



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 557 OF 2010

(Before Hon. Lady Justice Maureen Onyango)

MICHAEL ONYANGO.....CLAIMANT

VERSUS

STEEL STRUCTURES LIMITED.....RESPONDENT

JUDGMENT

On 21st February 2014, the Claimant filed his Amended Memorandum of Claim dated 17th February 2014 in which he is suing the Respondent for compensation following his resignation. He seeks the following reliefs:

1. That the Court orders the Respondent to pay the Claimant Kshs.585,800.00 as follows:
 - i. Unpaid salary for 2 days of July 2009----- Kshs.2,000
 - ii. Unpaid leave travelling allowance for 163 months----- Kshs.32,600
 - iii. Retirement/Terminal Benefits (gratuity and transport)---- Kshs.551,200
2. That costs hereof be paid by the Respondent.
3. Any other or further relief that this Honourable Court deems just to order.

The Respondent in its Reply dated 1st July 2010 and filed on 6th July 2010 denies owing the Claimant the alleged sums and prays that the Claim be dismissed with costs and an award on the counter-claim for the sum of Kshs.60,000.00 issued.

Claimant's Case

It is the Claimant's case that he was employed as a helper and rose through the ranks to become an accounts assistant in the accounts department.

It is also the Claimant's case that he fell sick and was unable to attend to his duties as required. From 2009, the Claimant's health deteriorated substantially and the Respondent's doctor recommended that he should rest from routine work. Due to health problems and pressure from work, the Claimant resigned and the Respondent accepted the resignation.

It is the Claimant's case that by accepting the Claimant's request for immediate resignation, the Respondent rescinded the contractual condition of two months written notice or pay in lieu.

The Claimant avers that although he cleared with the Respondent, he was not paid his terminal dues.

During trial, the Claimant adopted his Statement of Claim filed on 21st February 2014, Verifying Affidavit and the documents MO1 to M12 annexed to the Claim.

Upon cross examination, the Claimant confirmed that he never gave one month's notice or pay the Respondent one month's salary in lieu of

notice. He further confirmed that he had signed a clearance certificate in full and final payment but contended that his claim was for inadequate payment of terminal dues. It was the Claimant's testimony that the terminal benefits were based on the CBA.

During re-examination, the Claimant testified that he had been disgruntled before he resigned.

Respondent's Case

It is the Respondent's case that paragraph 5 of the Claimant's contract of employment provided that in case of termination, a party was to give the other party 2 months' written notice of termination or pay two months' salary in lieu of notice. As such, the Claimant was to give the Respondent two months' notice or pay Kshs.30,000 x 2 = Kshs. 60,000.00 being salary in lieu of notice.

It is the Respondent's case that the Claimant's demand for Kshs.547,465.75 is misplaced as he was not rendered redundant by the Respondent.

In his witness statement, Samuel Njogu Mungai stated that after 12 years of employment the Claimant was made an accountant under study pursuant to his request. It is his evidence that the Respondent received and accepted the Claimant's resignation on 16th July 2009. He was paid his salary and terminal dues, cleared with the Respondent and was issued with a clearance certificate.

It is his averment that the Respondent did not contribute to the Claimant's resignation which was voluntarily.

RW1, **Samuel Njogu Mungai**, an administrative assistant of the Respondent, relied on his witness statement as evidence in chief. He also relied on the documents filed in response to the claim.

It was his testimony that the Claim against the Respondent was invalid because the Claimant was paid all his dues, acknowledged receipt and affirmed that he had no further claims against the Respondent. He also testified that the Claimant resigned on the ground that he was of ill health.

During cross examination, RW1 denied that the Claimant had been issued with a warning letter because of his ill health and instead asserted that the letter was issued because of poor working conditions. RW1 conceded that the CBA provided that employees were entitled to 22 days' pay for every completed year of service by way of gratuity. He however contended that the Claimant was not covered by CBA as he had resigned from membership.

