



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1732 OF 2015**

**RAYMOND KILONZO NZIOKA.....CLAIMANT**

**- VERSUS -**

**BOBMIL INDUSTRIES LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 14<sup>th</sup> June, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 29.09.2015 through C. Kimathi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A finding the respondent to have unfairly and wrongfully dismissed the claimant from employment.
- b) Unconditional reinstatement to serve remaining term of contract Kshs.315, 000.00 x 12 = Kshs.3, 780, 000.00.
- c) 12 months compensation for unfair and wrongful dismissal at 12 months x Kshs.315, 000.00 x 5 = Kshs.18, 900, 000.00.
- d) Unpaid pension for 10 months.
- e) Remaining term of the contract i.e 5 years to retirement compensation for general damages.
- f) The respondent to pay costs of the suit.

The claimant's case is that he previously worked for Sopa Lodges Limited and he was employed by the respondent after an interview. He was employed by the respondent in the position of Human Resource Manager at Kshs. 275, 000.00 effective around 05.09.2014. The claimant's further case is that he served with loyalty until 01.07.2015 when the contract of service between the parties ended. The claimant's case is that he was forced to leave employment by the respondent's board on account that he was too expensive and that he had not performed as expected – claims which the claimant refuted. Further, the claimant's case is that a meeting was convened on 30.06.2015 and the Board offered payment of 2 months' salary in lieu of notice as a good gesture for separation on mutual agreement but the claimant gave a counter offer of 12 months' salary for wrongful termination but the respondent's board rejected the claimant's offer. The claimant further pleaded that on 01.07.2015 he was unduly influenced and pressurized to accept 3 months' salary in lieu of notice on condition that he accepts the offer or he leaves employment empty handed. The respondent addressed to the claimant the letter dated 01.07.2015 thus,

**“Dear Mr. Nzioka,**

**RE: MUTUAL SEPARATION**

**We refer to the discussion held with you and the Board of Directors in the presence of the undersigned it was mutually agreed that you will be relieved of your duties diligently with effect from 1<sup>st</sup> July 2015. Consequently upon clearing with the Company you will be paid as follows. This is with no prejudice whatsoever.**

- **Salary up to and including 1<sup>st</sup> July 2015.**
- **3 months pay in lieu of Notice as per policy.**
- **22 leave days as at 1<sup>st</sup> July 2015.**

**Wishing you all the best in all your future.**

**Yours Faithfully,**

**Signed**

**GROUP GENERAL MANAGER”**

The respondent filed on 21.01.2016 the memorandum of response through Macharia – Mwangi & Njeru Advocates. The respondent prayed that the suit be dismissed with costs.

The respondent admitted that it employed the claimant effective 08.09.2014 and that the claimant had voluntarily resigned from his previous employment. The respondent's case was that the claimant served on probation and the probationary period was extended for 3 months effective 01.01.2015 and the contract of service lapsed on 01.07.2015 by virtue of a mutual agreement. It was the respondent's case that the claimant had been informed that his performance was not up to the task and he was required to improve. The respondent denied the claimant's case that he was to serve until the age of retirement of 60 years and when a younger professional would take over from the claimant.

The respondent's case was that it was mutually agreed that the claimant would be relieved of his duties effective 01.07.2015 and his final dues were tabulated at Kshs. 1, 055, 279.00 for salary up to 01.07. 2015; 3 months' salary in lieu of notice; and 22 accrued leave days. The claimant accepted the payment as full and final settlement. Thus the respondent denied the claimant's allegations of unfair termination. The respondent alleged that prior to the termination the claimant engaged in serious malpractices including failure to disclose he was involved in active politics contrary to the respondent's policies; failure to disclose that he was a gun holder; involvement in dubious transactions with the claimant's service provider; hiring staff based on nepotism including hiring 5 junior staff from the same village; and the claimant's motor vehicle being involved in a fatal accident. Thus it was in those circumstances that parties mutually agreed to separate through meetings at which parties negotiated the terms of separation.

The Court has considered the pleadings, the evidence and the submissions on record. The Court makes the following findings on the matters in issue.

- 1) There is no dispute that the parties were in a contract of service from 08.09.2014 to 01.07.2015.
- 2) The claimant surrendered the prayer for reinstatement stating that time had run. The Court returns that the prayer for reinstatement was accordingly abandoned by the claimant.
- 3) The claimant testified that the payslips on record showed that no pension had been deducted. There was no evidence that the claimant had joined the contributory pension scheme. Thus the prayer for pension shall fail. Despite being the Human Resource Manager he testified that he did not know if the forms for contributory pension he alleged to have completed were acted upon. The Court finds that such evidence by the claimant cannot be trusted. Clause 4 (a) of the contract of service notified the claimant that the respondent had a pension scheme, that the claimant could opt to join, the contribution was 5% of the gross pay for the employee and employer and that the scheme was governed by the trust deed and scheme rules. There being no evidence that the claimant opted to join the scheme, the prayer for pension for the 10 months served will fail. In any event the claimant testified, **“ If I was a scheme member it would have reflected in my payslip....pension was not factored in pay slip.”**
- 4) While praying for allegedly unexpired 5 years of service purportedly of unexpired term of service ending upon attaining 60 years of age, the claimant testified that the contract was open ended on tenure. The Court has perused the contract of service and it does not provide that the claimant would retire upon attaining the age of 60 years. Accordingly the prayer for pay for unexpired term of service will fail as lacking contractual basis.
- 5) The claimant signed the discharge voucher on 01.07.2015 upon receipt of Kshs. 527, 639.50 being full and final settlement of monies due to him from the respondent. While that discharge would not preclude the claimant from alleging unfair or unlawful termination as envisaged in section 35(4) of the Employment Act, 2007 the Court considers that in the instant case, accepting the final payment on the part of the claimant confirmed the mutual separation agreement. The claimant was paid under that mutual separation agreement and he is precluded from turning back after enjoying the fruits of that agreement. The contract of service had provided for one month pay in lieu of notice but which the parties varied to 3 months under the separation agreement and as per the evidence by the respondent's witness (RW). Further as per RW's evidence there was no protest by the claimant as he received the final dues and the letter on mutual separation was delivered to him.
- 6) While making the findings, the Court has considered the claimant's record of service and period served and returns that taking all circumstances of the case into account, the terms of the separation agreement as far as the final dues paid were concerned cannot be found to have been unfair.
- 7) Accordingly, the Court returns that the claimant's case will fail.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the claimant's suit with costs.

**Signed, dated and delivered in court at Nairobi this Friday 14<sup>th</sup> June, 2019.**

**BYRAM ONGAYA**

**JUDGE**