



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.412 OF 2017**

**HEKEKIEL SAMWEL LITUNYA.....CLAIMANT**

**VERSUS**

**GILANI'S SUPERMARKET LIMITED.....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent on 1<sup>st</sup> June, 1993 as a general worker/off loader earning a wage of Ksh.14,100.00.

On 19<sup>th</sup> July, 2016 the claimant suffered a work injury on his back, he sought medical attention and was given time off to recover. Upon resuming duty he developed chronic back pains. The claimant applied for a work transfer to another area that did not involve heavy lifting but the respondent declined. He opted for early retirement by letter dated 6<sup>th</sup> March, 2017 but there was no reply. The respondent informed the claimant to continue with treatment before internal clearance in March, 2017 and for the issuance of a certificate of service and settlement of terminal dues on 29<sup>th</sup> March, 2017 the claimant reported back to work and was informed a letter had been sent to him through his postal address. On 10<sup>th</sup> April, 2017 the claimant received the letter alleging he had been absent from work without cause and the hearing date had already past. The claimant was then advised to collect his certificate of service later and collect his terminal dues. the matter was reported to the labour officer.

The claimant is seeking the payment of the following;

- a) Service pay/gratuity for 24 years Ksh.195,231.60;
- b) Wages for March, 2017 Ksh.12,782.00; a d
- c) Costs

The claimant testified in support of his claims.

The defence is that upon the employment of the claimant his wages were guided by the general wages orders which allowed for a review. The claimant had been issued with several warnings and by letter dated 1<sup>st</sup> October, 2016 he was demoted for unsatisfactory work performance.

The work related injury reported on 19<sup>th</sup> July, 2016 was not a back injury as alleged but a right hand middle finger injury. The medical records submitted are dated 8<sup>th</sup> March, 2017 which are dates after the claimant applied for early retirement. The medical certificate dated 3<sup>rd</sup> March, 2017 is a fabrication and different from what the claimant had earlier submitted.

By letter dated 12<sup>th</sup> May, 2017 the claimant's advocates wrote to the respondent but later established the claim was without facts. The claimant was not given time to seek treatment as alleged and his case of being absent from work was treated as desertion. He was issued with a notice to show cause through his last noted address and failed to attend.

The claims thus made are without basis.

In evidence the respondent called Zedrick Nduati Waweru the human resource manager and who testified that the claim made for gratuity pay is not due as under the contract of service there was no such benefit and the claim for salary for March, 2017 is not payable as there was no work done by the claimant. The claimant worked until 4<sup>th</sup> March, 2017 and left after half (1/2) day work. The claimant absconded duty

and was invited to show cause which he failed to attend and this warranted summary dismissal and the notice was copied to the labour officer..

Mr Waweru also testified that where the claimant is able to clear, his terminal dues shall be promptly paid together with the Certificate of Service.

By letter dated 6<sup>th</sup> March, 2017 the claimant applied to the respondent for early retirement. In the letter the claimant noted that he had been served with notice and warning for allegedly refusing to take instructions from his supervisor. That the claimant had been found to work below the required standards and due to his health challenges he requested for early retirement.

Is the claimant entitled to service gratuity pay?

Is the claimant entitled to salary for March, 2017?

Early retirement from work is an option available to an employee. Such is a lawful termination of work as to force an employee who otherwise seek to retire from employment would be servitude.

The claimant applied for his early retirement vide letter dated 6<sup>th</sup> March, 2017. It is apparent from his application that he had just been issued with a warning letter on 2<sup>nd</sup> March, 2017 with regard to his work performance.

The claimant testified that on 5<sup>th</sup> March, 2017 he applied for early retirement and was allowed to go home and receive treatment. There is no record for his request or an approval for the same. It is however not in dispute that the claimant had had a work injury where his finger was injured. The claimant has also submitted treatment records for other injuries. On his own accord he applied to retire and the last day at work was 4<sup>th</sup>/5<sup>th</sup> March, 2017.

The claims made are for payment of service gratuity and salary for March, 2017.

The claimant has submitted payment statements for December, 2016, January and February, 2017. There were statutory deductions and payments. There were union dues deducted.

The claimant did not state what union he belonged to and whether there was an agreement allowing for gratuity payment upon early retirement as service pay is not due upon the payment of the statutory dues. without any agreement, private treaty or a provision under the employment contract for the payment of gratuity, the claims made in this regard are without justification. Such are declined.

The claimant is only entitled to the wages due for the 4 days at work in March, 2017 and nothing more. Such dues should be paid at the shop floor.

**Accordingly, the claims made are hereby dismissed save for wages due for 4 days worked in March, 2017. A Certificate of Service Shall issue in accordance with section 51 of the Employment Act, 2007. Each party shall bear own costs.**

Delivered at Nakuru this 14<sup>th</sup> day of February, 2019.

**M. MBARU JUDGE**

In the presence of:.....