



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 893 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JOHN MBITHI KAVUMBU.....CLAIMANT

VERSUS

RIVERDALE BOOMS LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed a Memorandum of Claim on 28th May, 2014 alleging unfair dismissal and nonpayment of his terminal dues by the Respondent. The Claimant was employed by the Respondent as a General Worker until 1st October, 2012. He avers that he reported to work on the said day and was informed by his supervisor that there was a shortage of work thus he had been dismissed.

He avers that due process was not followed prior to his dismissal and he was not issued with a notice despite him having financial obligations which he had to fulfill. He therefore seeks the following reliefs:

1. A declaration that the dismissal of the Claimant from employment was unlawful and unfair and that the Claimant is entitled to payment of his terminal dues and compensatory damages.
2. An order of the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling to Kshs.204,000/= plus interest thereon from the date of filing the case until payment.
3. Costs of this cause plus interest thereon.

The Respondent filed its Statement of Defence on 6th August, 2014. It avers that the Claimant resigned on his own accord by his letter dated 1st October 2012 which stated that his resignation was effective from 22nd October, 2012. It contends that the Claimant was paid his terminal dues totaling Kshs.4,638. It further contends that as at the end of July 2012 the Claimant had taken all his leave.

During the hearing each party called one witness and were thereafter were directed to file their respective submissions. However, only the Claimant filed his written submissions thus the Court ordered that Judgement be delivered without the Respondent’s submissions.

Claimant’s Case

The Claimant testified that he was employed by the Respondent from on 10th October, 2009 until his resignation on 21st October, 2012. He testified that he was employed in the maintenance department and he also cleaned toilets. He testified that during his employment he went on leave. It was his testimony that he was not paid house allowance and was not housed by the Respondent though some employees were housed. That the Respondent made his NSSF contribution.

He testified that he resigned from employment due to personal reasons. That he was only paid his salary upon resignation.

In cross-examination, he clarified that he was not sacked but resigned. That at the time of his resignation he had taken all his leave.

Respondent’s Case

JUSTINE MBAABU, a former employee of the Respondent in the Human Resource Department testified as RW1. She testified that the

Claimant submitted his resignation notice on 1st October, 2012. It was her testimony that the Claimant had taken all his leave days hence he was only paid his salary.

In cross-examination, she testified that the Claimant was only paid salary as the respondent did not owe him any terminal dues. She contended that the Claimant's salary was inclusive of house allowance.

Claimant's submissions

The Claimant submits that though he resigned the Respondent did not pay his terminal dues. He submits that he did not proceed on leave for the 2 years he was employed thus he is entitled to unpaid leave in accordance with section 28 of the Employment Act.

He submits he was neither paid house allowance or provided with a housing facility contrary to section 31 (1) of the Employment Act. He submits that the Respondent's failure to provide him with either housing facility or pay him house allowance was discriminatory as all other subordinate staff were provided with accommodation within the Respondent's premises.

He submits that he is entitled to a Certificate of Service as provided under section 51 of the Employment Act.

Determination Upon consideration of the pleadings, evidence and submissions by the parties, the issues for determination are:

- a. Whether the Claimant was unlawfully dismissed
- b. Whether the Claimant is entitled to the reliefs sought

Whether the Claimant was unlawfully dismissed.

The Claimant pleaded that on 1st October, 2012 his supervisor, Mr. Maina informed him that he was dismissed as there was shortage of work. However, in his testimony the claimant admitted that he had resigned for personal reasons. In the said letter the Claimant indicated that his parents needed him back at home therefore his resignation would be effective from 22nd October, 2012.

The Claimant having resigned, his averment of having been unfairly dismissed is unfounded as there was no evidence of his dismissal under section 44 of the Employment Act.

Whether the Claimant is entitled to the reliefs sought

i) Declaration that the Claimant's dismissal was unfair and unlawful

Having found that the Claimant was not dismissed from employment, this relief cannot be granted.

ii) One month's salary in lieu of notice and damages for wrongful and unfair dismissal

The Claimant having resigned cannot claim to be entitled to these two remedies under Section 36 and 49 of the Employment Act.

In respect of damages, Section 49(1) entitles the Claimant to the payment of compensation being not more than 12 months' salary upon finding that the termination of his employment was unfair. There being no proof of unfair termination, the claim for damages is dismissed.

iii) Untaken/unpaid leave for entire service

The Claimant testified that during his employment he went on leave yet he sought 3 months leave for the entire period of service. The Respondent on its part produced a leave application form which indicated that the Claimant had no pending leave days for the year 2012. This claim fails as the Claimant has not proved which year he had pending leave even though the evidence by the Respondent was only in respect of the year 2012.

iv) House allowance

The Respondent has not proved that the Claimant's salary of Kshs.6,000 was consolidated salary or that it did provide the Claimant with accommodation. Under Section 48 of the Labour Institutions Act as read with Section 3(6), 26 and 28 of the Employment Act the claimant is entitled to the same. Since the minimum wage was Kshs.8,579.80 in 2012, Kshs.7,586 in 2011, Kshs.6,743 in 2010 and Kshs.6,130 in 2009, the claimant's salary of Kshs.6,000 did not include house allowance. He is thus entitled to the difference between the Kshs.6,000 that he was paid and what would have constituted a consolidated wage as the respondent's is that it paid him a consolidated wage. The same is

as follows –

October 2009 to April 2010

$(7,050 - 6,000) \times 7 \dots\dots\dots 7,350$

May 2010 to April 2011

(7,755 – 6,000) x 12 21,060

May 2011 to April 2012

(8,724 – 6,000) x 12 32,688

May 2012 to September 2012

(9,867 – 6,000) x 5 19,335

Total Kshs.80,433

I award the claimant the same.

The respondent shall also pay the claimant's costs for the suit. Interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE