



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 276 OF 2017

JAMES MAGIGE MWITA.....CLAIMANT

VS

P.N. MASHRU LTD.....RESPONDENT

JUDGMENT

Introduction

1. James Magige Mwita, the Claimant in this case was an employee of P.N. Mashru, the Respondent herein. Mwita filed this claim on 18th April 2017 seeking compensation for unlawful termination of employment and payment of terminal dues.
2. The Respondent's defence is by way of a Response dated 27th June 2017 and filed in court on even date.
3. When the matter came up for hearing, the Claimant testified on his own behalf. The Respondent chose not to call any witness.
4. Both parties filed written submissions.

The Claimant's case

5. The Claimant states that he was employed by the Respondent in March 2011, in the position of Mechanic, earning a monthly salary of Kshs. 15,181.
6. The Claimant further states that on 16th August 2015, he was called to the Human Resource Office and informed by one Mary that his services were no longer required. He was issued with a termination letter which he signed and handed back to the Respondent.
7. The Claimant avers that he was not given any justifiable reason for the termination nor was he given an opportunity to defend himself.
8. The Claimant goes on to state that in the month of November 2015, he was called to the Respondent's office and issued with a cheque of Kshs. 38,124. He was not issued with a breakdown of the said amount.
9. The Claimant claims that although his letter of appointment and pay slips provided for house allowance he was not paid any house allowance.
10. The Claimant's claim is as follows:

- a. 1 month's salary in lieu of notice.....Kshs. 15,181.00
- b. Unpaid house allowance for 4 years & 5 months.....120,688.95
- c. 12 months' salary in compensation.....182,172.00
- d. Certificate of service
- e. Costs plus interest

The Respondent's Case

11. In its Response dated 27th June 2017 and filed in court on the same date, the Respondent denies the Claimant's claim and states that his employment was terminated procedurally in accordance with the Employment Act.

12. The Respondent further states that the Claimant was paid his terminal dues.

Findings and Determination

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

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

14. The Claimant testified that on 16th August 2015, he was called to the Human Resource Office by one Mary who told him that his services were no longer required. He was issued with a termination letter which he signed and returned to Mary.

15. None of the parties produced a termination letter. In its Response to the claim, the Respondent concedes that the Claimant's employment was indeed terminated. The Respondent does not however disclose the reason for the termination.

16. In its final submissions filed on 25th November 2019, the Respondent suggests that it could terminate the Claimant's employment by notice, without assigning any reasons. With much respect, this is an erroneous presentation of current employment law.

17. Under Section 45(2) of the Employment Act, an employer is required to demonstrate a valid reason for terminating the employment of an employee and that reason must be related to the employee's conduct, capacity or compatibility or the operational requirements of the employer.

18. The Respondent did not offer any reason for terminating the Claimant's employment nor did it comply with the procedural fairness requirements of Section 41 of the Employment Act.

19. As a result, the Court finds and holds that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

20. I therefore award the Claimant six (6) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's conduct in the termination transaction.

21. The Respondent did not provide any evidence to prove that the Claimant was either given notice or paid in lieu thereof. I therefore allow the claim for one (1) month's salary in lieu of notice.

22. The Claimant also claims house allowance. Section 31(1) and (2) of the Employment Act provides as follows:

31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

2. This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

23. From the pay slips filed by the Claimant, which the Respondent did not contest, the Claimant was not paid house allowance. I therefore allow the claim thereon and adopt the resultant figure of Kshs. 17,458 as the Claimant's monthly salary for purposes of this claim.

24. In the end, I enter judgment in favour of the Claimant as follows:

- a. 6 months' salary in compensation.....Kshs. 104,748

b. 1 month's salary in lieu of notice	17,458
c. House allowance for 53 months @ Kshs. 2,277.....	<u>120,681</u>
Total.....242,887

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

26. The Claimant will have the costs of the case.

27. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY FEBRUARY 2020

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JUDGE

Appearance:

Mr. Mathare for the Claimant

Mr. Ngaine for the Respondent