



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 505 OF 2013

PAUL MUTAVI.....1st CLAIMANT

RICHARD MUTUA NTHULI.....2nd CLAIMANT

VERSUS

DUNHAM INVESTMENTS.....RESPONDENT

JUDGMENT

1. Paul Mutavi (1st Claimant) and Richard Mutua Nthuli (2nd Claimant) instituted legal proceedings against Dunham Investments (Respondent) alleging *unfair termination of employment and breach of contract*.

2. The Respondent filed a *Response* on 20 June 2013 denying having any contractual relationship(s) with the Claimants, and in the alternative that there was no unfair termination of employment. The Respondent also contended that the Claimants had declined to collect their terminal dues.

3. The Respondent changed Advocates on 6 August 2013.

4. On 18 June 2018, the Claimants filed their proposed *List of Issues*, and the Court adopted the same for hearing.

5. The Cause was heard on 28 May 2019 and both Claimants testified (they also adopted their filed witness statements).

6. Despite being served with and acknowledging receipt of a hearing notice, the Respondent and its advocate did not attend the hearing.

7. The Claimants filed their submissions on 13 June 2019.

Unfair termination of employment

8. Both Claimants testified that they were verbally informed of the termination of their contracts, and that no notices and/or reasons were given.

9. The Respondent's pleaded case and documents though not proved, contended that the Claimants gave notice(s) of resignation, and therefore the question of unfair termination of employment did not arise.

10. Unless it is a case of summary dismissal, section 35(1)(c) of the Employment Act, 2007 requires the employer to give *written notice of termination of employment* at least 28 days in advance for employees paid by the month.

11. There being no evidence that the prescribed *written notices* were issued to the Claimants, the Court finds that the termination of their respective contracts of employment were unfair.

12. The Respondent did not lead any evidence in terms of sections 43 and 45 of the Employment Act, 2007 to show that the Claimants resigned, and the Court rejects that defence.

13. In consideration of the Claimants' lengths of service, the Court is of the view that the equivalent of 4 months gross wages as compensation would be appropriate for the 1st Claimant, and the equivalent of 6 months gross wages for the 2nd Claimant.

Underpayments

14. The 1st Claimant was engaged as a gardener from 2002 and he alleged that he was underpaid from 1 May 2009 to 30 October 2012.

15. Although pleading certain figures, this Claimant did not disclose as a matter of evidence the wages earned during the periods relating to the underpayments, and therefore the Court is unable to determine with precision any amounts due as underpayments.

16. The 2nd Claimant was employed as a cook with effect from 1997 and he claimed underpayments from 1 May 2009 up to 30 October 2012.

17. The 2nd Claimant did not equally disclose salary progression to enable the Court determine whether he was paid below the prescribed minimum wages.

Terminal benefits

Pending leave

18. Annual leave of at least 21 days is a statutory prerequisite.

19. The carrying forward of annual leave is however circumscribed by section 28(4) of the Employment Act, 2007 to some 18 months after the leave earning period.

20. The 1st Claimant sought accrued leave running to 4 years up to time of separation, but he did not disclose whether he sought for leave and was denied.

21. The 2nd Claimant on his part sought accrued leave extending to 9 years. He also did not disclose whether he applied for leave and was denied.

22. If any of the Claimants had an in-house agreement with the Respondent in regard to carrying forward or taking of leave, no evidence was led.

23. The Court would in the circumstances decline to make any award in respect of leave.

Service pay

24. The 1st Claimant sought *service pay* of Kshs 44,550/- and the 2nd Claimant Kshs 80,186/-.

25. The Claimants however did not prove the formula used to arrive at the computations. Section 35(5) of the Employment Act, 2007 has not set out any formula for computing service pay.

26. However, in letters dated 28 October 2012 and 12 November 2012, the Respondent (and its advocate) admitted that the 1st Claimant was entitled to service pay of Kshs 19,800/- and the 2nd Claimant to service pay of Kshs 40,500/-.

27. The Court will allow *service pay* in terms of the admissions.

Certificate(s) of Service

28. A *certificate of service* is a statutory entitlement and the Respondent should one to each of the Claimants within 15 days.

Conclusion and Orders

29. The Court will however allow the claims and award the Claimants as hereunder

1st Claimant

(a) Terminal dues Kshs 27,542/-

(b) Compensation Kshs 16,000/-

TOTAL **Kshs 43,542/-**

2nd Claimant

(a) Terminal dues Kshs 45,900/-

(b) Compensation Kshs 21,000/-

TOTAL **Kshs 66,900/-**

30. Certificate(s) of service to be issued within 15 days to each Claimant.

31. Claimants to have costs.

Delivered, dated and signed in Nairobi on this 19th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimants Mr. Nyabena instructed by Nyabena Nyakundi & Co. Advocates

For Respondents Robi Kerato & Co. Advocates

Court Assistant Lindsey