



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 987 OF 2014

SAMUEL MUTURI MAINA.....CLAIMANT

VERSUS

DR. DOMINIC KARANJA.....RESPONDENT

JUDGMENT

Introduction

- 1. By this claim brought by Memorandum of Claim dated 11th June 2014 and filed in court on 16th June 2014, the Claimant seeks relief for unlawful and unfair termination of employment. The Respondent filed a Statement of Response on 28th July 2014.
- 2. When the matter came up for hearing, both parties testified on their own behalf. They also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a general worker from November 2010 until 25th April 2014, when he was summarily dismissed. The Claimant states that his dismissal was unjustifiable and unprocedural. He further claims that during his employment with the Respondent, he was not allowed to go on leave.

4. The Claimant’s claim is as follows:

- a) One month’s salary in lieu of notice..... Kshs. 10,000.00
- b) Leave pay for 4 years..... 40,000.00
- c) 12 months’ salary in compensation..... 120,000.00
- d) Service pay..... 7,142.90
- e) Costs plus interest

The Respondent’s Case

5. In its Statement of Response dated 25th July 2014 and filed in court on 28th July 2014, the Respondent admits having employed the Claimant as pleaded in the Memorandum of Claim. The Respondent states that on several occasions, the Claimant exhibited insubordination

and failed to take directives.

6. While denying the Claimant's claim for unlawful and unfair termination, the Respondent states that the Claimant voluntarily resigned from his employment following a notice issued to the Respondent in the month of February 2014, with the notice period indicated as the months of March and April 2014.

7. In further response, the Respondent avers that on 25th April 2014, the Claimant defied instructions to clean the Respondent's car on the ground that his notice period was to expire in 5 days' time. The Respondent therefore opted to waive the unexpired 5 days' notice and disengaged the Claimant from employment. The Claimant was paid his salary for the month of April and he left the Respondent's premises on 25th April 2014.

8. The Respondent states that by the time he left employment, the Claimant had utilized all his leave days.

Findings and Determination

9. 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

10. The Claimant states that his employment was unlawfully terminated by the Respondent on 25th April 2014. On his part, the Respondent maintains that the Claimant voluntarily resigned from his employment and that the only thing the Respondent did was to waive the pending notice of 5 days, for which the Claimant was fully paid.

11. In his testimony before the Court, the Claimant agreed that he had indeed given a termination notice on 3rd February 2014. He however changed his mind after the Respondent prevailed upon him not to leave employment.

12. In the final submissions filed on behalf of the Respondent, reference was made to Section 38 of the Employment Act, 2007 which provides as follows:

38. Where an employee gives notice of termination of employment and the employer waives the whole or any part of the notice, the employer shall pay to the employee remuneration equivalent to the period of notice not served by the employee as the case may be, unless the employer and the employee agree otherwise.

13. In the case now before me, the Respondent opted to release the Claimant before expiry of the notice period. The Claimant was paid his full salary for the notice period.

Remedies

14. In light of the foregoing, the Court finds the Claimant's claim for unlawful termination to be without basis. He is therefore not entitled to compensation nor notice pay.

15. The Respondent did not produce any leave records to counter the claim for leave pay which therefore succeeds and is allowed. In his testimony before the Court, the Respondent admitted that he did not make National Social Security Fund (NSSF) remittances on behalf of the Claimant. The claim for service pay is therefore also allowed.

16. Finally, I enter judgment in favour of the Claimant in the following terms:

- a. Leave pay for 3 years (10,000/30x21x3)..... Kshs. 21,000
 - b. Prorata leave for 5 months (10,000/30x1.75x5)..... 2,917
 - c. Service pay for 3 years (10,000/30x15x3).....15,000
- Total..... 38,917**

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

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

19. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Muturi for the Claimant

Ms. Nyambura for the Respondent