



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 45 OF 2018

[Formerly Kisumu E&LRC NO. 69 of 2017]

KENNETH DIMOSH OTIENO OTUMBA..... CLAIMANT

VERSUS

H. YOUNG & COMPANY (E.A) LIMITED..... RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent on 4th November 2011 as a heavy motor vehicle mechanic grade 3 on a basic salary of Kshs. 25,286 and house allowance of Kshs. 5,057. The claimant was hired to serve the Malaba-Webuye road project which started in the year 2011 and ended in February 2016.

2. The claimant testified that on 7th July 2011, the claimant sustained serious injuries at the defendant's site in Bungoma and filed Bungoma HCCC NO. 313 of 2013 claiming damages for the injuries sustained and cost of medical treatment.

3. That on 16th November 2015, the claimant's employment was terminated by the respondent. The claimant testified that the termination was malicious and was due to the suit filed against the respondent. That the claimant was not given reason for termination nor was he given notice to show cause. That the claimant was not paid terminal dues.

4. That the claimant who suffered 50% disability is unable to secure another job. The claimant prays for:

(i) 3 months salary in lieu of notice Kshs. 91,026.

(ii) Payment in lieu of 13 days not taken Kshs. 13,552.

(iii) Service gratuity Kshs. 151,710 less amount paid Kshs. 104,004.

(iv) The claimant further seeks damages for the unlawful and unfair termination of employment.

(v) Interest and costs

5. During the hearing, the claimant admitted having been paid Kshs. 104,004, vide the pay slip of November 2015. He stated that his gross salary was Kshs. 31,120.

6. The claimant testified that he was now registered as a person with disability. The suit for injuries was ruled in favour of the claimant. The payment made to the claimant was in respect of gratuity in the sum of Kshs. 50,572 and notice pay in the sum of Kshs. 58,352. The claimant had served for 5 years.

7. RW1, Agnes Mutua testified for the respondent. She stated that she was the Human Resource Officer of the respondent. That the claimant was employed on 4th November 2011 and was given an appointment letter dated 9th January 2011.

8. That on 16th November 2015, the respondent lawfully terminated the employment of the claimant on account of redundancy in terms of *Section 40(1) (e) (f) and (g) of the Employment Act, 2007*.

9. That the claimant was paid notice pay, final dues and outstanding leave days and is not entitled to any further payments.

10. RW1 produced the letter of appointment dated 9th November 2011, stating that the appointment as heavy vehicles mechanic was for Malaba-Webuye project and was not to extend to any other project.

11. RW1 also produced a final discharge certificate duly signed by the claimant upon receipt of Kshs. 104,004 final dues. The discharge is dated 19th April 2016.

12. RW1 also produced a pay slip for the month of November 2015 duly signed by the claimant on 27th November 2015. In terms of the slip the claimant was paid Kshs. 10,004 being salary for days worked; Kshs. 50,572 in lieu of notice; Kshs. 58,352 gratuity. The claimant was in terms of the document registered with NSSF.

13. RW1 further produced document showing the leave details for the claimant.

14. RW1 further produced the letter of termination of the claimant dated 16th November 2015, which states “following reduction of majority of works at Webuye-Malaba site, the management hereby terminates your services effective 16th November 2015. The respondent prays that the suit be dismissed with costs.

Determination

15. The issues for determination are:

(i) Whether the termination of employment of the claimant was for a valid reason and

(ii) Whether the claimant is entitled to the reliefs sought.

16. In answer to both questions above, the court has carefully analyzed the oral and documentary evidence tendered by the claimant vis a vis that by RW1.

17. The court is satisfied that the claimant had served the respondent as a heavy vehicle mechanic specifically employed for Malaba-Webuye project in terms of the letter of appointment dated 9th January 2011. It is also not in dispute that the Malaba-Webuye project came to an end in February 2016. The claimant was declared redundant due to considerable reduction of works as the project was about to come to an end. The termination was about two months to the end of the project.

18. In terms of *Section 2 and 40 of the Employment Act, 2007*, it is lawful and valid to terminate employment of an employee on account of significant reduction of work that renders an employee redundant.

19. From the evidence before court, the employment of the claimant was terminated for a valid reason. It is also not in dispute that the claimant was paid in lieu of two months' notice in the sum of Kshs. 50,572. Furthermore, it has been proved that the claimant was paid service gratuity for the number of years served in the sum of Kshs. 58,352,000. The claimant was also paid in lieu of leave days not taken. Clearly, the claimant signed a final discharge certificate in which he confirmed that he had no further claims against the respondent upon receipt of the aforesaid terminal benefits.

20. The claimant had pleaded in his statement of claim that he was not paid any terminal benefits upon termination of employment. This claim was clearly untrue. The claimant was unable to demonstrate any malice on the part of the respondent. Clearly, a reason was given in the letter of termination for the separation contrary to the pleadings by the claimant.

21. The claimant did not pray for a certificate of service in the statement of claim and failure to get one is not sufficient prove of malice on the part of the respondent.

22. The only fault on the part of the respondent is that it did not give the claimant at least one (1) month notice to the date of termination. The letter of termination was dated 16th November 2015 and it took effect immediately.

23. The respondent failed to respect the procedural requirement under *Section 40(1) (a) of the Employment Act, 2007*.

24. Accordingly, the termination was procedurally flawed hence unfair and in violation of *Sections 40 and 45 of the Act*.

25. Accordingly, the claimant is entitled to compensation in terms of *Section 49(1) (c) and 4 of the Employment Act, 2007*.

26. In this respect the respondent had a valid reason to terminate the employment of the claimant. The respondent paid all terminal dues to the claimant upon termination. The respondent did not provide a certificate of service to the claimant and the claimant suffered loss and damage only on account of the failure to receive notice to absorb the effect of the job loss. The court notes that the letter of termination had clearly provided that the employment of the claimant was for the specific project that had come to an end.

27. Accordingly, the court awards the claimant the equivalent of two (2) months salary in compensation for the unfair termination of employment in the sum of Kshs. 60,686.

28. Furthermore the two months' notice ought to have been based on gross salary and not basic salary and the claimant is awarded the difference in the sum of Kshs. 10,114.

29. Judgment is entered in favour of the claimant as against the respondent for Kshs. 70,800 with interest at court rates from date of judgment till payment in full.

30. Respondent to pay costs of the suit. For the avoidance of doubt all other claims made against the respondent are dismissed for want of proof.

Judgment Dated, Signed and delivered this 29th day of January , 2020

Mathews N. Nduma

Judge

Appearances

M/S Asunna for Claimant

M/S Akinyi for Respondent

Chrispo – Court clerk.