



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 357 OF 2018

BETWEEN

PAUL MWIKYA MUTIACLAIMANT

VERSUS

EXON INVESTMENTS LIMITED...RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

C. Masinde & Company Advocates for the Claimant

Muthee Soni & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 30th May 2018. He states, he was employed by the Respondent as a Turn Boy, between July 2011, and July 2017 when he was unfairly dismissed. His last salary was at the rate of Kshs. 17,070 monthly. He states, he was diagnosed with kidney stones at Port Reitz Hospital, and declared medically unfit to continue working. Upon receiving the Claimant's Doctor's Report, the Respondent locked out the Claimant. The Claimant avers there was no notice, and he was not given a hearing in any form. He prays for Judgment against the Respondent for: -

- a. Compensation for unfair termination at Kshs. 204,840.
- b. Notice at Kshs. 17,070
- c. Service pay over a period of 7 years at Kshs. 59,745.
- d. Annual leave over a period of 7 years at Kshs. 119,490

Total... Kshs. 401,145

- e. Costs.
- f. Interest.
- g. Certificate of Service to issue.

2. The Respondent filed its Statement of Response on 25th June 2018. It denies to have employed the Claimant, and/or terminated his

services. Without prejudice to the foregoing, the Respondent states termination was lawful. The Claimant is not entitled to the prayers sought.

3. The Claimant gave evidence, and closed his case on the 25th November 2019. The Respondent did not call Witnesses, and closed its case on the same day- 25th November 2019. Parties subsequently filed and exchanged their Closing Submissions.

4. The Claimant adopted his Statements of Claim and Witness, in his oral evidence. He also exhibited 6 documents to prop up his Claim. He fell ill, and presented his Medical Report to the Respondent. Rather than give him reasonable accommodation, the Respondent terminated his contract. Cross-examined, the Claimant told the Court his Doctor's Report, states he could not work. He had not been working prior to 17th July 2017. He had backache. He did not have a letter of termination.

The Court Finds: -

5. There is no evidence given by the Respondent, to contradict the Claimant. It is clear, from the Claimant's oral and documentary evidence, that he was employed by the Respondent. In the absence of a written contract drawn by the Respondent, the Court does not doubt the dates given by the Claimant, to have comprised his period of employment, July 2011 to 17th July 2017.

6. The Medical Report issued on 17th July 2017 by a Ministry of Health Institution, Port Reitz Hospital, confirms that the Claimant had kidney stones, and was not fit enough to continue serving in his department. He presented this letter to the Respondent. Rather than assign him any other role, the Respondent simply locked the Claimant out, and ended the employment relationship.

7. Termination was unfair. It was not based on valid reason. The Respondent ought to have reasonably accommodated the Claimant, or at the very least, retire him formally, on medical ground. It was the wrong option to lock out the Claimant because he was ailing. It was wrong to send the Claimant away, without any terminal benefits.

8. He worked for 7 years. He did not have any warnings and his record was untainted. He was 46 years old, on termination. He was paid nothing by way of terminal benefits. He did not contribute to the circumstances leading to termination of his contract. **He is granted 7 months' salary in compensation for unfair termination at Kshs. 119,490.**

9. The prayer for notice pay is allowed at Kshs. 17,070.

10. He prays for service pay based on 7 years of service. There is exhibited by the Claimant, N.S.S.F Member Statement of Account, showing that the Respondent subscribed him to the N.S.S.F, and remitted a total of Kshs. 10,800 by way of contributions. Service pay based on 7 years, at the rate of 15 days' salary for every complete year of service, would yield Kshs. 68,936, in favour of the Claimant's Social Security Account. **The Court grants him the difference as service pay, at Kshs. 58,136.** Mere subscription to the N.S.S.F, as this Court observed in Nairobi Industrial Court Cause No. 871 of 2012, between *Elijah Kipkoros Tonui v. Ngara Opticians t/a Bright Eyes Limited*, does not disentitle an Employee service pay.

11. There is no record exhibited by the Respondent, or other form of evidence, contesting the prayer for annual leave. The Claimant would be entitled to a minimum of 21 days of annual leave, upon satisfying the qualifying period, under Section 28 of the Employment Act. **He is allowed annual leave pay, for a period of 7 years, based on 21 days a year, at Kshs 96,511.**

12. Certificate of Service to issue.

13. No order on the costs.

14. Execution of the Judgment is stayed for 30 days from the date herein.

15. Interest granted at the rate of 16% per annum from the end of the stay period.

IN SUM IT IS ORDERED: -

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: compensation at Kshs. 119,490; notice at Kshs. 17,070; service at Kshs. 58,136; and annual leave at Kshs. 96,511 – total Kshs. 291,207.

c. Certificate of Service to issue.

d. No order on the costs.

e. Stay of execution allowed for 30 days.

f. Interest allowed at the rate of 16% per annum from the end to stay period.

Dated and delivered at Mombasa this 29th day of September 2020

James Rika

Judge