



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 36 OF 2018

(Before Hon. Justice Mathews N. Nduma)

JOHN GODIA AHONDA.....CLAIMANT

VERSUS

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION...RESPONDENT

JUDGMENT

1. The claimant filed suit on 8th February 2018, praying for compensation for termination of his service and the court order payment of terminal benefits and wage arrears as set out in the statement of claim to wit:

- (a) One month salary in lieu of notice.
- (b) Unpaid wages for November 2006 to December 2007.
- (c) Unpaid wages for January 2010 to December 2010.
- (d) Unpaid wages for 10th October 2011 to November 2012.
- (e) Unpaid house allowance for 5 years.
- (f) 15 years gratuity at one month basic salary per each completed year of service.
- (g) Compensation for unlawful termination.
- (h) Unpaid wages as worked by the dispute resolution officer and industrial relations officer.

2. The claimant testified that he was employed as a recruitment organizer by a letter dated 15th February 2003 at a monthly salary of Kshs. 5,000 and a housing allowance of Kshs. 1,000 per month. The position was confirmed by a letter dated 3rd August 2005 and the salary increased to Kshs. 6,000 and Kshs. 1,500 house allowance.

3. The claimant stated that he worked until 8th January 2018 when he received a letter of termination dated 2nd January 2018 written by Isaac M. Andabwa, National General Secretary. At the time of termination the claimant earned Kshs. 20,000 monthly gross pay as per the pay slip for December 2017.

4. The claimant was accused of disrespecting the Branch secretary Mr. Patrick Sakwa, RW1. The claimant denied the allegations before court. The claimant was not given a notice to show cause nor was he called to a disciplinary hearing. The claimant was 73 years old at the time of termination. The claimant stated that he should have been retired and paid his terminal benefits.

5. The claimant also denied having taken money from the respondents. The claimant prays for the reliefs set out in the statement of claim including notice pay.

6. The claimant admitted that the claims for arrear salary for the period 2006 to 2007; January to December 2010 and unpaid wages for 10th October 2011 to November 2012 were all time barred.

7. The claimant however claims payment of house allowance from the year 2012 to 2017. That he was entitled to Kshs. 5,000 house allowance and it is not in the pay slip.
8. The claimant prays for compensation for breach of contract with no valid reason in violation of Sections 41, 43, 45 and 47 of the Employment Act 2007. The claimant stated that he was entitled to payment of Gratuity as per the contract dated 1st December 2012. In terms thereof the claimant is entitled to one month salary for every completed year of service.
9. Counsel for the respondent Mr. Wet, confirmed that the contract dated 1st December 2012 was valid and should be admitted as evidence. Under cross examination, the claimant admitted that he signed a new contract in November 2012 for a period of 5 years. That he earned Kshs. 15,000 for two years and it was raised to Kshs. 20,000 thereafter until termination. The claimant insisted that he was not paid gratuity and house allowance. Claimant admitted that the contract expired in the year 2017 and he was given a new contract dated 1st January 2017 same to lapse on 31st December 2018.
10. The claimant stated that he did not serve the full contract since it was terminated on 8th January 2018. That gratuity in terms of the contract was for 18 days salary for every year served and the old gratuity terms were to be honoured which was one year salary for each completed year of service upon the end of the five year contract.
11. The claimant denied having been advanced any money by the respondent. Claimant stated that retirement age was 60 years in the last contract. The claimant denied alleged misconduct by himself. Claimant stated that he responded to allegations made against him in court but not before he was terminated.
12. RW1 Mr. Patrick Sakwa testified that he was the Branch Secretary of the 1st respondent and the claimant was their employee. RW1 relied on witness statement dated 17th May 2018 and produced documents marked exhibits R'1' to '10' in defence of the case.
13. RW1 testified that the claimant was employed as recruitment organizer and was not a dispute officer as he alleges or at all. RW1 testified that gratuity was paid at the end of every year and the claimant was therefore paid. That the claimant received a salary advance of Kshs. 25,000 on 13th October 2017 as per payment voucher of the same date. RW1 said that the claimant requested for advance payment regularly. That the claimant was involved in misconduct and was given a fair hearing as seen in the letters produced before court. RW1 was the complainant.
14. That the claimant did not respond to the allegations but he admitted taking money from employers. That the respondent only owes the claimant Kshs. 100,000 being gratuitous payment for a job well done. Under cross examination, RW1 insisted that the claimant was employed to recruit members as organizer but not to attend to labour and employment disputes. RW1 stated that he was the supervisor of the claimant. RW1 admitted under cross examination that the claimant was at times engaged in dispute resolution. RW1 stated that the suit had no merit and it be dismissed.

Determination

15. The issues for determination are:

- (a) Whether the termination of the employment of the claimant was for a valid reason and if respondent followed a fair procedure.
- (b) Whether the claimant is entitled to the reliefs sought.

