

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 266 of 2002

SAYED NISAR A. SAYED.....PLAINTIFF

VERSUS

AMEECO MANAGEMENT LIMITED.....DEFENDANT

J U D G E M E N T

The Plaintiff claims in his plaint that on 31st October 2001 his employer, the Defendant, without reasonable cause and without due notice dismissed him from employment. As a result of that he has been subjected to distress, anguish and embarrassment and has suffered loss and damage. He therefore claims general damages for unlawful dismissal and Sh.468,000/- being one month's pay of Sh.72,000/- in lieu of notice and gratuity of Sh.396,000/- as well as costs and interest.

On its part the Defendant disputes the claim and states that the Plaintiffs services were lawfully terminated and he is therefore not entitled to either general damages or the sum of Sh.468,000/- claimed in the plaint. Instead it prays that this suit be dismissed with costs.

When the case came up for hearing before me on the 18th July 2007 the parties agreed that except for the documents on the Plaintiff's list of documents filed on 31st January 2005 which they produced by consent neither would call any evidence and that the main issue raised in the case is legal and the same can be disposed of by written submissions. They recorded a consent to that effect and thereafter filed written submissions and left the matter to me to decide.

I have perused both the parties' counsels' submissions and the documents filed by the Plaintiff. I agree with counsel for the Defendant that each party is bound by its pleadings. The Plaintiff having not claimed in his plaint payment in lieu of leave he cannot be allowed to claim it in his written submissions. His claim of payment in lieu of 10 weeks accrued leave put forward for the first time in his counsel's written submissions cannot therefore be entertained.

As regards the claim for general damages, although the Plaintiff claimed in the plaint that he was dismissed, however, having perused the parties' written submissions and the Defendant's letter of 30th October 2001 it is clear that this is a case of termination and not dismissal.

In the case of termination of employment, notice should always be given on either side. In the words of the Court of Appeal in **Paramount Bank Ltd –Vs- Mohamed Ghiab Qureishi & Another, Civil Appeal 239 of 2001, [2005] eKLR**

“A contract of service must be terminated by notice, unless the hiring is for a definite period. If the contract is silent as to the length of such notice the courts will not construe this as meaning that no notice on either side is required – Payzu –Vs- Hannafore, [1918] 2 K.B. 345. The length of notice will be determined by usage (Hamilton –Vs- Bryant 30 T.L.R. 408). If there is no usage then the court will find that reasonable notice will be given on either side – Crediton Gas Company – Vs- Crediton V.D.C. [1928] Ch.174. See also Ombaya – Vs- Gailey & Roberts Ltd [1974] EA 522”

In this case the Plaintiff's list of documents produced by consent does not include a service contract. So I do not know if there was one and if there was whether or not it provided for termination. But the Plaintiff has saved me the trouble of speculation. Having claimed payment of one month's salary in lieu of notice and the Defendant having, in its letter of 30th November 2001 said it paid him Sh.55,520/- "being Notice Pay moneys after deduction of taxes" which appears to be one month's net salary, I take it that the parties are agreed that the termination notice should have been for one month or payment of one month's salary in lieu. The issue now is whether or not that notice was given.

According to the Defendant it paid the Plaintiff one month's salary in lieu of notice. The Plaintiff on the other hand claims in his counsel's submissions that the said sum of Sh.55,520/- was his October 2001 salary. There being no evidence to support the Plaintiff's claim I must, on the contents of the Defendant's letter of 30th November 2001, accept its contention that that payment was in lieu of notice. Consequently and as damages for unlawful termination of employment are restricted to the period of notice – **Rift Valley Textiles Limited –Vs- Edward Onyango Ogada, Civil Appeal No. 27 of 1992, Kenya Ports Authority –Vs- Edward Otieno, Civil Appeal No. 120 of 1997 and Alfred J. Githinji – Vs- Mumias Sugar Co. Ltd, Civil Appeal No. 194 of 1991** – and no damages being payable for injured feeling – **Paramount Bank Ltd –Vs- Mohamed Ghiab Qureishi (Supra)** – I find that the Plaintiff is not entitled to any damages in respect of notice of termination of employment.

There is no evidence and none of the Plaintiff's documents support the claim for gratuity. There is therefore no basis for the grant of that claim and I accordingly reject it also.

In the final analysis I find the Plaintiff's claims unmeritorious. Consequently I dismiss this suit with costs to the Defendant.

DATED and delivered this 12th day of October 2007.

D.K. MARAGA

JUDGE