Upon re-examination, RW1 testified that the Claimant was paid:

1. Kshs.26,000.00 being the salary he had earned up to the time he left.
2. Kshs.94,286.00 being his pension.
3. A cheque of Kshs.10,018.00.

RW1 testified that the Claimant withdrew his membership from the union. He asserted that the reason for the Claimant's resignation was because he was unwell and that the Claimant did not mention that the reason for his illness was because of working conditions.

Submissions

The Claimant in his written submissions dated 28th August 2018 and filed on 29th August 2018, submits that by the Respondent's acceptance of the Claimant's resignation, it rescinded the contractual condition of notice or payment. Further, the Claimant resigned due to illness thus ousting the requirement for notice or payment.

It is the Claimant's submissions that the provisions of the CBA apply to him since he was an employee of the Respondent and was paying agency fee to his union as required under section 49 of the Labour Relations Act.

The Claimant submits that he was not adequately compensated for his 25 years of service. He further submits that he is entitled to gratuity since according to clause 9 (b) of the CBA, ill health does not negate entitlement to gratuity.

The Respondent in its written submissions dated 13th November 2014 and filed on 14th November 2018, submits that there is no salary owed to the Claimant as his pay slip indicates that he was paid for 15 days which amounted to Kshs.14,423.10. The Respondent also submits that the amount of Kshs.2,000 is not payable to the Claimant because he did not work on 16th June 2009 as his resignation was supposed to take effect immediately.

It is the Respondent's submission that the Claimant is not entitled to the leave travelling allowance because he did not prove his entitlement to this claim and that he withdrew his union membership. The Respondent also submits that the Claimant is not entitled to the Kshs.551,200 claimed as the Claimant was a member of NSSF and a pension scheme.

Determination

After considering the evidence adduced by the parties, the following are the issues for determination:

1. Whether the Claimant is entitled to the reliefs sought.
2. Whether the Respondent is entitled to the amount claimed in its counter-claim.

Before the determination of these issues, it is important for the Court to address the issue of constructive dismissal and the additional reliefs sought pursuant to the Amended Statement of Claim dated 17th August 2016.

The Nderi Nduma J. made a determination concerning these issues in his Ruling delivered on 10th November 2017. He dismissed the Claimant's Application dated 5th September 2016 seeking leave to amend the Statement of Claim to introduce the prayer for constructive dismissal. As such, the matter is now settled and cannot be deliberated on a second time. Therefore, the Amended Statement of Claim before this Court for consideration is that which was filed on 21st February 2014.

Whether the Claimant is entitled to the reliefs sought.

The claimant has not demonstrated that his terms of service at the time of termination provided for leave travelling allowance. He has not contested the authenticity of the letter of resignation from union membership dated 16th July 1996. He cannot therefore claim a benefit under the terms of the CBA. The prayer must therefore fail and is accordingly dismissed.

The prayer for retirement/terminal benefits was not substantiated. It was not provided for in the claimant's terms of employment. It is worth noting that the claimant was a member of a pension scheme and NSSF. He is thus not entitled to gratuity which is provided for in the CBA that does not cover him following his resignation therefore and his promotion and enrolment into the pension scheme. The claimant is however entitled to salary for 2 days as the letter accepting his resignation as well as the certificate of service state that he was in employment up to 17th July 2009. I award him the same at Kshs.2,000.

Whether the Respondent is entitled to the amount claimed in its counter-claim.

The Respondent argues that the Claimant owes it Kshs.60,000 pay in lieu of notice for resigning without issuing two months' notice and for his failure to pay salary in lieu of notice. The Claimant has not rebutted this assertion. However, taking into account the reason for the Claimant's resignation which was due to his extreme ill health, and that the respondent accepted the resignation and advised the claimant of his last working day being the 17th July 2009, the counterclaim is an afterthought and must fail.

Conclusion

Both the claim and the counterclaim fail with the exception of the claimant's prayer for payment of 2 days' salary for which he is awarded Kshs.2,000.

Each party shall bear its costs.

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

MAUREEN ONYANGO

JUDGE