



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2087 OF 2016

JUSTUS MUIA KIOKO.....CLAIMANT

-VERSUS-

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

(Before Hon. Justice Byram Ongaya on Friday 29th May, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 11.10.2016 through Samuel Nyambane & Company Advocates. The claimant prayed for judgment against the respondent for:

- 1) A declaration that the respondent action of sacking the claimant is illegal or unlawful, that the claimant is entitled to severance pay, terminal benefits, 1 month in lieu of notice, unpaid leave, salary underpayments, transport allowance and gratuity all totaling to Kshs. 294, 140.00 as particularized at paragraph 6 of the memorandum of claim.
- 2) General damages for wrongful termination as the Court shall assess.
- 3) Costs of the suit and interest.
- 4) Any other relief that the Honourable Court may deem fit and just to grant.

The claims were particularized as follows:

- a) Certificate of service.
- b) One month's salary in lieu of notice Kshs.16, 808.00.
- c) Severance pay for each year worked Kshs. 25, 212.00.
- d) Leave days for years worked Kshs.50, 424.00.
- e) General damages for wrongful termination Kshs.201, 696.00
- f) Total Kshs. 294, 140.00.

The claimant has pleaded that he was employed by the respondent for 3 years up to 27.11.2015 when the respondent without any reasonable cause or justification unilaterally sacked the claimant from his gainful employment. The claimant alleges that the sacking was illegal or unlawful and contrary to rules of natural justice because he was not given an opportunity to defend himself, no reasons were given, he was not heard and he was sacked in breach of the provisions of the Employment Act, 2007 and the collective agreement (CBA) as to notice and terminal dues.

The respondent entered appearance on 25.10.2016 through Adede & Company Advocates. The statement of response was filed on 02.11.2016 and the respondent prayed that the claim be dismissed with costs. The respondent admitted that it employed the claimant for 3 years until 27.11.2015 and that the Court enjoys jurisdiction to hear and determine the case. The respondent further pleaded as follows:

- 1) The claimant was not terminated arbitrarily but he was given reasons for the termination, a termination notice was delivered and terminal dues paid.

2) The claimant's basic monthly pay was Kshs.14, 007.00. The claimant was paid Kshs.14, 007.00 pay in lieu of notice, leave days and gratuity at 15 days for two full years served. The claimant signed a discharge certificate releasing the respondent from further claims.

The Court has considered all the pleadings and evidence. The findings are as follows:

1) There is no dispute that the parties were in a contract of employment.

2) There is no dispute that the respondent terminated the claimant from employment with effect from 25.11.2015.

3) The claimant testified that he was dismissed without reason. He had worked from end of March 2013 to November 2015. He testified that he was summoned to sign for payment of salary and after he signed he was told that his employment was over. A security man who was present pushed him out and he stood terminated. He admitted that he signed the discharge certificate dated 23.04.2016 and he was paid Kshs.14, 077 and told it was pay for November 2015. It was his evidence he was not given a termination notice and was not prepared for the termination. He confirmed that he signed the discharge certificate long after the termination. The respondent's witness (RW) was the Human Resource Manager. It was her evidence that the claimant was terminated when the work he was assigned came to an end but had no documentary evidence that the work ended (RW1 having joined the respondent's service on 13.11.2017 long after the claimant's termination and her evidence being reliance on documents.) The net terminal pay due to the claimant per final pay slip was Kshs.16, 077 but there was Kshs. 2, 000.00 deducted and not explained. She confirmed that after the termination some employees performing similar work as the claimant remained in the respondent's service and no termination notice was served and no termination letter was on record. The Court has considered the evidence and finds that the respondent's evidence does not support the respondent's pleading that reasons for termination were offered, a termination notice or letter served and full terminal dues paid. The claimant's account is upheld that he was abruptly terminated without a reason. In so far as the termination was not attributable to the claimant's conduct and the respondent alleged reduced or no work, the Court returns that it amounted to unfair redundancy. Workers performing work similar to that performed by the claimant are said to have remained in service. The Court finds that the termination on account of purported redundancy was unfair for want of compliance with section 40 of the Employment Act, 2007. The Court has considered the 2 complete years of service, the claimant's desire to continue in employment and the aggravating factor that the termination was in full contravention of the relevant provisions of the Act. Under section 49 of the Act the claimant is awarded 6 months' salaries in compensation for the unlawful and unfair termination at monthly last gross pay of Kshs. 16,808.00 making **Kshs. 100,848.00**. The claimant is also awarded **Kshs. 16, 808.00** one month pay in lieu of notice under section 40 of the Act and **Kshs. 16, 808.00** severance pay at 15 days for each of the two complete years of serve. The claimant is also awarded **Kshs. 7, 688.00** as pay for 14.27 leave days admitted by the respondent in the final pay slip and the Court returns that the claimant offered no evidence to dispute the computed balance of leave days and further offered no evidence to justify the amount for leave pay as claimed and prayed for. Thus the claimant is awarded the sum of **Kshs. 142,152.00**.

4) The Court returns that per the claimant's evidence the amount of Kshs.14, 077.00 in the purported discharge certificate amounted to his November 2015 salary and the discharge certificate could not operate to bar the claimant from urging and claiming his rights as provided for under the Employment Act, 2007 and from claiming unfair termination and as expressly provided for in section 47 of the Act. Further the Court finds that the claimant did not plead particulars and provide evidence on the prayers for salary underpayments, transport allowance and gratuity and returns that the same will fail as unjustified.

5) The claimant is entitled to the certificate of service as prayed for.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1) The declaration that the termination of the claimant's employment by the respondent was unfair and unlawful.

2) The respondent to pay the claimant a sum of **Kshs. 142,152.00** by 01.08.2020 failing interest to run thereon at court rates from the date of this judgment till full payment.

3) The respondent to deliver to the claimant a certificate of service in 30 days from today.

4) In view of the prevailing Covid 19 situation, there be stay of execution until 01.08.2020.

5) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday, 29th May, 2020.

BYRAM ONGAYA

JUDGE