



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 70 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

ABUBAKAR ALI SHEE.....CLAIMANT

VERSUS

TOURISM PROMOTION SERVICES (KENYA) LIMITED.....RESPONDENT

JUDGMENT

The Claimant in his Statement of Claim Amended on the 19th day of February 2016 pursuant to the Order of the Honourable Court made on the 9th December 2015 alleges that he was unlawfully/wrongfully and summarily terminated from the Respondent's employment.

The Claimant claims from the Respondent the sum of Kshs.7,169,355.20 being special damages consequent upon the termination of his employment that is made up as follows:

- i. Service Gratuity Kshs.2,101,660.80
- ii. 12 Statutory damages for unfair termination
(Kshs.218,923/- x 12 months) Kshs.2,627,076.00
- iii. Accrued house allowance Kshs.175,130.40
- iv. Accrued medical allowance Kshs.128,000.00
- v. Accrued education allowance for dependants Kshs.50,000.00
- vi. Accrued leave allowance Kshs.240,000.00
- vii. Salary in lieu of notice (4 months x 218,923/-) Kshs.875,692.00
- viii. Tax deduction on 'early' pension withdrawal Kshs.971,796.00

Total Kshs. 7,169,355.20

The Claimant also claims general and exemplary/punitive damages for unlawful, unfair and malicious dismissal.

The Respondent in its Memorandum of Reply amended on 22nd February 2016 acknowledged having terminated the Claimant's services. However, it contends that the termination was procedural, legal and effective as per the contract of employment and the law existing as at 18th May 2005.

The Respondent further avers that the Claimant was offered all necessary terminal dues as evidenced by the termination letter dated 18th May 2005 that he was entitled to but he declined to receive the same.

The Respondent avers that the Claimant was terminated on 23rd May, 2005 when the repealed Employment Act, (1975) was in force and which provided that an employer could terminate the employment of an employee by giving the requisite notice and without assigning any reason for termination.

The Respondent further avers that the Claim for tax deduction for early pension withdrawal has no merit and has no foundation in law and in contract. Similarly the claim for interest, as the Claimant declined the offer by the Respondent to settle dues and can therefore not be allowed to benefit from his own inequitable conduct.

The Respondent urged the Court to dismiss the Claimant's suit with costs.

Evidence

On **17th September 2018**, the Claimant (CW1) in his testimony stated that he was employed in the year 1973 by Block Hotels for 16 years then Lohno Hotels for 13 years. At the time of termination he was the General Manager, Sweet Waters Tented Camp, Nanyuki, which ceded its management to Tourism Promotion Services Limited (T.P.S) the Respondent herein.

He stated that he was served with a letter dated 18th May 2005 purporting to terminate his services from Tourism Promotion Services (The Respondent). He further stated that in his view his termination was not done in good faith.

CW1 testified that his termination letter did not have a reason for his termination. Further, that at the time of termination he was earning a monthly salary of Kshs.218,923.00/- as per the last payslip.

CW1 further testified that he was not paid any of his dues at the time of termination. Further, that he has never been called upon by the Respondent to calculate his terminal dues.

It was his evidence that upon receipt of his termination letter he did clear with housekeeping and accounts department and handed over to the new manager, Mr. Ondiek. Further, that the clearance shows that he left employment by way of redundancy.

CW1 urged the Court to allow his Claim as prayed.

On cross examination the Claimant stated that he worked for Tourism Promotion Services (TPS) for barely a month before his services were terminated. On Further cross examination he averred that his termination from employment was unfair as he was not terminated at the Respondent's head office but rather his termination was done in the presence of staff which occasioned him embarrassment.

He further stated that the employment contract provided for 3 months' notice which was later on enhanced to 4 months' notice or payment in lieu thereof. CW1 confirmed that via the letter dated 23rd May, 2005 he was offered some payments, that is, salary up to 22nd May 2005, leave days and 4 months' pay in lieu of notice. He further averred that he was not paid gratuity and the letter did not contain any figures of what was actually owing to him.

On re-examination CW1 stated that he was forced to withdraw his pension early as he needed to pay school fees.

On the amounts prayed for CW1 averred that if he was issued with the master roll he will be able to justify the amounts as calculated.

CW1 prays that the Memorandum of Claim be allowed as drawn.

The Respondent's case was heard on 17th September 2018. RW1 (**Catherine Wambui Waruhiu**) Human Resource Director with the Respondent testified on behalf of the Respondent. It was her evidence that the Claimant was offered employment vide the offer letter dated 12th October 1992 and an employment contract was signed thereafter on 8th February 1993.

RW1 further stated that CW1's employment was terminated vide the letter dated 18th May 2005, effective 23rd May 2005. Further that the Claimant was offered payment of terminal dues as itemised in the termination letter but he declined the same instead proceeding to file the instant claim.

RW1 avers that the Claimant is only entitled to Kshs.975,975/- being his terminal dues and not more.

