254,000/=

The sum will be subject to deduction of income tax as provided in section 49(2) of the Employment Act.

The Claimant is also awarded costs and interest from date of Judgment.

Read in open Court this 19<sup>th</sup> day of September 2013

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**Mr. Babu for** \_\_\_\_\_ for Claimant

No appearance for Respondent