



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

CAUSE NO. 440 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

KIEMA MWANGANGI.....CLAIMANT

VERSUS

RAJANI ENGINEERING LIMITED.....RESPONDENT

JUDGMENT

The claimant's case is that he was employed by the Respondent in November 2007 and worked continuously and diligently for the Respondent until 28th September 2013, when he alleges he was dismissed from employment without any reason.

It is the respondent's case that he reported to work and one Mr. Kisoo, his Supervisor, informed him that work was over and he should leave the Respondent's premises with immediate effect. He claims that the Respondent's actions were unlawful and unfair and the dismissal was aggravated by the fact that the Respondent refused to pay him his final dues. He prays for one month's salary in lieu of notice, payment in lieu of leave not taken, unpaid house allowance and compensation for unlawful termination of employment.

The Respondent on the other hand alleges that the Claimant was terminated as a result of insubordination. That he was reassigned by his supervisor to go to work in the field at Syokimau which orders he refused to obey and he stormed out of the respondent's premises and never returned. The Respondent denies terminating the Claimant's employment and alleges that he resigned after absconding from duty. The respondent prays for the Claim to be dismissed with costs.

The Respondent filed a counterclaim alleging that as a result of the Claimant's abrupt resignation on a date when he was meant to go to work in the field, he denied the Respondent an opportunity to to make alternative arrangements for the loss of labour.

That in tabulation of the Claimant's final dues, the Respondent paid the claimant service pay which was not due to the Claimant as he was a registered member of NSSF and section 35(5) of the Employment Act exempts the Claimant from such payment. They pray for one week's pay in lieu of notice and a reimbursement of Kshs.32,273.00 being the money inadvertently paid to the Claimant as service pay.

The parties made their respective submissions after they were heard with the claimant testifying on his behalf and David Mwanzia Kyale (RW2) testifying on behalf of the respondent.

Issues for Determination

1. Whether there was a valid reason for termination.
2. Whether due procedure was adhered to.
3. Whether the Claimant is entitled to remedies sought.

Reason for Termination

The Employment Act provides for the burden of proof where the issue of wrongful dismissal arises. Section 47(5) states:

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the

grounds of the termination of employment or wrongful dismissal shall rest on the employer.

RW1 who testified on behalf of the respondent did not have personal knowledge of the facts as transpired on the date of termination of the claimant's employment. There was no proof that the claimant refused to obey his Supervisor's assignment to work in Syokimau as alleged. There was no evidence that the claimant was subjected to a disciplinary process or even asked to show cause why his employment should not be terminated. The claimant's evidence of the incidents leading to the termination of his employment are thus unconverted.

In the case of *Standard Group Limited v Jenny Luesby [2018] eKLR* Court of Appeal agreed with the superior Court's decision where it was stated:

"There are no exceptional circumstances that have been established by the respondent that the case against the claimant was so severe that she could not be accorded the basic minimum. That is notice and a hearing made before the summary dismissal. That hearing is as important as the law made it mandatory even in the worst case scenario where an employee grossly misconduct oneself. The right to hearing is what amounts to meeting the true tenets of natural justice. Such a hearing in an employment relationship should be conducted in the presence of the affected employee together with another employee of her choice as this is the true meaning of a fair hearing. However senior an employee is, where the case is that of misconduct, the seniority is not justification for failure to meet the mandatory provisions of the law. It remains a sacrosanct duty for an employee to uphold. This was denied of the claimant and I find this to be an unfair labour practice."

I therefore find the termination of the claimant's employment unfair both procedurally and substantively.

Remedies

The remedies for wrongful dismissal and unfair termination are provided for in section 49 as read with section 50 of the Act. Among them is an award of **"the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."** Section 49(4) sets out several factors which should be taken into account in deciding whether to recommend the remedies under 49(1) and (3) being:

- a. the wishes of the employee**
- b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and**
- c. the practicability of recommending reinstatement or re-engagement;**
- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;**
- e. the employee's length of service with the employer;**
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;**
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;**
- h. the value of any severance payable by law;**
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;**
- j. any expenses reasonably incurred by the employee as a consequence of the termination;**
- k. any conduct of the employee which to any extent caused or contributed to the termination;**
- l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and**
- m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.**

Salary in Lieu of Notice

Having found that the Claimant was unfairly terminated he is entitled to payment in lieu of notice. I award him pay in lieu of notice based on the minimum rate of pay at the material time being the minimum rate for 2013 of Kshs.470.60. I award him 28 days' salary as provided in Section 35(1)(c) of the Employment Act being Shs.470.60 x 28 at Kshs.13,176.80. I have done this on the strength of Sections 3(6) and 26 of the Employment Act and Section 48(1) of the Labour Institutions Act, which require this court to apply the minimum statutory rates of pay and terms of employment where the employer has subjected an employee to less favourable terms.

Payment in lieu of annual leave not taken

The Respondent alleges that it used to tabulate the Claimant's dues, which included accrued leave for the year and paid the Claimant at the end of each year. The respondent's documents 'R1' is a bundle of payment vouchers titled "*Final Dues*" which included service pay, leave pay and bonus for the year. These documents were denied by the claimant in his evidence. He stated that he had never seen the documents before and denied that he signed them although he conceded that the signature on the documents looked like his. I however note that but for the last voucher, which seems to have been signed by the same person in the place of the recipient and the witness, all other signatures are strikingly similar to the claimant's on the verifying affidavit. It is therefore my finding that the claimant received in lieu of leave pay for all the years he worked except the year 2013. I therefore award him prorata leave for 2013 being 9 months at 1.75 days per month. This adds up to 18.75 days. At Kshs.470.60 per day. I award the claimant Kshs.7,411.95=

House Allowance

The Respondent claims that house allowance was included in the daily wage payable to the Claimant. Section 31 of the Employment Act provides that:

An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

Under the Regulation of Wages (General) Order daily wages are inclusive of house allowance. It is the duty of the respondent under Sections 10 and 74 of the Employment Act to prove by records that the claimant was paid house allowance. In the present case what the claimant was paid was less than the minimum daily wage which in 2013 was Kshs.470.60. It could therefore not have been inclusive of house allowance. I therefore award him the difference but only for 3 years as he was not underpaid before May 2011. This works out at Kshs.120.60 per day. For 26 days a month for 36 months this amounts to Kshs.112,881.60 which I award him.

Counterclaim

The Respondent avers that it suffered loss for lack of sufficient notice from the Claimant who it purports to have resigned abruptly. The Court has already found that the Claimant was terminated without a hearing, as it has not been proved that he resigned. It was also not proved that there was any loss to the respondent. The counterclaim to this extent fails for not having been proved.

The Respondent also alleges that it inadvertently paid service pay the claimant whereas he was a registered member of NSSF. Service pay under section 35[5] is not payable where an employee is a Member of:-

- a. A registered pension or provident fund scheme under the Retirement Benefits Act;**
- b. A gratuity or service pay scheme established under a collective agreement;**
- c. Any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and**
- d. The National Social Security Fund.**

The law however does not limit the right of an employer to pay service pay. It only limits the employee from demanding the same as of right. What the law provides is minimum terms, which means that the employer is expected to comply with that minimum provision or do better. The payment by the respondent of service pay over several years cannot by any stretch of interpretation be a mistake or a double benefit. This prayer therefore fails.

The upshot is that the counterclaim is dismissed with costs and judgment entered for the claimant in the total sum of Kshs.133,470.35/=. The respondent shall further pay the claimant's costs. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE