



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2388 OF 2016

STANSLAUS ONCHARI.....CLAIMANT

v

CREATIVE CONSOLIDATED SYSTEMS LTD.....RESPONDENT

JUDGMENT

1. Stanlaus Onchari (Claimant) sued Creative Consolidated Systems Ltd (Respondent) on 24 November 2016 and he stated the Issue in Dispute as

Wrongful, unfair and unlawful termination

Non-payment on employment dues.

2. On the same day, other Causes against the Respondent were filed and registered as

(i) Nairobi Cause No. 2389 of 2016, Oraelo Yonah v Creative Consolidated Systems Ltd.

(ii) Nairobi Cause No. 2390 of 2016, Judith Khavele v Creative Consolidated Systems Ltd.

(iii) Nairobi Cause No. 2391 of 2016, Wilfred Wafula v Creative Consolidated Systems Ltd.

(iv) Nairobi Cause No. 2392 of 2016, Maureen Nyaboke v Creative Consolidated Systems Ltd

3. According to an affidavit of service filed in Court on 19 June 2019, *Notice of Summons* and a copy of the *Memorandum of Claim* was served upon and acknowledged through stamping on 6 December 2016 by an unnamed Clerk (similar affidavits were filed in respect of the other 4 Causes).

4. The Respondent did not enter *Appearance* or file a *Response* in any of the Causes.

5. On 25 September 2019, the record shows that Deputy Registrar after a brief oral address from the Claimants' advocate made a directive that *proceedings of 2388/16 to apply*.

6. The Deputy Registrar directed that pre-trial directions be taken on 9 October 2019 including whether the Causes could be consolidated.

7. When the Causes came up for pre-trial directions on the scheduled dates, the advocate holding brief for the Claimants' advocate told the Court that *Responses* had not been filed, and therefore she was seeking directions that the Causes proceed to formal proof (undefended).

8. The Court directed that the Causes proceed as undefended and that hearing dates be taken in the registry.

9. The Claimants' had the Causes fixed for hearing on 25 February 2020 and on that date, the Claimant in this Cause testified.

10. The Claimant did not file his submissions by the agreed date of 20 March 2020 (or by this morning).

11. Since there was no order on consolidation, the Court will only deliver judgment in respect to this Cause.

12. The other Causes should, therefore, be fixed for hearing in the normal way.

Unfair termination of employment

13. The Claimant was employed by the Respondent on 1 February 2013. He stated that on 21 July 2016 he received a letter dated 11 July 2016 from the Respondent's Deputy Human Resources Manager/Operations notifying him of the termination of his employment.

14. According to the Claimant, the decision was unfair because he was not given an opportunity to be heard and because he was not paid his dues.

15. The Court has considered the Claimant's unchallenged testimony as well as a copy of the termination letter.

16. The notice purported to give 1-month notice but at the same time indicated that the Claimant was expected to hand over by 10 July 2016.

17. Section 35(1)(c) of the Employment Act, 2007 requires an employer to give *written notice of termination of employment* at least 28 days in advance (or pay in lieu of notice). The Respondent did not give adequate notice nor tender pay in lieu of notice.

18. Further, sections 40, 41, 43 and 45 of the Employment Act, 2007 contemplate the giving of reasons before termination of employment. The notice to the Claimant did not give any reasons.

19. The Court, in the circumstances, finds that the termination of the Claimant's employment was both procedurally and substantively unfair.

Compensation and salary in lieu of notice

20. The Claimant served the Respondent for about 3 years and in consideration of the length of service, the Court is of the view that compensation equivalent to 3-months gross wages would be fair (salary was Kshs 9,800/-).

21. Since adequate notice was not given and there was no evidence of pay in lieu of notice, the Court will award the equivalent of 1-month salary in lieu of notice.

Breach of contract

Unpaid leave

22. The Claimant sought Kshs 29,400/- on account of untaken leave during the period of employment.

23. Section 28(4) of the Employment Act, 2007 circumscribes how much annual leave can be carried forward.

24. The Claimant did not disclose whether he requested for leave and was declined or whether he carried forward the leave with the permission of the Respondent. Relief is declined.

Overtime

25. The Employment Act, 2007 leaves it to the parties to agree on working hours (unlike the Regulations made under the Labour Institutions Act).

26. The Claimant did not lay any evidential or legal foundation to this head of the claim.

27. Relief is declined.

Unpaid salary for July 2016

28. The Claimant was entitled to earned wages up to the effective date of termination of employment as of right, and the Court will allow the head of the claim in the sum of Kshs 9,800/-.

Service pay

29. Pursuant to section 35(5) & (6) of the Employment Act, 2007 and lacking any other evidence that the Claimant was a contributor to the National Social Security Fund or a pension scheme, the Court will allow the head of the claim for *service pay* in the sum of Kshs 14,700/-.

Damages for constitutional violations

30. Although seeking an award of punitive and aggravated damages for violation of constitutional rights, no foundation evidential or legal was made for this relief, and it is declined.

Conclusion and Orders

31. The Court finds and declares that the termination of the Claimant's employment was unfair, and further that the Respondent was in breach of contract.

32. The Claimant is awarded

(a) Compensation Kshs 29,400/-

(b) Salary in lieu of notice Kshs 9,800/-

(c) July 2016 salary Kshs 9,800/-

(d) Service pay Kshs 14,700/-

TOTAL Kshs 63,700/-

33. The Claimant is denied costs for failure to file submissions.

Delivered through video, dated and signed in Nairobi on this 15th day of May 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Waiganjo instructed by Waiganjo Wachira & Co. Advocates

Respondent did not participate

Court Assistant Judy Maina