



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 528 OF 2014

FRANCIS NDERITU GITONGA.....CLAIMANT

- VERSUS -

H-YOUNG & COMPANY (E.A) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th May, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 02.04.2014 through Kahuthu & Kahuthu Advocates. The claimant prayed for judgment against the respondent for:

- a. Payment of Kshs. 701,000.00 being Kshs.30,000.00 September 2013 salary; 6 months pay in lieu of notice Kshs.180,000.00; one month pay Kshs.30,000.00; 10 night outs Kshs.10,000.00; damages for wrongful termination Kshs.30,000.00; loss of expected earnings at 12 months' pay Kshs. 360,000.00; leave earned and not taken Kshs.16,000.00; travel allowance for 4 months at Kshs. 3,000.00 per month Kshs.12,000.00; house allowance at 6,000.00 per month for 4 months Kshs.30,500.00; encashment for leave but not taken Kshs.2,500.00; and accrued pension to be calculated at trial.
- b. Reinstatement of the claimant to his former position with full benefits and promotions.
- c. Interest on (a) above at court rates.
- d. Such further or other relief as this court deems just to grant.

The respondent filed the memorandum of response on 02.05.2014 through Wanjiku Muriu & Company Advocates. The respondent prayed that the suit be dismissed with costs. The claimant filed a reply to the response on 17.07.2014.

It is not in dispute that the respondent employed the claimant as a security officer from 02.02.2013 to 04.09.2013. At employment the claimant was not given a written contract of service as the agreement was oral.

On 14.08.2013 three plant operators siphoned 270 litres of fuel being the property of the respondent. The incident took place at the site the respondent had deployed the claimant to take charge. The evidence is that the operators thereafter threatened to kill the claimant in view of the report the claimant had made against them. Thus, for 6 to 7 days the claimant took refuge and for that period he did not report at work. He reported the threats to the police. The employees the claimant reported to have siphoned the fuel were dismissed but the majority were not employees of the respondent.

The respondent's witness (RW) confirmed that the claimant requested to be redeployed in view of the threats. However, there was no vacancy and the respondent decided to terminate the claimant's employment. In the letter dated 24.10.2013 addressed to the claimant's advocates the respondent explained the circumstances of the termination thus, "**We advise that your client Francis Nderitu Gitonga requested for a transfer through the memo dated 22nd August 2013 full particulars of which you are well aware. At the time the management had no site in need of a Security Officer and the undersigned advised your client that he would be reinstated once an opportunity presented itself. Subsequently we issued him with a termination letter on the 3rd of September 2013.**" The respondent further stated that the claimant's terminal dues had been computed at **Kshs. 37, 010.00** being salary up to 04.09.2013; leave earned but not taken; travelling allowance due; and one month in lieu of termination notice.

The termination letter dated 03.09.2013 simply stated that the claimant's employment had been terminated effective 04.09.2013 and that the terminal dues would be paid.

The **1st issue** for determination is whether the termination of the claimant's contract of employment was unfair. The respondent says the reason for termination was by notice or pay in lieu of notice. However, the evidence is clear. The claimant was terminated on account of a grievance as conveyed in his internal memo of 22.08.2013 that he be transferred from the respondent's Eastleigh site to another site in view of the reports he had made and the ensuing threats to his life (and the respondent confirmed that reason in paragraph 3 of the memorandum of response). Instead of resolving the grievance amicably, the respondent decided to terminate the employment. The court returns that there is no reason to doubt the claimant's life was threatened following the reports he had made. The grievance that he be transferred was therefore valid and well founded. The court holds that the initiation of the complaint by the claimant was responsible and with good foundation and the initiation of the grievance would not constitute a fair reason for dismissal or imposition of other disciplinary penalty as envisaged in section 46 (h) of the Employment Act, 2007. On that account the dismissal was unfair as read with section 43 of the Employment Act, 2007 that the reason was invalid.

The court has considered that if the service was to be based on completion of works at the site, the respondent's case was that the claimant would have served 9 to 12 more months. Nevertheless, it was possible that the claimant would be retained in the claimant's service as he had previously served at Homabay with the respondent. There was no material evidence to show that the works in issue would end in 8 to 12 months as per RW's oral evidence. The court has also considered that the circumstances surrounding the dismissal were such that the claimant had a clean record of service and had performed his duties properly and thereby suffering his predicament. The court has considered that the claimant had served for only 8 months from February to September 2013 and he was being terminated for having performed his work properly. Taking all the circumstances into account he is awarded 3 months' salaries, under section 49 of the Act in compensation making **Kshs.117, 000.00** at Kshs.39, 000.00 gross pay per month. The claimant is also awarded **Kshs. 37, 010.00** within the terms of the termination letter.

Further, while making the award the Court has considered section 45(3) of the Employment Act, 2007 and holds that the section says that an employee with not less than 13 months of service as at termination shall as of right complain that he or she has been unfairly terminated. The section does not say that employees with a period of service less than 13 months as at termination cannot find and file an action for unfair termination. Thus, in the circumstances of the present case, the Court finds that the claimant had a valid cause of action.

To answer the **2nd issue** for determination the court returns that the other remedies for computed payment and as prayed for will fail for want of justification. Indeed, they were set out in the submissions without justification on their award. They will fail as abandoned or unjustified. Parties were in concurrence that a certificate of service should issue in terms of section 51 of the Employment Act, 2007. In conclusion judgment is entered for the claimant against the respondent for:

- a. Payment of **Kshs.154, 010.00** by 01.07.2018 failing interest at court rates to be payable from the date of the suit till full payment.
- b. The respondent to deliver the certificate of service by 01.06.2018.
- c. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 18th May, 2018**.

BYRAM ONGAYA

JUDGE