



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 238 OF 2015

GIBSON MUTUA MUTIA..... CLAIMANT

VERSUS

HARDWARE & ACCESSORIES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th June, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 20.04.2015 through IRB Mbuya & Company Advocates. The claimant prayed for judgment against the respondent for:

- 1) One-month salary and house allowance in lieu of notice Kshs. 18, 400.00.
- 2) House allowance from 03.08.1988 2011 to 31.05.2012 Kshs. 924, 000.00.
- 3) Annual leave for last year of employment Kshs. 14, 861.00.
- 4) Severance pay for each year served $15/26 \times 18400 \times 24$ Kshs. 254, 769.00.
- 5) Maximum compensation for unprocedural, wrongful and unfair termination per sections 49 and 50 of Employment Act, 2007 Kshs. $18, 400.00 \times 12$ Kshs. 220, 800.00.
- 6) Punitive damages to act as punitive measures to curb employers from unilaterally and unfairly terminating employee without due regard of employment or labour law.
- 7) Certificate of service
- 8) Costs of the cause.

The claimant's case is that he was employed by the respondent as a Shop Assistant from 03.08.1988 to 31.05.2012. He worked for 24 years and as at termination he earned Kshs. 16, 000.00 per month. He was terminated on 31.05.2014 after being advised to retire on medical grounds. The respondent presented the medical report and asked the claimant to write a resignation letter to be paid terminal dues. Thereafter, the respondent accepted the resignation and asked the claimant to leave the premises. The claimant states that the work environment led to the retirement on medical grounds. He also claims leave pay in lieu of annual leave for the last year served.

The response to the memorandum of claim was filed on 28.05.2015 through Sherman Nyongesa & Mutubia Advocates. The respondent states that the claimant voluntarily resigned from employment and he was paid all his dues at the time he resigned. The respondent prayed that the claim be dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was Mohamed Iqbal Musani. Final submissions were filed for the parties. The Court has considered all the material on record and finds as follows:

- 1) The Court finds that the parties were in a contract of service. RW confirmed that as at time the claimant resigned he was earning Kshs. 16, 000.00 being Kshs. 13, 900.00 basic pay and Kshs. 2, 100.00 house allowance.

2) By letter dated 23.03.2012 Dr. Gwaku B. certified that the claimant was allergic to dust and was advised to avoid dusty environments and was recommended for retirement on medical grounds due to his working environment. The claimant wrote the letter dated 30.05.2012 to retire on medical grounds and based on the letter dated 23.03.2012 by Dr. Gwaku B. The respondent accepted resignation from employment effective 01.05.2013. The Court finds that in view of the two letters the parties agreed to separate by what the claimant called retirement on medical grounds and the respondent called resignation. The Court finds that in the circumstances, allegations for unfair termination and compensation in that regard on the part of the claimant were unfounded. Further, the Court finds that the claimant was never forced to retire or resign on medical grounds.

3) The Court finds that as testified by RW the pay included house allowance and the claimant has provided no evidence and justification for the house allowance as claimed. RW2 also testified that the pay was consolidated and was inclusive house allowance. The Court finds that the claim for house allowance was unjustified and no grievance was shown to exist about house allowance while the contract of service subsisted. The Court finds that the claim was a pure afterthought.

4) Since the claimant voluntarily resigned or retired, the Court finds no justification for pay in lieu of termination notice as prayed for.

5) No justification has been made out for punitive damages as claimed and prayed for and the same is declined.

6) The claimant testified that he was not given leave in last year of service. RW testified that he did not confirm if the claimant took such leave. On a balance of probability, the claimant has established entitlement to leave for last year of employment **Kshs. 14, 861.00**.

7) The claimant validly resigned and is not entitled to severance pay as prayed for and as envisaged in redundancy cases under section 40 of the Employment Act, 2007. Also basis for punitive damages was not established.

8) The claimant is entitled to a certificate of service and in view of the margins of success, to 50% costs of the suit.

In conclusion judgment is hereby entered for parties and the suit determined with orders:

1) The declaration that the claimant voluntarily resigned from employment.

2) Respondent to deliver certificate of service in 7 days.

3) The respondent to pay the claimant **Kshs. 14, 861.00** by 01.08.2021 failing interest to be paid at Court rates from the date of this judgment till full payment.

4) The respondent to pay 50% of the claimant's costs of the suit.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 18th June, 2021.

BYRAM ONGAYA

JUDGE