



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 592 OF 2019

SAMSON ODUK.....CLAIMANT

- VERSUS -

JOTUN KENYA LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd October, 2020)

JUDGMENT

The memorandum of claim was filed on 06.09.2019 through Cliff Oduk Advocates. The claimant prays for judgment against the respondent for:

- a) One-month salary in lieu of the notice Kshs. 169, 000.00.
- b) 12 months' pay for unfair termination Kshs. 2, 028, 000.00.
- c) 18 days' unpaid leave Kshs. 138, 270.00.
- d) Damages for discrimination Kshs.1, 000, 000.00.
- e) Damages for unfair labour practices Kshs. 1, 000, 000.00.
- f) Damages for emotional distress and pain Kshs.1, 000, 000.00.
- g) Interest on a to f above at 14% from the date of termination letter till payment in full.
- h) Costs of the suit.
- i) Any other orders that the Court may deem fit to grant.

The claimant signed a contract of service with the respondent on 02.06.2016. He was employed as Sales Executive – Dealers at Kshs. 150, 000.00 per month. He served probation successfully and was confirmed on permanent terms by the letter dated 29.08.2016. His salary increased over time and the last monthly pay was Kshs. 169, 000.00.

The claimant's case is that on 04.06.2019 he was summoned to an informal meeting by the respondent's human resource office and was requested to tender his resignation to the respondent upon an alleged ground of overhaul of the entire retail development team. He to resign on the spot and he declined. He then on 04.06.2019 received the letter of termination dated 01.06.2019. By the letter dated 25.06.2019 the claimant demanded his terminal dues. The termination was unfair because it was in violation of section 40 of the Employment Act, Article 27(1), 41(1) and 47 of the Constitution. The termination letter gave notice that the employment contract will be terminated effective 30.06.2019. The decision was due to overall expected performance of the retail development team and the decision made was to overhaul the entire team. The claimant would be paid for the whole of June being notice period and any outstanding leave days.

The respondent appointed Iseme, Kamau & Maema Advocates to act in the suit. The replying memorandum was filed on 13.11.2019. The respondent pleaded as follows:

- a) The respondent employed the claimant as pleaded for the claimant.
- b) The contract was not unlawfully and un-procedurally terminated. Termination was per terms of service and the Employment Act,

2007.

c) Clause 31.2 of the contract provides that the contract could be terminated by either pay giving one-month notice or pay in lieu of notice without the necessity of giving reasons thereof. Clause 31.3.3 provides that notwithstanding clause 31.2 the respondent was entitled to terminate the contract on account of staff reduction due to the restructuring of the respondent's staff requirements. The sales team was being overhauled in a restructuring hence termination of the claimant.

d) The outstanding 6 leave days were paid together with the June 2019 salary.

e) Termination was per clause 31.3.3 of the contract hence it was not unfair.

f) The suit should be dismissed with costs.

Parties opted to rely on the pleadings, documents and final submissions. The Court has considered all the material on record and makes findings as follows:

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

2) The employment was terminated by the letter dated 01.06.2019. It is clear that the termination was under clause 31.3.3 of the contract. The Court finds that it was not under clause 31.2 on termination upon a month's notice or a month's pay without assigning reasons. To the extent that there was restructuring the Court finds that the termination amounted to redundancy and the respondent was bound to comply with section 40 on redundancy but did not do so. The Court finds that the termination was unlawful and unfair as submitted for the claimant.

3) Under section 40 of the Act the claimant was entitled to one-month notice then one month pay in lieu of termination notice. The Court finds that he is entitled to the prayer for one month pay **Kshs. 169, 000.00**.

4) The court has considered the criteria for award of compensation under section 49 of the Employment Act, 2007. The claimant desired to continue in employment and had a clean record of service of three years. He did not contribute to his termination. He was entitled to 3 years' severance pay which was not paid at all. He was entitled to be prepared for the redundancy and notice to the Labour Officer was never issued per section 40 of the Act. The aggravating factor therefore is that the respondent acted in total disregard of the law, section 40 of the Act. To balance justice for the parties the claimant is therefore awarded 8 months' salaries making Kshs. 169, 000.00 x 12 = **Kshs. 1, 352, 000.00**.

5) Upon the material on record the Court is unable to resolve the issue of pending leave days for want of due evidence. The prayer will fail.

6) The Court finds that the claimant has not offered evidence and justification for award damages upon headings of discrimination, unfair labour practices and emotional distress and pain. The prayers will be declined.

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

1) Payment of **Kshs. 1, 521, 000.00** (less PAYE at the rate as the date of this judgment) by 01.12.2020 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

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

3) In view of the prevailing Covid 19 situation there be stay of execution of the decree herein until 01.12.2020.

Signed, dated and delivered by the court at **Nairobi** by video-link this **Friday 23rd October, 2020**.

BYRAM ONGAYA

JUDGE