



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1806 OF 2014

WYCLIFFE WEKESA NANDEYOKA.....CLAIMANT

VS

KAY CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 14th October 2014 and amended on 17th November 2014, the Claimant has sued the Respondent for unlawful termination of employment and failure to pay terminal dues.
2. The Respondent filed a Memorandum of Defence on 25th November 2011 but did not call any witnesses. The Claimant testified on his own behalf. Both parties filed written submissions.

The Claimant's Case

3. The Claimant was employed and deployed in the Respondent's Garage Department at a gross monthly salary of Kshs. 25,000 effective 22nd August 2005. He was subsequently promoted to the position of Workshop/Stores Supervisor in which he earned a monthly salary of Kshs.42, 116.
4. The Claimant states that in the month of July 2014, he was notified by the Respondent's Human Resource and Administration Manager, John Mutisya Mwanzia that he would be transferred to the Respondent's sister company, Krystalline Salt Limited located in Mombasa. The Claimant was required to think over the proposed transfer and notify Mwanzia for further directions.
5. The Claimant avers that he agreed to move to Mombasa but was unable to communicate his decision to Mwanzia who had been transferred to Gongoni in Malindi. Mwanzia told the Claimant that he was in the process of winding up his duties in Nairobi.
6. The Claimant states that he later met the new Human Resource and Administration Manager, Ndege Nyambane who informed him that he needed to consult the Managing Director on the Claimant's deployment. On 10th September 2014, Nyambane told the Claimant that his employment had been terminated on the ground that his department was overstaffed. The Claimant was issued with a termination letter on 12th September 2014. He was paid Kshs. 82,712 being leave pay, one month's salary in lieu of notice and salary for 12 days worked in September 2014.
7. It is the Claimant's case that the termination of his employment was unlawful and unfair. He now

claims the following:

- a. Damages for wrongful and unfair termination of employment
- b. Unpaid salary from 13th September 2014 to expiry of the employment contract on 31st September 2014
- c. House allowance
- d. Severance pay & terminal benefits
- e. Costs plus interest

The Respondent's Case

8. In its Memorandum of Defence dated 24th November 2016 and filed in court on 25th November 2016, the Respondent states that the Claimant was employed on fixed term contracts from time to time. On 1st January 2013, he was employed as a Mechanic/Electrician at a consolidated monthly salary of Kshs. 36,464 inclusive of housing, overtime and commuter allowance. At the time of termination, the Claimant's salary had been increased to Kshs. 42,116.

9. The Respondent agrees that it offered the Claimant a transfer to its sister company, Krystalline Salt Limited in July 2014. However, for a period of six weeks, the Claimant did not communicate either his acceptance or refusal of the transfer. The Respondent therefore invited the Claimant for a meeting on 10th September 2014. At this meeting, the Claimant did not offer an explanation as to why he had failed to respond to the transfer.

10. After considering the discussions at the meeting of 10th September 2014, the Respondent resolved to terminate the Claimant's employment. The Claimant was issued with a termination letter dated 12th September 2014 and his terminal dues were tabulated and paid to him. The Respondent also issued the Claimant with a Certificate of Service dated 22nd September 2014.

Findings and Determination

11. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

12. The Claimant's employment was terminated by letter dated 12th September 2014 stating as follows:

“Dear Wycliffe,

RE: TERMINATION OF EMPLOYMENT SERVICES

Reference is hereby made to our terms and conditions of employment, termination clause sub-section (a) stipulates that, an employee's employment may be terminated by either the employer or the employee giving **a one month notice** in writing for transition or paying cash in lieu of notice.

In light of the above, this letter is intended to kindly inform you that your services have been terminated with effect from **13th September 2014**. Consequently, you are required to transition

your work to Mutinda Mutua. Your dues will be calculated and paid to you as required by law. This was also explained to you in the meeting held in our HR office attended by yourself.

On behalf of the company we wish to thank you for the period that you have worked with us and wish you all the best in your future endeavors.

Yours faithfully

For Kay Construction Co. Ltd

(Signed for) (Signed for)

John Mutisya Mwanzia Hasmita Patel

HR & Administration Manager”

13. This letter does not disclose the reason for termination of the Claimant’s employment. However, from the Respondent’s Memorandum of Defence, it would appear that the termination was triggered by the Claimant’s failure to respond to an offer for transfer to the Respondent’s sister company, Krystalline Salt Limited in Mombasa. The Claimant denies the Respondent’s averment in this regard and states that he was ready and willing to move to Mombasa but was not given a chance.

14. Even assuming that the Claimant had indeed declined to take up the offer for transfer, there was no evidence that he was given an opportunity to defend himself, prior to the termination of his employment. The result is that the charge against the Claimant was not tested at the shop floor and the Respondent therefore failed to discharge its burden under Sections 41 and 43 of the Employment Act, 2007.

Remedies

15. In the end, I find that the termination of the Claimant’s employment was substantively and procedurally unfair and he is entitled to compensation. I therefore award the Claimant twelve (12) months’ salary in compensation. In making this award, I have taken into account his length of service and the Respondent’s conduct prior to the termination.

16. The Claimant’s contract provided for a consolidated salary and the claim for house allowance is therefore without basis and is dismissed. Similarly, the Court did not find any basis for the claims for salary for the unexpired term of the Claimant’s contract, severance pay and terminal benefits which also fail and are dismissed.

17. In the ultimate, I enter judgment in favour of the Claimant in the sum of Kshs. 505,392 being 12 months’ salary in compensation for unlawful and unfair termination of employment.

18. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

19. The Claimant will have the costs of the case.

20. It is so ordered.

DATED AND SIGNED AT MALINDI THIS 29TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Owang for the Claimant

Miss Kanyiri for the Respondent