



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 861 OF 2017

SIMON RUWA MWERO.....CLAIMANT

VS

EXON INVESTMENTS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Simon Ruwa Mwero against his former employer, Exon Investments Limited. The claim is documented by a Memorandum of Claim dated and filed in court on 16th November 2017. The Respondent filed a Response on 6th April 2018 to which the Claimant responded on 17th April 2018.
2. The matter proceeded to full trial, with the Claimant testifying on his own behalf and the Respondent calling its Human Resource Officer, Susan Nyale. The parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a Clerk from 20th July 2015 until 15th May 2017 when his employment was terminated. He earned a monthly salary of Kshs. 14,508.
4. The Claimant’s case is that his employment was terminated on 15th May 2017, without justifiable cause and in violation of due procedure. He therefore seeks the following:

- a) One month’s salary in lieu of notice.....Kshs. 14,508
- b) Leave pay for one year.....11,718
- c) Service pay.....14,508
- d) 12 months’ salary in compensation.....174,096
- e) Overtime worked.....150,660
- f) Public holidays.....4,464
- g) Certificate of service
- h) Costs plus interest

The Respondent’s Case

5. In its Response dated 23rd March 2018 and filed in court on 6th April 2018, the Respondent denies having employed the Claimant as pleaded in the Memorandum of Claim.

6. The Respondent further denies terminating the Claimant's employment unlawfully and states that if at all the Claimant's employment was terminated, it was done within the law and due process was followed.

7. The Respondent denies the Claimant's entire claim and puts him to strict proof.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

9. In denying the Claimant's claim of unlawful and unfair termination of employment, the Respondent accuses the Claimant of deserting duty. In his testimony before the Court, the Claimant admitted having been called to go back to work after 15th May 2017. He confirmed that he was not interested in continuing to work for the Respondent.

10. In *Ali Juma Mgala v Elephant Steel Industries Limited [2020] eKLR* this Court affirmed its earlier decision in *Samin Juma Pekeshe v Mohamed Karim T/A Zamza Enterprise [2019] eKLR* by stating:

"...an employee who declines an offer to go back to work cannot come to court and complain of unfair termination of employment. This holding..... is premised on the understanding that the remedies under Section 49 of the Employment Act are meant to cushion employees from the vagaries of sudden unlawful loss of employment."

11. Having confirmed that he had declined the Respondent's offer to go back to work, the Claimant placed himself outside the cushion provided by the Employment Act. His claims for compensation and notice pay are therefore without basis and are disallowed.

Other Claims

12. Regarding the claims for leave pay and service pay I have this to say; the Respondent, being the custodian of employment records as mandated by Sections 10 and 74 of the Employment Act ought to have produced such records to counter the Claimant's claims. Having failed to do so, the claims for leave pay and service pay are allowed.

13. The Claimant also lays a claim for overtime and public holidays. The Court was referred to the decision in *Rogoli Ole Manadiegi v General Cargo Services Limited [2016] eKLR* where my brother, **Rika J** stated the following:

"It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee."

14. The only thing I wish to add is that an employee who pursues a claim for working beyond normal working hours is expected to prove it with the particularity and precision set for special damage claims.

15. The Claimant failed to meet this standard and his claims for overtime and public holidays were not proved and therefore fail.

16. Ultimately, I enter judgment in favour of the Claimant as follows:

- a) Leave pay for 1 year (14,508/30*21).....Kshs. 10,156
- b) Service pay for 1 year (14,508/30x15).....7,254
- Total.....17,410**

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

18. Each party will bear their own costs.

19. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY SEPTEMBER 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Ngonze for the Claimant

Mr. Ngaine for the Respondent