



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.215 OF 2015

LUKAS OTANDO KEYA..... CLAIMANT

VERSUS

TIMBERCRAFT (E.A.).....RESPONDENT

JUDGEMENT

The claim is based on the stated facts that the claimant was employed by the respondent in the year 1994 as a carpenter and paid ksh.562 per day. He worked until 11th September, 2014 without taking annual leave or being paid any other allowances.

The claim is that on 11th September, 2014 the claimant was advised by Dr Etemesi of Right Valley Provincial Hospital to take seek leave from the respondent since he had developed a knee problem and was unable to work. He was allowed 14 days sick leave by the respondent but during such period he did not recover and hence sought a further leave so that he could nurse the knee.

The respondent declined to allow further sick leave and instead dismissed the claimant from his employment and thus claim this act was unfair, unreasonable and without lawful justification on the grounds that there was no proper justification resulting in termination of employment, there was discrimination against the claimant on account of his health status, there was no notice and the claimant is seeking the following dues;

- a) Annual leave for 20 years at Ksh.562 x 30 x 20 years Ksh.337,200;
- b) Notice pay Ksh.16,860;
- c) Compensation
- d) Gratuity for 20 years Ksh.227,200; and
- e) Costs.

The claimant testified that upon employment by the respondent for 20 years, on 11th September, 2014 he fell sick and was allowed sick leave for 2 weeks. The sick leave had been recommended by his doctor. After the 2 weeks he had not recovered and hence requested for more time but he was dismissed without any explanation, notice or being paid his terminal dues.

The claimant also testified that his last day at work was on 18th October, 2014. The respondent issued notice dated 23rd September, 2014 on the reason that he was on medical leave and that he was told to write resignation letter and then made a report to the labour officer where his dues were calculated but was not satisfied by the payment of Ksh.176,468 which he had accepted. It was not a full settlement.

The voucher dated 31st December, 2013 for 3 years leave pay and was paid at ksh.40,464 and acknowledged covering the years 2011, 2012 and 2013. He noted he had no other claims.

Defence

The defence is that the claimant enjoyed his annual leave. In the course of work the claimant got sick and was allowed sick leave but there was no advice by a Dr. Etemesi directing the respondent to grant sick leave as alleged and the claims that there was unfair termination of employment due to request to take sick leave is baseless and without foundation.

The defence is also that the claims made for annual leave for 20 years, compensation and payment of gratuity do not arise and should be dismissed and without prejudice the defence is that the claimant offered to retire from his employment with the respondent, this was accepted and his terminal dues calculated on 7th October, 2014 and paid vide letter dated 23rd September, 2014 and 7th October, 2014 with confirmation of receipt of final dues. the claimant was also paid for an outstanding annual leave vide letter dated 10th October, 2015.

The alleged letter from Dr Etemesi was a fraud. The respondent did an enquiry and it obtained that Dr Etemesi had not authored the letter submitted by the claimant.

The claims made should be dismissed with costs.

Francis Njoroge the general manager of the respondent testified that the claimant was employed as a carpenter from the year 1994 on an oral contract and worked for 66 days each week and paid weekly per the applicable Wage orders and last earning ksh.562 per day.

Mr Njoroge also testified that in September, 2014 the claimant complained that he had a sick leg and asked for medical leave and based on an alleged Doctor report he was given 14 sick leave days. He accompanied the claimant to the provincial hospital and established he had forged signature of the Doctor who had no knowledge of the submitted letter and had never treated or seen the claimant.

Upon the discovery of the forged letter, the claimant rushed and resigned from his employment on 23rd September, 2014 which the witness accepted and proceeded to tabulate terminal dues. the claimant hence resigned during his sick leave days. The respondent was still paying his wages.

Both parties went to the labour officer and there was agreement on the dues payable to the claimant all at ksh.176,467 and which included service pay at 15 days for each year worked and 8 months pro-rated leave pay earned in the year 2014 as all previous leave days were paid.

On the claims made there is nothing due as all annual leave is paid and acknowledged, the claimant resigned voluntarily, and there was payment to NSSF and NHIF. On 31st December, 2013 the claimant was paid for all owing leave days and nothing is due and the claim should be dismissed with costs.

Both parties filed written submissions.

On the pleadings, evidence and written submissions, the issues which emerge for determination can be summarised as follows;

Whether there was unfair termination of employment; and

Whether the remedies sought should be granted.

The claimant's case is that he got sick and was allowed 14 days sick leave by the respondent as his employer. He did not get well and hence applied for more time based on Dr Etemesi recommendation but instead the respondent dismissed him from his employment and thus claims that this was unfair, it was discriminatory and claims for payment of terminal dues for annual leave for 20 years, gratuity, compensation and costs.

The respondents defence is that the claimant was allowed sick leave and while on such leave he tendered his resignation when it was discovered that the medical letter he had used to apply for sick leave was forged. He was paid his terminal dues including service pay, and had taken all his annual leave days and nothing owe.

The claimant does not contest his letter dated 23rd September, 2014 seeking to terminate his employment with the respondent on account of medical reasons and seeking that he can be allowed to work on piece-rate terms.

The claimant also testified that on 11th September, 2014 he was allowed 14 days sick leave and which then was to end on 25th April, 2014. By tendering his resignation to the respondent on 23rd April, 2014 two (2) days prior to the end of the sick leave ended, I take it the claimant was aware of his actions, this did not relate to his being denied extension of sick leave since he was already enjoying such sick leave. There is no claim that there was no payment of his wages during the sick leave period.

Without contesting the resignation was forced or involuntary for any reason(s), such action ended employment.

In the letter of demand from his advocates dated 1st July, 2015 the claimant demanded from the respondent that on 11th September, 2014 he had been allowed 14 days sick leave upon recommendation by Dr Etemesi but he did not recover and asked for more time to get well but was dismissed. This demand and the details therein are is/are not logical. The claimant resigned from his employment during the sick leave period. He has not tendered any application to suggest he wanted more time and which was declined and even if he did this could only arise after the allocated sick leave period lapsed.

On this basis, the claimant ended own employment with the respondent and cannot claim there was unfair termination of employment or that there was discrimination against him on medical grounds such averments and claims are misguided and without any foundation.

Upon ending own employment, the clamant cannot claim notice pay or compensation. Notice pay ought to have been due to the respondent.

On the claim for annual leave pay for 20 year from the year 1994 to September, 2014 the claimant admitted that the matter was reported to

the labour officer and terminal dues were tabulated and which included pro-rated leave pay for 8 months worked in the year 2014.

Also, in December, 2013 the claimant was paid for his annual leave for the years 2011, 2012 and 2013 and he acknowledged. In terms of section 28(2) of the Employment Act, 2007 taking and or payment for annual leave is addressed. See **E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR**.

The claimant acknowledged payment of his terminal dues. this was witnessed by the Labour Officer. These dues are outlined in letter dated 7th October, 2014.

Hence by the time he was making demand for payment of his terminal dues and alleged unfair termination of employment on 1st July, 2015 the claimant was well aware of having been paid his terminal dues. to thus file suit and make the claim herein is to engage in rush claims geared towards unjust enrichment and therefore should pay costs to the respondent.

Accordingly, the claim is hereby dismissed in its entirety. Costs to the respondent.

Dated and delivered electronically this 11th May, 2020.

M. MBARU 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 the Order herein shall be delivered to the parties via emails.

this 11th May, 2020.

M. MBARU JUDGE