



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 53 OF 2016

BETWEEN
NELSON ANYANZWA ORUKO.....CLAIMANT
VERSUS
TAPIOCA LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Oyugi Kitoo & Company Advocates for the Claimant

Federation of Kenya Employers for the Respondent

JUDGMENT

1. Through his Statement of Claim filed on 4th February 2015, the Claimant seeks Judgment against his former Employer, the Respondent herein, on the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 9,000.
- b) Annual leave over a period of 19 years at Kshs. 138,054.
- c) Public holidays over the same period at Kshs. 110,720.
- d) Compensation for unfair termination at Kshs. 108,000.

TotalKshs. 365,774

- e) Declaration that termination was unfair.
- f) Costs.
- g) Interest.
- h) Any other suitable order.

2. He avers that he was employed in March 1995 as a Casual Labourer. He later became a regular Employee, designated as a Mill Operator, earning a monthly salary of Kshs. 9,000, until 1st May 2014 when his contract was terminated. There was no valid reason justifying termination. The Claimant had refused to work with a defective machine, while the Respondent insisted the Claimant works, exposing the Claimant to the risk of occupational injury. Another Employee was recruited in Claimant's place. The Claimant did not resign as alleged by the Respondent.

3. The Respondent filed its Statement of Response on 4th July 2016. It is agreed that the Claimant was employed by the Respondent, but denied that his contract was unfairly terminated by the Respondent. He resigned voluntarily, citing personal problems, in his letter of resignation dated 23rd May 2014. The Respondent accepted resignation. His final dues were tabulated and paid. Claimant's Union Shop Steward, was involved at every turn. The Respondent urges the Court to dismiss the Claim with costs.

4. Parties recorded a consent order on 26th September 2018, to have the Claim considered and disposed of under Rule 21 of the Employment and Labour Relations Court [Procedure] Rules 2016. They confirmed filing of their Closing Submissions on 23rd November 2018.

The Court Finds:-

5. It is not disputed that the Claimant was employed by the Respondent from the year 1995 to 2014. Particulars of employment are not contested. There is dispute with regard to the circumstances surrounding termination of Claimant's contract. The Claimant avers his contract was terminated by the Respondent on 1st May 2014. The Respondent answers that the Claimant left employment voluntarily, through a letter dated 23rd May 2014.

6. The Court has formed the view that the Claimant's contract was terminated by the Respondent, through the letter dated 17th April 2014. The letter is clearly on the letterhead of the Respondent Company, and signed by its Director, Dilip Khangram. The reason in justifying termination was that the Claimant was not able to handle machines properly, despite his years of experience. His contract was terminated on 17th April 2014.

7. Termination decision is disclosed in Claimant's letter of resignation, to have been the subject of further deliberations, involving the Claimant's Trade Union and Respondent's Management. It is out of these deliberations that the Claimant appears to have been advised, to write the resignation letter. The Respondent accepted this offer of resignation, thereby substituting the decision to terminate Claimant's contract, to termination by consensual resignation.

8. Claimant's offer of resignation is dated 23rd May 2014, while Respondent's acceptance is of the same date. The Shop Steward was involved in the process and signed both letter of offer and acceptance. It was agreed the Claimant is paid terminal dues, in accordance with the CBA concluded between the Respondent and Claimant's Trade Union. The Claimant was subsequently paid Kshs. 23,712.

9. The Claimant's contract therefore came to an end through a negotiated process involving the Claimant and his Union of the one part, and the Respondent of the other. Termination resulted from a negotiated process in which the Claimant, his Union and the Respondent were participants. In the end there was agreement, that termination at the instance of the Employer is substituted with voluntary resignation by the Employee, with payment to the Employee, of terminal dues under the CBA. Such termination does amount to unfair loss of employment.

10. The Court finds termination was consensual, and terminal benefits were paid to the Claimant, as agreed between his Union and the Respondent. ***The Claim is rejected with no order on the costs.***

Dated and delivered at Mombasa this 22nd day of February 2019.

James Rika

Judge