16. The claimant had passed the retirement age for the employees of the respondent being 60 years old when his employment was terminated by the respondent by a letter dated 2nd January 2018 for misconduct.

17. At the time, the claimant was serving under a fixed term contract dated 1st January 2017 which was due to expire on 31st February 2018. The contract was however terminated on 8th January 2018. At the time of termination, the claimant had only 18 days left to the end of the contract. The respondent admitted that it owed the claimant Kshs. 100,000 outstanding gratuity for a job well done but had paid on a monthly basis gratuity payables in respect of the previous contract of employment which commenced in the year 2012 and ended in the year 2017. The claimant however states that he was yet to be paid gratuity for years served at the rate of one month salary for each completed year of service for 15 years.

18. It is not disputed that the respondent first employed the claimant on 15th February 2003 as recruitment organizer and the claimant served continuously in that position until the date of termination being 8th January 2018. The claimant therefore served the respondent for a continuous period of 15 years. It is also not in dispute that the terms of service of the claimant were during the period provided in different letters of appointment being letter dated 15th February 2005, letter of 3rd August 2005, letter dated November 2012 and letter dated 1st January 2017. The claimant was entitled to payment of gratuity from November 2015 and not in the previous letters.

19. The respondent does not dispute that the claimant was entitled to payment of gratuity at the rate of one month salary for each completed year of service from November 2015 but alleges that it paid the gratuity in advance, at the end of each year and therefore it no longer owed the claimant any contractual gratuity. However the respondent had elected to pay the claimant Kshs. 100,000 gratuitously to thank him for a job well done.

20. The claimant testified that he was wrongly terminated from employment on false allegations of misconduct. Was not given a fair hearing and therefore entitled to compensation. The respondent conceded that it had accused the claimant of misconduct which he failed to respond

to and his employment was terminated for a valid reason on 8th January 2018.

21. The claimant adduced sufficient evidence to demonstrate that he had served the respondent continuously for a period of 15 years. The claimant demonstrated that he earned Kshs. 20,000 at the time his employment was terminated. The claimant failed to prove that he was entitled to payment of house allowance over and above the gross salary of Kshs. 20,000 he received which is demonstrated in the pay slip produced by the claimant for the month of December 2017.

22. The respondent produced employment records of the claimant but did not adduce any documentary evidence that it had paid the claimant terminal gratuity at the end of each year as alleged by RW1 from November 2015. RW1 did not also demonstrate that it had served the claimant with a show cause letter to answer the alleged charges made by RW1 against the claimant. The respondent also failed to demonstrate that it had invited the claimant to a disciplinary hearing before terminating his employment for misconduct.

23. The claimant has therefore discharged the onus placed on him by *Section 47(5) of the Employment Act, 2007*, to show that the termination of his employment was wrongful. The respondent has on the other hand failed to justify the termination as required under *Section 47(5)* aforesaid by demonstrating that it had adhered to the provisions of *Section 41 and 43 of the Act* in giving the claimant a fair hearing to explain the allegations the respondent made against him.

24. Therefore the respondent had no valid reason to terminate the employment of the claimant and it did not follow a fair procedure in effecting the termination in violation of *Section 45 of the Act*.

25. The claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Act*. In this respect, the claimant had served the respondent past the retirement age and his employment had been extended up to 31st February 2018. The claimant was to stop working in 18 days before his employment was wrongfully terminated. The respondent did not pay the claimant gratuity upon termination and did not compensate the claimant for the job loss. The claimant did not contribute to the termination though he conceded that he was past retirement age. The court grants the claimant the equivalent of one month salary in the sum of Kshs. 20,000 in compensation for the wrongful termination of employment. The court awards the claimant one month salary in lieu of notice in the sum of Kshs. 20,000. The court awards the claimant Kshs. 40,000 being service gratuity not paid at the rate of one month salary for each completed year of service from November 2015 to date of termination. In addition, the claimant is awarded Kshs. 100,000 already admitted by RW1 to be a gratuity award due for a job well done.

26. The claims for unpaid salary other than being time barred have also not been proved by the claimant. The same are dismissed.

27. The claim for payment of house allowance has also not been proved and is dismissed.

28. In the final analysis, judgment is entered in favour of the claimant against the respondent in the sum of Kshs. 180,000. The amount is payable with interest at court rates from date of filing suit till payment in full. The respondent to pay costs of the suit.

Judgment Dated, Signed and delivered at Nairobi this 30th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with ***Order 21 rule 1 of the Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by ***Article 159(2)(d)*** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under ***Article 48*** of the Constitution and the provisions of ***Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)*** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Claimant in person

Mr. Wati for respondent

Chrispo – Court Clerk