



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 75 OF 2018

JAMES MUNYALO.....CLAIMANT

VS

RAPHAEL MUTI GITHAKA T/A GISA ENGINEERING & PAINTING.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 8th February 2018 and filed in court on 14th February 2018, the Claimant has sued the Respondent for unlawful termination of employment and failure to pay terminal dues. The Respondent filed a Response on 21st February 2020.
2. When the matter came up for trial, the parties gave *viva voce* evidence and also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a scaffolder/painter earning a daily wage of Kshs. 1,000 from 19th November 2014 until 4th October 2017.
4. The Claimant further states that on 4th October 2017, he was issued with a termination letter dated 3rd October 2017, by the Respondent's Site Engineer, Dickson M. Mathai who alleged that there was reduction of work at the site.
5. The Claimant avers that after the termination of his employment, the Respondent employed other scaffolders/painters.
6. The Claimant's case is that the termination of his employment was unlawful and unfair. He adds that he was never allowed to proceed on leave and was not paid house allowance. Additionally, the Claimant claims to have worked on public holidays.
7. The Claimant particularises his claim as follows:

- a. One month's salary in lieu of notice.....Kshs. 26,000
- b. Leave pay for 2 years.....52,000
- c. House allowance for 36 months.....140,400
- d. Service pay @ 15 days' pay per year.....45,000
- e. Severance pay @ 15 days' pay per year.....45,000
- f. 12 months' salary in compensation.....312,000
- g. Certificate of service
- h. Costs plus interest

The Respondent's Case

8. In his Response dated 21st February 2018 and filed in court on even date, the Respondent states that he runs a contracting firm which gets contracts from individuals and companies and other minor projects, including cleaning services. The Claimant was employed in one such project and was paid a daily wage of Kshs. 950, inclusive of housing and other benefits.

9. The Respondent states that his projects are time bound assignments and at the end of contract, the labourers are released. He adds that the Claimant was released at the end of the contract as it would have been impractical to continue in employment without work.

10. The Respondent further states that the Claimant was in line to be considered again in future if the Respondent secured another contract. The Respondent denies having employed other employees after the Claimant's departure. The Respondent contends that the Claimant was employed elsewhere soon after he was released and he therefore did not suffer loss of income.

11. The Respondent denies that the Claimant worked on public holidays. He states that the Claimant was allowed statutory leave days.

Findings and Determination

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

- a. Whether the Claimant has made out a case of unlawful termination;
- b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

13. The Claimant filed a letter dated 3rd October 2017 addressed to him as follows:

“As evident we have reduced work on site and the company has opted to release you as from the 4th October until further notice or when upon (sic) the company will have more opportunities,

Your (sic) hereby advised to clear with the stores

Yours faithfully

Dickson M. Mathai

(signed)

SITE ENGINEER/QUALITY COORDINATOR”

14. This letter was written on the Respondent's letterhead and the Respondent did not challenge its authenticity or efficaciousness. The Court therefore took the letter as the official communication of the Claimant's exit from the Respondent's employment.

15. According to letter dated 3rd October 2017, the Claimant's employment with the Respondent came to an end by virtue of reduction of work at the site where the Claimant was engaged. There was no evidence that the Claimant was employed on a fixed term contract pegged on any one project.

16. It would appear therefore that the Claimant was declared redundant. Section 2 of the Employment Act, 2007 defines redundancy as:

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

17. While the law recognises redundancy as a legitimate mode of termination of employment, it must be effected within the mandatory conditions established under Section 40 of the Employment Act. These conditions fall within three broad categories namely; redundancy and termination notices, objective selection criteria and prior payment of statutory dues.

18. In the well-known case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR* the Court of Appeal stated thus:

“redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with fair procedure. As section 43(2) [of the Employment Act] provides, the test of what is a fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means.....is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy-that is that the services of the employee have been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

19. In this case, the Respondent made no attempt to comply with any of the conditions established under Section 40 of the Employment Act. The ensuing termination was therefore unfair within the meaning of Section 45 of the Act and the Claimant is entitled to compensation.

Remedies

20. I therefore award the Claimant six (6) months’ salary in compensation. In making this award, I have considered the Claimant’s length of service, his employment record plus the Respondent’s failure to observe the law in bringing the employment to an end.

21. I further award the Claimant one (1) month’s salary in lieu of notice.

22. The Claimant also claims house allowance. However, from the evidence on record, he was paid a daily wage which, barring a claim for underpayment, would be inclusive of house allowance. The claim for house allowance is therefore disallowed.

23. Having been declared redundant, the Claimant is entitled to severance pay as provided by Section 40(1)(g) of the Employment Act.

24. The Respondent admitted that he did not make regular National Social Security Fund (NSSF) remittances to the Claimant’s account. I therefore allow the claim for service pay.

25. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

26. Finally, I enter judgment in favour of the Claimant as follows:

a. 6 months’ salary in compensation.....	Kshs. 180,000
b. 1 month’s salary in lieu of notice.....	30,000
c. Severance pay for 3 years (30,000/30x15x3).....	45,000
d. Service pay for 3 years (30,000/30x15x3).....	45,000
e. Leave pay for 2 years (30,000/30x21x2).....	<u>42,000</u>
Total.....	342,000

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

28. The Claimant is also entitled to a certificate of service plus costs of the case.

29. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to 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 electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this judgment has been delivered during the court recess.

LINNET NDOLO

JUDGE

Appearance:

Mr. Tolo for the Claimant

Mrs. Makuto for the Respondent