



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.127 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 29th October , 2020)

FRANCIS NYONGESA OKUMU.....CLAIMANT

VERSUS

SEB ESTATES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 26th January, 2016 and filed in Court on 1st February, 2016, in which he seeks compensation for unfair and unlawful termination of his employment by the Respondent herein as well as its failure to pay his terminal dues & compensatory damages.

2. He states that he was employed by the Respondent on or about 5th September, 2009 in the position of a cleaner stationed at Ruchwa Estate and was earning a monthly salary of Kshs. 7, 600/- only.

3. He further maintained that he performed his duties diligently and to the Respondent's satisfaction and that on or about 13th June, 2015, the Respondent through its Personnel Manager one Thomas Mbithi Mutinda informed him to temporarily join the Respondent's security department.

4. The Claimant further maintained that he performed his newly assigned roles as from 19th June, 2015 to 25th June, 2015 despite not having any formal training on the same. He further averred that he held the position until 27th June, 2015 when he resigned from lawful duties citing breach of the Respondent's promise that his services to the security department were to be short term.

5. He further averred that his salary was below the legal minimum wage for cleaners. It was his further contention that during the subsistence of his employment with the Respondent he was neither paid house allowance nor was he offered any housing which in his view amounts to unfair labour practice which prompted him to resign.

6. The Claimant maintains that due to his unemployment he is entitled to the following reliefs:-

1. A declaration that the Respondent's action to unilaterally change the Claimant's terms of employment amounted to unfair labour practices which were unlawful and inhumane.

2. A declaration that the Claimant is entitled to payment of his terminal dues as pleaded.

3. An Order that the Respondent to pay the Claimant his due terminal benefits totaling to Kshs. 252,040/- comprising of the following:-

i. Payment in lieu of untaken leave for 4 years being Kshs. 10,954.70/- x 4 years = Kshs. 43,818.8/-

ii. House Allowance being 15/100 x Kshs. 10,954.70/- x 69 months (using Minimum wage) Kshs. 113,381.15/-

iii. Underpayments for the period of service:-

a. between 1st May, 2012 and 1st May, 2013 (Kshs. 8,579.80 – Kshs. 7,600) Kshs. 11,757.6/-

b. Between 1st May, 2013 to 1st May 2015 (Kshs. 9,780.95 – Kshs. 7,600) Kshs. 52,342.8/-

c. *Between 1st May, 2015 and June 2015 (Kshs. 10,954.70 – Kshs. 7,600) Kshs. 3,354.7/-*

iv. *Service Pay for 5 years of completed service $15/30 \times \text{Kshs. } 10,954.70/- \times 5 \text{ years} = \text{Kshs. } 27,385/-$*

Total Claim Kshs. 252,040/-

v. *The Claimant claims for his certificate of service as is statutorily provided for.*

4. Interest on 3 above from the date of Judgment until full payment.

5. Costs of the Suit plus interest thereon.

7. The Respondent despite being served with the summons as well as the Statement of Claim herein failed to enter Appearance or file an appropriate Response to the Claim. The matter was subsequently certified ready to proceed as an undefended Claim and the Claimant directed to fix the matter for hearing.

Evidence

8. The matter proceeded for hearing on 21st September, 2020 with the Claimant, CW1 testifying. He sought and was allowed to have his Witness Statement filed dated 26th January, 2016 adopted as his evidence in chief. In his statement the Claimant reiterates the averments made in his Memorandum of Claim.

9. He further testified that he was forced to tender his resignation from the Respondent as he was reassigned to duties he was not trained to perform and his salary remained the same.

10. The Claimant further maintained that the Respondent's actions were unlawful, unfair and contrary to the provisions of the Employment Act and as a result urged this Court to allow his claim in terms of the reliefs sought therein.

11. The Claimant was thereafter directed to file his written submissions to the Claim.

Claimant's Submissions

12. It is submitted on behalf of the Claimant herein that the Respondent's action of unilaterally issuing him with new roles without any formal training without consulting him amounted to unfair labour practice and amounted to a termination of his Contract. To buttress this argument the Claimant relied on the provisions of Section 10 of the Employment Act and the case of **Elizabeth Kwamboka Khaemba Vs BOG Cardinal Otunga High School Mosocho & 2 Others (2014) eKLR** where the Court held that failure by an employer to consult an employer when changing his terms of employment amounted to unfair and unlawful termination.

13. The Claimant further submitted that his redeployment to the security department without any formal training amounted to constructive dismissal. For emphasis the Claimant cited and relied on the case of **Kepha Thuo Magau Vs Board of Governors Satima Secondary School (2013) eKLR**.

14. He further maintained that he is therefore entitled to the reliefs as sought in his Memorandum of Claim by dint of the provisions of Section 28, and 35 of the Employment Act, 2007. To fortify this argument the Claimant cited and relied on the cases of **Elizabeth Kwamboka Khaemba Vs Bog Cardinal Otunga High School Mosocho & 2 Others (2014) eKLR** and **Kenya Plantation & Agricultural Workers Union Verses James Finlays (K) Limited (2018) eKLR**.

15. In conclusion, the Claimant urged this Court to allow her Claim in its entirety in terms of the reliefs sought therein.

16. I have examined the evidence and submissions of the Parties herein. The Claimant was able to prove through his identification documents that he was employed by the Respondent as a Cleaner.

17. He also showed in his Appendix II that he resigned from the Respondent's employment after being reassigned guard duties for which he was unable to do.

18. The Respondents though served failed to adduce any evidence to the contrary. They did not enter appearance and neither did they file a defence upon being served with summons to enter appearance.

19. The Claimant's case therefore remained uncontroverted. I therefore find for the Claimant in this Claim.

20. As concerns remedies sought, I find for Claimant and award him as follows:-

1. 8 months' salary as compensation for unfair constructive termination = $8 \times 7,600 = 60,800/=$

2. Unpaid house allowance for 3 years prior to the termination = $15\% \times 7,600 \times 36 = 41,040/=$

3. Unpaid salary for June 2015 = 7,600/=

4. Underpayment of salary for the period of May 1st 2013 to 1st May 2015 = 9,780.95 -7,600 = 52,342.8/=

plus for 1st May 2015 to June 2015= 10,954.70/=63,297.5/=

TOTAL AWARDED = 172,737.5/=

5. *The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.*

Dated and delivered in Chambers via zoom this 29th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Omamo holding brief Mulaku for Claimant