RW1 further testified that the Claimant's claim for service pay is untenable and is not due as there is no provision in the employment contract that provided for service pay and that NSSF deductions were made from the Claimant's salary and remitted to the statutory body.

RW1 testified that the Claimant was properly terminated as per the provisions of his employment Contract and as such is not entitled to the reliefs sought in the Statement of Claim.

On cross examination RW1 stated that she has worked for TPS (the Respondent Company) for the last 25 years in different capacities, that the notice period as provided by the employment contract was 3 months' which was amended to 4 months' notice or payment in lieu thereof.

She confirmed that the Claimant's dues have not been paid since he declined to receive the monies as evidenced by his letter of protest. She further admits that the termination letter does not provide for the amount in figures that is due to the Claimant.

On further cross examination RW1 stated that the Respondent did not inform the Labour Office of the intention to lay off the Claimant as the employment contract did not make such a provision.

On enquiry by the Court RW1 stated that the Management of the Respondent decided not to continue with the Claimant's employment.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Statement of Claim and his oral evidence in Court.

It is submitted by the Claimant that his termination was malicious and that he was grossly humiliated by the Respondent's decision to terminate his services in the manner that it did.

The Claimant further submitted that the contract of employment provided at page 8 clause 2.3 that before termination of a non-unionisable staff, the owner had to be informed well in advance. The Claimant avers that no notice was given prior to his termination.

The Claimant further submitted that the Respondent failed to provide any proof of approval by the owner to effect the change in the office of the General Manager as provided by Section 3 (b) of the management contract.

The Claimant further submitted that the Respondent's actions were contrary to Section 16A of the repealed Employment Act with regard to redundancy which provides:

“an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days for each completed year of service as severance pay.”

The Claimant submitted that the Respondent's decision to terminate his services was based on nepotism. For emphasis he relied on the authority of ***David Wanjau Muhoro Versus OI Pejeta Ranching Limited (2014) eKLR.***

The Claimant submitted that he is entitled to the reliefs as sought in his statement of claim. He relied on the case of ***Michie Gitau Versus NSSF Board of Trustees HCC 3264 of 1993*** (unreported)

Respondent's Submissions

The Respondent submitted that the Claimant is not entitled to service gratuity as it made payments to NSSF. Further that the Claimant's service were terminated prior to the enactment of the Employment Act, 2007, which provides expressly for payment of service pay. It is submitted that the Claimant would only be entitled to service pay/gratuity if it was provided for in his employment contract. The Respondent relied on the authorities of ***Central Bank of Kenya Versus Davies Kivieko Muteti (2009) eKLR*** and ***Galaxy Paints Company Limited Versus Falcon Guards limited (2000) 2 EZ 385*** for emphasis.

The Respondent submitted that the Claimant was not declared redundant as his termination letter made no reference to redundancy and another General Manager was appointed in place of the Claimant.

It is further submitted that the employment contract provided as follows with regards to termination of employment:

“Notice period: After satisfactory completion of probation this contract may be terminated by either party by giving the other 3 months' salary in lieu of notice.”

Further that the Claimant acknowledged this right by stating in his letter as follows:

“I appreciate the fact there was a changeover in management and that either party has a right to terminate the contract as provided for on the contract.”

The Claimant is therefore estopped from alleging that the Respondent is not entitled to terminate the Contract. For emphasis the Respondent relied on the case of ***Ezekiel Nyangoya Okemwa versus Kenya Marine & Fisheries Research Institute (2016) eKLR.***

With regards to a fair hearing it is submitted that in the repealed employment law regime, there was never a requirement to grant an employee a hearing prior to termination. All that was required was proper notice, or payment in lieu thereof. The Respondent relied on the case of ***Rift Valley Textiles Limited Versus Edward Onyango Oganda (1994) eKLR.***

The Respondent submitted that should the Court find that the Claimant's employment was unlawfully terminated then the quantum of such damages would be confined only to the salary equivalent to the notice period as per the decision held in ***Unilever Tea Kenya Limited Versus John Kememia Gitau (2017) eKLR.***

It is further submitted that the Claimant is not entitled to the claim for house allowance relying on the cases of ***Godfrey Mwangi Wanjohi Versus Mitchell Cotts Kenya Limited (2002) eKLR***, ***Luhume Versus Coffee Marketing Board of Uganda (1970) EA 155*** and ***Wakiro Versus Committee of Bagisu Co-op Union (1968) EA 523*** for emphasis on the issue.

The Respondent submitted the Claim for education allowance ought to be dismissed as the Claimant has not attached the requisite receipts to support his claim.

The Respondent further submitted that the Claimant is only entitled to an amount of Kshs.975,975.00 being terminal dues that were offered to the Claimant at the time of termination and declined. Further that the Claimant cannot then claim for interest from the date of termination as he is the one who declined payment. The Respondent relied on the authority of *Jane Wanjiku Wambui Versus Anthony Kigamba Hato & 3 Others (2018) eKLR*.

