



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 387 OF 2015

(Before Hon. Justice Mathews N. Nduma)

EDWARD WASIKE NACHAMI.....CLAIMANT

VERSUS

LAKE INSTITUTE OF TROPICAL MEDICINE.....RESPONDENT

JUDGMENT

1. The claimant prays for payment of Arrear Salary, salary in lieu of notice, accrued leave, service gratuity and compensation for unfair termination as set out under paragraph 5 of Memorandum of Claim.
2. The claimant was employed by the respondent on 1st February 2012 earning a gross salary of Kshs. 7,000. The claimant was suspended from employment by a letter dated 3rd November 2014 due to scaling down of the activities at the respondent college. The claimant was assured that as soon as normal operations resumed, he would be recalled.
3. As per the letter dated 3rd November 2014, the respondent owed the claimant arrear salaries at the time in the sum of Kshs 170,000. The claimant testified under oath and stated that as at the time of termination of employment he earned a gross salary of Kshs. 10,000 per month.
4. The claimant testified further that he was not recalled back to work as promised and was not paid arrear salary and other terminal benefits claimed in this suit.
5. The claimant produced a letter dated 1st December 2014 from the ministry of labour following complaint by the claimant. The labour office scheduled a meeting for 8th December 2014 to resolve the dispute. The meeting took place and the labour officer wrote a further letter dated 4th March 2015 recalling the agreement in the meeting between the claimant and the principal of the respondent to the effect that when the institute re-opens in January 2015, the respondent would pay the claimant arrear salary owed to him. The respondent was given up to 20th March 2015 to pay the claimant his dues failing which the matter would be brought to court.
6. The respondent did not pay the dues nor recall the claimant to work and the labour officer wrote a notice of prosecution to the Director of the respondent dated 3rd July 2015.
7. The claimant told the court that he was registered with NSSF. That he did not go on leave for the period 2013 and 2014. That he was not paid notice pay nor any severance upon being terminated.
8. The claimant seeks damages for the unlawful termination.
9. The suit was served on the respondent on 24th November 2015, and a return of service was filed dated 24th November 2015 on 22nd October 2018 upon directions by the court for proof of service.
10. The suit remains undefended.

Determination

11. The claimant has proved on a balance of probabilities that he was retrenched from work on the basis that work had diminished. He had been promised that he would be recalled to work when circumstances improved but it did not happen. The respondent admitted in the letter

dated 3rd November 2014 that it owed the claimant arrear salary in the sum of Kshs. 170,000. This amount has been proved and is awarded.

12. The claimant was not given termination notice nor was he paid in lieu of notice. The court awards him Kshs. 10,000 in lieu of notice. The claimant had not gone on leave for the years 2013 and 2014. The court awards him Kshs 21,000 in lieu of leave days not taken as claimed.

13. The claimant claims service gratuity in the sum of Kshs. 30,000. Evidence before court is that the claimant was retrenched and was not paid severance pay for the years worked. The claimant worked for the respondents from 1st February 2012 to 3rd November 2014, a period of two years and nine months. The claimant is entitled to 15 days salary for each completed year of service. The court awards the claimant Kshs. 12,500 being service pay for the period worked.

Compensation

14. The respondent did not follow a fair procedure in declaring the claimant redundant. The respondent simply sent claimant home due to reduction of work and promised to recall him. The claimant was not paid any terminal benefits. The respondent did not notify the ministry of labour. The respondent did not pay the claimant arrear salary for 17 months. The respondent did not pay the claimant in lieu of notice. The claimant's termination was unlawful and unfair and violated *Section 40 as read with Section 41, and 45 of the Employment Act, 2007*. The claimant is entitled to compensation for the unlawful and unfair termination of employment in terms of *Section 49(1) (c) as read with (4) of the Act*.

15. In this regard, the claimant wished to continue working. The claimant was falsely promised that he would be recalled. The claimant was not paid salary earned for 17 months as at the time of termination. The claimant was not paid in lieu of notice. The claimant did not contribute at all to the termination. The claimant does not seek reinstatement. The claimant would have continued to work for the respondent for a long time but the employment was prematurely terminated.

16. From the Identity Card produced in court, the claimant was born on 22nd October 1980 and had many years of work before retirement. The respondent failed to honour the pledge to pay terminal benefits to the claimant following intervention by the ministry of labour.

17. The claimant suffered loss and damage set out in this claim. The respondent did not attempt in any way to mitigate the losses suffered by the claimant even upon being given opportunity by the labour office. No compensation or *exgratia* payment was made to the claimant upon termination.

18. The court awards the claimant the equivalent of five (5) months salary in compensation for the losses suffered due to the unlawful and unfair termination of employment.

19. In the final analysis judgment is entered in favour of the claimant as follows:

(a) Kshs. 170,000 arrear salary.

(b) Kshs. 10,000 in lieu of one month notice.

(c) Kshs. 21,000 in lieu of leave days not taken.

(d) Kshs. 12,500 severance pay/service gratuity.

(e) Kshs. 50,000 being the equivalent of five (5) months salary in compensation.

Total award Kshs. 263,500

(f) Interest at court rates from date of filing suit in respect of (a) to (d) above and from date of judgment in respect of (e) till payment in full.

(g) Costs of the suit.

Judgment Dated, Signed and delivered this 20th day of May, 2019.

Mathews N. Nduma

Judge

Appearances

Mr. Odeny for claimant

Chrispo – Court Clerk