



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 737 OF 2016

CALEB OCHIENG GOGO.....CLAIMANT

VERSUS

OIL SEALS AND BEARING CENTER LIMITED.....RESPONDENT

JUDGMENT

The suit was filed by the claimant on 4th May, 2016 in which the claimant prays for an award of compensation for unlawful and unfair termination of Employment and payment of terminal benefits to wit:-

Payment of Kshs.25,977 being one month salary in lieu of notice.

Service pay calculated at 15 days salary for each completed year of service in the sum of Kshs 143,712.

Costs and interest.

The claimant (C.W.1) testified that he was employed by the respondent as a Shamba boy on 2/9/1996 at a monthly salary of Kshs.3,000. That he served in that position for a period of 3 years. That he was promoted by his manager Mr. Jitu Shah to a position of a night guard in which position he served until his employment was terminated in August, 2013.

That he worked diligently and continuously as a guard for about 10 years and at the time of termination he earned Kshs 15,977.

That in the year 2007 the respondent paid the claimant service pay in the sum of Kshs 45,000. C.W.1 testified that he then asked why he was paid service pay for one year and not for the ten years he had served since 1996.

C.W.1 testified that Mr. and Mrs Shah advised that they would calculate the arrear service pay for ten years and pay him.

C.W.1 stated that in January, 2008, the respondent placed him on a 2 ½ years contract and upon expiry of the contract, the respondent paid him another service pay for the 2 ½ years in the sum of Kshs 28,000.

C.W.1 testified further that his contract was extended by another 2 ½ years which expired on 31st May, 2012. The claimant was paid further service pay for the 2 ½ years period and the contract was renewed for a further 2 ½ years which contract commenced on 1/6/2012.

That on 8th August, 2013, the respondent terminated the employment of the claimant before the expiry of the contract. This followed a request by the claimant for a salary raise upon the respondent adding the claimant additional duties of a shamba boy on top of his responsibilities as Security Guard. That the additional duties were added on C.W.1 without his consent after the respondent dismissed their shamba boy.

Mrs Shah was annoyed by the request for a salary raise and she demanded that the claimant leave work immediately. Mr. Shah paid the claimant salary up to 8th August, 2013 and terminated the employment of the claimant.

The claimant was not paid salary in lieu of notice nor was he paid service Pay for the term worked before the summary dismissal.

The claimant prays for payment of service pay for 10 years between 1996 and 2006 which the respondent undertook to pay the claimant in the year 2007 but did not pay. The claimant prays to be awarded accordingly.

Under cross-examination the claimant admitted that upon termination, he was paid Kshs.49,328.00 and a loan of Kshs.36,350.80 was deducted therefrom. That he took home Kshs 12,977.

The claimant produced a letter dated 8th August, 2013, which stipulates the final dues paid to the claimant in which the manager of the respondent Oil Seals and Bearing Center Limited thanked the claimant for the one and 2 months service the claimant had diligently rendered to the respondent.

In the said letter, the claimant was paid a total of Kshs 49,328.00 which comprised of a basic salary of Kshs 15,977.83 for August, 2013; Kshs 11,311.40 being payment in lieu of leave days not taken and severance pay for the months served in the sum of Kshs 6,060.92 and one month salary in lieu of notice in the sum of Kshs 11,977.83. The claimant also produced a payslip to that effect.

R.W.1 Satish Patel testified that he worked as Credit Controller of the respondent and adopted a witness statement dated 12/2/2018 as his evidence.

R.W.1 testified that the claimant opted to leave work voluntarily and the respondent agreed to pay his terminal dues. R.W.1 testified that the claimant worked with three different companies being **Electro Car Limited** between 1996 and 2001. That he then worked for **Firetec International Limited** from 2001 upto 31st May, 2012 and then worked for the respondent from 31st May, 2012 up to 8th August, 2013.

That the respondent paid service pay for the claimant for the different contracts he served the different entities. That C.W.1 was paid the full salary for the month of August, 2013 despite that he worked up to 8th August, 2013 and in addition C.W.1 was paid a month's pay in lieu of notice upon termination. R.W.1 stated that the claimant was paid a total of Kshs 49,328, less monies he owed the respondent. R.W.1. emphasized that from 2007 to 8th August, 2013, the claimant was paid service pay but prior to that date the claimant worked for a different company and not the respondent and therefore his claim lacks merit and it be dismissed.

Under cross-examination R.W.1 reiterated that the respondent accepted the request by the claimant to stop working. R.W.1 stated that there was a letter by the claimant opting to leave work.

R.W. 1 stated that the claimant worked for the respondent for the last 1 ½ years only and he was paid service pay for the 14 months worked upon separation.

R.W. 1 stated that the three different companies issued the claimant different letters of employment.