The Respondent prays that the Claimant's claim be dismissed with costs to the Respondent.

Determination

Having considered the pleadings, evidence, submissions and authorities cited by the parties, the following are the issues for determination:

1. Whether the termination of the Claimant's employment by the Respondents was wrongful, unfair and unlawful
2. Whether the Claimant is entitled to the reliefs sought
3. Who bears the costs of the suit

Applicable Law

In view of the fact that the employment of the Claimant was terminated in 2005, the applicable law is the repealed Employment Act (1976).

Was the termination therefore wrongful, unfair and unlawful?

I agree with the Respondent to the extent that the law at the time the Claimant's employment was terminated did not provide for unfair termination of employment. The Respondent therefore was not under any obligation at that point in time to comply with the requirements of natural justice and termination was at the pleasure of the employer as is supported by the employment contract that provided for notice or payment in lieu thereof.

In the case of *Anthony Makala Chitavi Versus Malindi Water & Sewerage Company Limited (2013) eKLR*, Radido J. held as follows:

"Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.

An employer was free generally to dismiss for a bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee."

Similarly, in the case of *Ezekiel Nyangoya Okemwa Versus Kenya Marine & Fisheries Research Institute (2016) eKLR*, Rika J held as follows:

"Employers had no obligation in observing the principles of natural justice, in termination of contracts of employment. The Courts have explained that under the old employment law in Kenya, Employers could terminate contracts of employment at will, for good cause, bad cause or no cause. At the time, employment was at the will of the employer."

Whether the Claimant is entitled to the reliefs sought?

The Claimant has prayed for the following reliefs:-

- i. Service Gratuity Kshs.2,101,660.80
- ii. 12 Statutory damages for unfair termination
(Kshs.218,923/- x 12 months) Kshs.2,627,076.00
- iii. Accrued house allowance Kshs.175,130.40
- iv. Accrued medical allowance Kshs.128,000.00
- v. Accrued education allowance for dependants Kshs.50,000.00
- vi. Accrued leave allowance Kshs.240,000.00

vii. Salary in lieu of notice (4 months*218,923/-) Kshs.875,692.00

viii. Tax deduction on 'early' pension withdrawal Kshs.971,796.00

Total Kshs. 7,169,355.20

The Claimant also claims general and exemplary/punitive damages for unlawful, unfair and malicious dismissal.

The Claimant has submitted that he is entitled to the reliefs sought above due to the wrongful, unfair and unfair termination of his employment by the Respondent. He goes further to justify that he is entitled to all the prayers as the same are provided for under the contract of employment.

The Respondent on the flip side has submitted that the Claimant is only entitled to an amount of Kshs.975,975.00 being terminal dues that were offered to the Claimant at the time of termination and declined.

The court finds that the Claimant is entitled to the amount of **Kshs.975,975.00/-** terminal dues only based on the provision of the termination letter that indicated as follows:

“Upon this termination your final dues will be worked out as follows:-

- *Salary up-to 22nd May 2005*
- *Four Months' salary in lieu of Notice*
- *Thirty Three days leave owed for 2004/2005 @ February, 2005*
- *Nine days leave prorated to February 2005*
- *Twelve days off days and public Holidays owed.”*

All other claims in my view therefore must fail as they are not supported by evidence adduced in court or the law.

The claimant is not entitled to service gratuity as his terms of service did not provide for the same. He was a member of the respondent's pension's scheme.

He is not entitled to compensation as this was introduced in the Employment Act, 2007 which was not in force at the time of the termination of the claimant's employment.

The claimant was housed and is not entitled to house allowance.

He is not entitled to medical allowance or education allowance for children as these were only payable during the pendency of employment.

Tax deduction on early pension is not a liability of the employer and is not payable.

Section 5(4) of the Employment Act 1976 (repealed) provided that –

5. (4) Upon the termination of every contract of service -

(a) by effluxion of time, it shall be the duty of the employer and not of the employee to ensure that the employee is paid such of the entire amount of the wages earned by or payable to him and of the allowances due to him as have not hitherto been paid;

(b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of wages and other allowance earned by him since the date of his dismissal,

The claimant was not offered his terminal dues at the time of termination. The letter of termination only gave heads without the amount payable. It was not for the respondent to wait for the claimant to accept the terminal dues before making payment as these were his entitlements. What the respondent ought to have done is tabulate the payment due and issue a cheque to the claimant upon clearance or to pay the same into his account. No deliberate attempt was made to pay before this suit was filed.

The respondent is a business and has been trading with the claimant's money. Having kept the claimant out of his money it is only fair to grant him the opportunity cost for the same. Although the claimant prayed for interest from date of termination, I will award him the same from date of filing suit.

The respondent shall pay claimant's costs for the case.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH JANUARY 2019

MAUREEN ONYANGO

JUDGE