



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO. 73 OF 2016

STEPHEN NJIRU MUGENDI.....CLAIMANT

- VERSUS -

NATION MEDIA GROUP.....RESPONDENT

(Before Hon. Justice Byram Ongaya in Chambers on Wednesday 21st March, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 15.04.2016 through Karweru & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Award of Kshs. 4, 037, 826.00 being Kshs.247, 240.00 salary for 10 months of unexpired contractual term; Kshs.123, 620.00 for 5 years' annual leave; Kshs.222, 516.00 for 5 years' house allowance; Kshs.491, 240 overtime over the 5 years' service; night outs over 5 years' service Kshs.558, 000.00; gratuity for 5 years' service Kshs.71, 250.00; and travel allowance over the 5 years' service Kshs.360, 000.00.
- b) Damages for unlawful termination.
- c) Costs of the suit plus interest.

The respondent filed the memorandum of response on 21.09.2016 through Iseme, Kamau & Maema Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

It is not in dispute that the respondent employed the claimant effective 04.01.2010 as the Sales and Distribution Assistant. The claimant was initially deployed in Embu and later in Nyeri and finally in Nanyuki. It is the claimant's case that on 14.03.2015 he was called and informed by the Commercial Manager, one Moses Ocholla that he was required to attend a meeting with the General Manager, one Sam Mutetei. The meeting was scheduled for 17.03.2015.

On 17.03.2015 the claimant attended the meeting and he was given the letter of termination dated 12.03.2015. The letter addressed to the claimant stated as follows:

"RE: TERMINATION OF EMPLOYMENT

We refer to your contract of employment with Nation Media Group and in particular the Terms and Conditions of Service and regret to advise that Nation Media Group will be terminating your services with effect from 13th March 2015. This has been necessitated by the staff reorganization in the department. You will be paid as follows less any money owed by you in your staff account and statutory deductions:

- 1. Salary for days worked up to and including 13th March, 2015;**
- 2. Salary for one (1) month in lieu of notice; and**
- 3. Salary for eighteen (18) accrued leave days.**

However, please note that your final dues will be released after you have completed the enclosed Clearance Certificate and returned all company property in your possession.

On behalf of management of Nation Media Group Limited, I thank you for your contribution to NMG and wish you every success in your future endeavours.

Yours faithfully,

Signed

SAM MUTETEI

GM-CIRCULATION & DISTRIBUTION

The claimant signed the letter on 17.03.2015 thus, **“I Stephen Mugendi of P.O Box 56 Nairobi have read and understood the terms and conditions stated above and agree to discharge my employment.”**

The claimant testified that at termination he earned Kshs.24, 724.00 per month. Upon termination, the claimant was paid the terminal dues as enumerated in the letter of termination of employment.

The **1st issue** for determination is whether the termination of the contract of employment between the parties was unlawful or unfair. The letter of termination and the testimony by the respondent’s witness (RW) are clear that the reason for termination was the reorganization of the respondent’s circulation and distribution department. RW’s testimony was that there had been a merger of certain distribution stations thereby affecting the established posts for the position held by the claimant. The court finds that the reason for termination was not attributable to the claimant’s otherwise good performance and the reason as advanced amounted to redundancy as defined under the Employment Act, 2007. It was urged for the respondent that the termination clause 2 in the letter of temporary employment dated 23.12.2009 applied. The clause stated thus, **“Either party may terminate the employment offer by giving two weeks’ written notice.”** The court has considered the evidence and all material on record and returns that the clause was not invoked in the instant case. As already found, the claimant’s employment was terminated on account of redundancy and section 40 of the Employment Act, 2007 applied in that regard.

The evidence is clear. The respondent failed to comply with provisions of the said section 40 as to the giving of a month’s notice personally to the claimant and the labour officer, and, including the reasons for and the extent of the intended redundancy. Further, the respondent did not comply with the criteria set out in the section on selection of the claimant or other affected staff for redundancy in issue. Finally, the respondent failed to effect payments in view of the redundancy as prescribed in the section and in particular as relates to the severance pay.

Accordingly, to answer the **1st issue** for determination, the court returns that the termination of the contract of employment between the parties was unfair or unlawful for want of due process as prescribed in section 40 of the Act.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

1. The claimant has prayed for damages for unlawful and unfair termination. Under section 49 of the Employment Act, 2007 the maximum compensation is for 12 months. The court has considered that the claimant was serving on an extended contract running from 01.01.2015 to 31.12.2015 so that there were about 9.5 months of unexpired term of service. The court has also considered that the claimant had served for over 5 years without a break in service. The court has further considered that the claimant desired to continue in employment and he did not contribute to the termination in any manner. Thus, the court considers an award of 10 months’ gross salaries at Kshs.24, 724.00 per month making **Kshs.247, 240.00** will meet justice in the case.

2. The court has considered the award for unfair termination and further considered that the claimant has not demonstrated inability to secure alternative gainful employment or engagement after the termination. Accordingly, the court returns that the claimant is not entitled to salary over the unexpired period of service.

3. The court has considered the prayers for house allowance, overtime, annual leave, travel allowance, and night outs over the 5 years of service. The termination was on 12.03.2015 and the suit was filed on 15.04.2016. Under section 90 of the Employment Act, 2007 a suit for continuing injury under the contract of service must be filed within 12 months from the cessation thereof. The court returns that the claims on the enumerated headings were of a continuing nature and the claims were time barred under the section. While making that finding the court returns that save for annual leave which was provided for in section 28 of Employment Act, 2007, the parties appear not to have contractual provisions to guide or form basis for the claims as the same were not established by evidence. The claims will therefore fail as unjustified.

4. The claimant prayed for gratuity at 15 days for each of the 5 years of service. The court considers that the claim is within the criteria for severance pay under section 40 of the Act. The court finds that there was no dispute that the claimant served for 5 complete years without a break. The court further finds that after the letter of temporary employment dated 23.12.2009, the next correspondence on record relating to the claimant’s service was the letter of renewal of contract dated 17.12.2014. Further, the certificate of service dated 03.07.2015 shows that the claimant was engaged on 04.01.2010 to 13.03.2015. Taking that evidence into account the court returns that the claimant is entitled to severance pay for the 5 completed years of unbroken service and is awarded **Kshs.71, 250.00**.

5. The court returns that the claimant is entitled to costs of the suit.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

a) The respondent to pay the claimant **Kshs.318, 490.00** within 45 days from the date of delivery of this judgment failing interest at

court rates to be payable thereon from the date of the delivery of judgment till full payment.

b) The respondent to pay the claimant's costs of the suit.

Written, Signed, and dated in chambers at Nairobi this Wednesday 21st March, 2018

BYRAM ONGAYA

JUDGE

Signed, dated and delivered in court at Nyeri this 9th day of April 2018

NZIOKI WA MAKAU

JUDGE