



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1790 OF 2017

ELKANA JUMBA KENYOLWA.....CLAIMANT

- VERSUS -

NEL ENTERPRISES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th March, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 05.09.2017 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's dismissal of the claimant's employment was illegal, unlawful, unfair and harsh and the claimant is entitled to payment of her due terminal benefits and damages.
- b) A declaration that the claimant is entitled to payment of her terminal dues and compensatory damages as pleaded in paragraph 9 above.
- c) An order for the respondent to pay the claimant the total sum of Kshs.408,800.00 as pleaded in paragraph 9 and 10 being:
 - One month salary in lieu of notice Kshs.12, 000.00.
 - Unpaid leave dues for entire period of service of 4 years Kshs.86, 400.00.
 - Payment for untaken off days for entire period of service Kshs.400.00 x 4 days per month x 48 months Kshs. 76, 800.00.
 - Payment in lieu of worked public holidays 11 x 12,000/30 x 4 years Kshs.17, 600.00.
 - Service gratuity calculated at 15 days for each year being 15/30 x 12000.00 x 4 years since no NSSF was paid Kshs.24, 000.00
 - Total claim Kshs.408, 800.00.
 - 12 months' gross pay being compensation Kshs.12, 000.00 x 12 Kshs.144, 000.00.
- d) Interest on (c) above from the date of filing suit until payment in full.
- e) Costs of the suit.

Despite service, the respondent failed to enter appearance, to file a defence, or to attend the hearing. The claimant testified to support his case.

The claimant testified that he was employed by the respondent as a general worker in November, 2011 and his last daily wage was Kshs.400.00. The contract was oral and the claimant like other employees handed in his national identification card every morning and it was returned every evening. He was paid on weekly basis at Kshs.400.00 per day.

The claimant testified that in October 2015 he was given permission to be away for 2 weeks and he was to resume duty on 02.11.2015. Prior to reporting from off time as agreed the claimant telephoned his manager one Raju who told him that work had reduced and that he should not resume duty. There had been no meetings or notice about the alleged redundancy. On 10.12.2015 the claimant telephoned Raju who told him that there was no job and the claimant should report at work on 05.01.2016. The claimant testified that he reported as was scheduled but was not assigned duty. The claimant's testimony was that it was not genuine that there was no job for him to perform or to be reassigned because the respondent was in the construction industry and had several on-going construction sites to which the claimant would have been reassigned to work. The claimant testified that he was terminated on account of redundancy without notice and terminal dues.

The only issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court has considered the pleadings, the evidence and the submissions on record and returns as follows:

- a) The evidence is that the claimant was abruptly terminated on account of redundancy without notice contrary to section 40 of the Employment Act, 2007. The further evidence is that the reason for termination was not genuine as per section 43 of the Act because there were other sites the claimant would be redeployed to serve. The claimant had served continuously without a break and the Court returns that the otherwise casual employment had converted as per section 37 of the Act to service subject to minimum terms of service under the Act. The Court finds that the termination was unfair.
- b) The Court has considered the aggravating factors that the procedure was unfair and the reason for termination was not genuine. The Court has considered that the claimant had a clean record of service for the 4 years of unbroken service. He desired to continue in employment and he did not contribute to his termination. He is awarded 12 months' salaries **Kshs. 144,000.00** for unfair termination as prayed for.
- c) The claimant was not given a termination notice and is entitled to a month's pay in lieu of termination notice as per section 40 of the Act **Kshs. 12, 000.00** as prayed for.
- d) The evidence is that the claimant worked continuously for 4 years without annual leave and he prays for Kshs. 48,000.00 pay in lieu of annual leave under section 28 of the Act but he is not entitled because the claim was beyond 12 months of limitation of action for a continuing injury under section 90 of the Act and it will therefore fail.
- e) No justification was made for payment of the house allowance as prayed for and being a continuous injury throughout the service it the same was time barred under section 90 of the Act and will fail.
- f) The claimant has established that he was not given off days throughout the service and prays for Kshs.76, 800.00 but he is not entitled because the claim was beyond 12 months of limitation of action for a continuing injury under section 90 of the Act and it will fail.
- g) The claimant's evidence was that he worked on public holidays and prays for Kshs.17, 600.00 but he is not entitled because the claim was beyond 12 months of limitation of action for a continuing injury under section 90 of the Act and it will fail.
- h) The claimant was severed from employment suddenly and he was not a member of NSSF and is awarded **Kshs. 24, 000.00** for service gratuity as prayed for.

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

- 1) The declaration that the termination of the claimant's contract of service by the respondent was unfair.
- 2) The respondent to pay the claimant a sum of **Kshs.180, 000.00** by 01.05.2019 failing interest to be payable thereon from the date of this judgment till full payment.
- 3) The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 29th March, 2019.

BYRAM ONGAYA

JUDGE