Determination

The parties filed their respective written submissions in which the parties have restated their respective cases. The issues for determination are:-

Whether the claimant was employed by the respondent from the year 1996 or in the year 2012.?

Whether the claimant left the respondent voluntarily or his employment was unlawfully terminated.

What remedies if any, is the claimant entitled to.

With regard to issue (i), the claimant bears the onus of proving on a balance of probabilities that he worked for the respondent from the year 1996 and not from the year 2012.

It is not in dispute that Mr. and Mrs Shah, the directors of the three companies received the service of the claimant initially as a shamba boy from the year 1996 and that the claimant guarded the premises of Mr. and Mrs Shah thereafter until August, 2013, when he left employment.

In his uncontroverted evidence, the claimant has in the least demonstrated that he worked continuously for the same employer Mr. and Mrs Shah. The onus shifted to the respondent to demonstrate on a preponderance of evidence that although, the claimant served Mr. and Mrs Shah from the year 1996, to August 2013, the appointment of the claimant was by three different companies.

The only way the respondent could discharge this onus was by producing letters of employment by the three different entities since in terms of Section 9 (2) **“An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection 3.”**

R.W.1 stated that the employment of the claimant by the three entities was reduced to writing but did not produce the letters of appointment before Court.

In terms of Section 74(1):-

“An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars.....”

This Court has held previously and it so holds that the Court shall make an adverse presumption against an employer who fails to produce

records they are by law mandated to keep that if the records were before Court, they would not support their specific allegations before Court which otherwise would have been vindicated by production of the document(s).

The Court therefore finds that the claimant has proved on a balance of probabilities that he worked for the respondent as a Shamba boy for a period of 3 years from 1996 and thereafter as a security guard until separation on 8th August, 2013.

Having found so, the next question to be answered is whether the employment of the claimant was unlawfully and unfairly terminated by the respondent. The claimant testified that in August, 2013, Mrs Shah added on the claimant additional duties of a shamba boy to his normal guarding responsibilities subsequent to which the claimant asked for a salary raise. That Mrs Shah was annoyed by that request for a salary raise by the claimant and she summarily terminated his service. That Mr. Shah then called the claimant to his office, paid him the final dues stipulated in the letter produced by the claimant dated 8th August, 2013.

R.W.1 who testified on behalf of the respondent made a bare denial of the allegations made by C.W.1 against Mr. and Mrs Shah. Clearly, R.W.1 was not aware of the actual circumstances which led to the separation of the claimant and the respondent.

The version made by C.W.1 is uncontroverted by any tangible evidence.

The Court finds that the respondent terminated the employment of the claimant on 8/8/2013, without any valid reason and without giving him a fair hearing in violation of Sections 41, 43 and 45 of the Employment Act, 2007. The Court declares that the termination of Employment of the claimant by the respondent was unlawful and unfair.

The claimant is entitled to compensation in terms of Section 49(1) (c) read with 49 (4) of the Act.

In this regard, the Court finds that the claimant had worked for the same employer as a Shamba boy and security guard for a continuous period of 17 years. The respondent in the letter dated 8/8/2013, thanked the claimant for having **“served this company diligently.”** The Court finds that the claimant did not contribute to the unlawful termination of his employment. The Court finds that the claimant lost prospects of continued employment and means of livelihood unfairly. That the chances of getting another employment by the claimant were lost.

That the claimant wished to continue working for the respondent. That the respondent paid terminal dues to the claimant upon termination but did not compensate the claimant for the sudden loss of employment.

The Court relies on the case of **Co-operative Bank of Kenya Ltd. –vs- Banking Insurance and Finance Union – C.A. No. 188 of 2014** to find that the claimant is entitled to payment of the equivalent of 10 months. salary in compensation for the unlawful and unfair termination of employment in light of the circumstances of the case and the provisions under Section 49(4) of the Employment Act, 2007 in the sum of kshs.(15,977x10) = Kshs 159,770.

Terminal benefits

With regard to terminal benefits claimed, the Court is satisfied that the claimant was paid service gratuity from the year 2007 up to August, 2013. That the claimant was also covered by National Hospital Insurance Fund and National Social Security Fund for the entire period of his employment.

The claimant claims service pay for the year 1996 upto the year 2007.

That claim is time barred by dint of Section 4(1) of the Limitation of Actions Act, Cap. 22 Laws of Kenya in terms of which the claimant was obliged to file a suit in respect of the claim within 6 years from the time the claim became due in 2007.

Indeed, the claimant testified that he had demanded the payment of 10 years’ service gratuity in the year 2007 but the respondent promised to pay but did not fulfil the promise.

In the final analysis, judgment is entered in favour of the claimant against the respondent in the sum of Kshs 159,770. Interest at Court rates from date of judgment till payment in full. Costs to follow the event.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 9TH DAY OF DECEMBER, 2021

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Jaoko for Respondent

Ms Kayoi for Respondent

