



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1869 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JOHN MAGIRI HEHO.....CLAIMANT

-VERSUS-

KENYA INTERNATIONAL LIMITED.....RESPONDENT

JUDGMENT

The claim herein was instituted by the claimant's memorandum of claim dated and filed on 22nd October 2014. The respondent filed a defence to the claim on 25th November 2014, denying the averments in the claim.

By application dated 21st March 2016 counsel for the respondent sought leave to cease acting for the respondent. The application being unopposed was granted on 14th June 2016.

The hearing notice was serviced on the respondent by registered post on 14th November 2017 following fruitless attempts to trace the offices of the respondent.

The case was heard ex parte on 13th December 2017. The claimant testified that he was employed by the respondent as a Driver and worked for 36 years. He was issued with a letter of retirement dated 31st August 2014. He was not issued with notice before retirement. He signed a final settlement statement because it was a condition for payment of his last salary. His final pay was Kshs.41,166.10. He was not given reasons for the termination.

He prayed for orders as set out in his memorandum of claim.

In the submissions filed on behalf of the claimant it is submitted that the termination was unfair because the respondent did not comply with Section 45 of the Employment Act.

In the respondent's statement of reply to the claim, it is denied that the claimant was unfairly terminated. The respondent avers that the claimant was lawfully retired on 31st August 2014 through the procedure set out in Section 35 of the Employment Act and he willingly signed for his full and final settlement statement on 1st September 2014. He was paid salary in lieu of notice in accordance with Section 36 of the Employment Act. The claimant was a member of NSSF and is not entitled to service pay.

Determination

The facts of this case are not contested. The claimant was employed by the respondent as a Driver and worked for 36 years before being retired on 31st August 2014. He signed a discharge on 1st September 2014. He was paid shs.13,395 in lieu of 19 days leave and 2 months' salary in lieu of notice.

The issue for determination is whether the retirement of the claimant amounted to an unfair termination and whether he is entitled to the remedies sought in the claim.

It is unfortunate that in this case the respondent did not attend court for hearing and therefore could not be interrogated on the issues in dispute. The claimant did not state his age at the time he was retired or submit terms and conditions of service which provide for retirement.

The claimant's letter of retirement is reproduced here below –

“31st August 2014

John Magiri Heho (Truck Driver)

P. O. Box 65516

Nairobi

Dear Mr. Magiri

RE: RETIREMENT LETTER

This is to notify you that your retirement is due with effect from 31st August 2014.

We fully acknowledge your services and maintain that you have been among the most dedicated staffs of our organisation. Your thirty six years of services have been an asset for us. You have always been loyal and devoted to the company.

We are definitely going to miss a wonderful employee like you who has contributed so much in the development of the company.

On behalf of the management and staff of the organisation we wish you happy and peaceful retired life.

Yours Faithfully

For KSC International Limited

SIGNED

Anthony Opiyo

Administration Manager”

From the letter it is clear that the claimant was retired. The respondent did not refer to the terms of service that informed his retirement. The respondent did not even state what the claimant's age was at the time of retirement. This is because the Employment Act does not provide for retirement. The court however takes judicial notice that human beings cannot work forever and a time reaches when they have to retire from service. Most organisations provide for a retirement age and even retirement benefits.

It was imperative for the claimant to explain why he thought his retirement was an unfair termination which he did not.

Remedies

The claimant sought the following remedies –

- a) A declaration be issued to declare that the claimant's dismissal from employment is wrongful.
- b) Special damages in the sum of Kshs.805,674.09.
- c) General and exemplary damages for unlawful termination.
- d) Interest on (c) and (d) above at court rates at the time of filing this suit.
- e) Cost of this suit.
- f) Any other relief as this court may deem fit and just to grant.

I have already found that the claimant was retired. I therefore dismiss the prayer for declaration that the claimant was wrongfully dismissed from employment.

The prayer framed as special damages is broken down at paragraph 9 of the memorandum of claim as follows –

- a) Salary in lieu of notice **Kshs.49,848**
- b) Service Pay **Kshs.517,652.31**

c) Annual leave Kshs.18,213.78

d) 12 months compensation for unfair termination Kshs.219,960

Total Due Kshs.805,674.09

According to the claimant's final settlement statement, he was paid 2 months salary in lieu of retirement termination notice in the sum of Kshs.36,660. His salary per month being Kshs.18,330 and house allowance of Kshs.3,666 his gross pay for purposes of payment of notice was Kshs.21,996. He was therefore entitled to payment of Kshs.43,992 on account of 2 months' salary in lieu of notice. I award him the difference of Kshs.7,332. He was also paid for 19 days pending annual leave days in the sum of Kshs.13,395. The claim for annual leave is therefore dismissed for reason that it has not been proved. The claimant did not mention pending leave in his testimony in court.

The prayer for compensation for unfair termination is also dismissed as the claimant was not unfairly dismissed.

The claimant prayed for service pay. Having been a member of NSSF as confirmed by his payslip, he is not entitled to service pay. I however note that he was retired. I further note that he was working in the building and construction industry. The Employment Card defines the respondent as Civil Engineering Contractors.

There is provision for retirement benefits under the Regulation of Wages (Building and Construction Industry) Order Legal notice Number 94 of 27th August 2004 as revised by subsequent amendments.

Under Rule 19 thereof, an employee who has completed two years of service is entitled to two month' notice or pay in lieu.

Under Rule 16 provides as follows

Retirement

16 (1) On completion of 4 years' service with an employer, an employee shall be entitled to twenty days' pay for every completed year of service by way of gratuity to be based on the employee's wages at the time of termination of his service.

I have taken into account the provisions of Section 26 of the Employment Act as read with Section 48 of the Labour Institutions Act which provide as follows—

Section 26 Employment Act

26. Basic minimum conditions of employment.

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

Section 48 Labour Institutions Act

48. Wages Order to constitute minimum terms of conditions of employment

(1) Notwithstanding anything contained in this Act or any other written law—

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

(2) An employer who fails to—

(a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or

(b) provide an employee with the conditions of employment prescribed in the order, commits an offence.

(3) If an employer is found guilty of an offence under subsection (2), the court may in addition to any other penalty order the

employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid.

(4) Where proceedings are brought under subsection (2) in respect of an offence consisting of a failure to pay remuneration at the statutory minimum remuneration or to provide an employee with the conditions of employment prescribed in the order, then—

(a) if an employer is found guilty of the offence, evidence may be given of any like contravention on the part of the employer in respect of any period during the twelve months immediately preceding the date of the offence; and

(b) on proof of such contravention, the court may order the employer to pay the difference between the amount which ought to have been paid during that period to the employee by way of remuneration and the amount actually paid: Provided that evidence shall not be given under paragraph (a) unless notice of intention to give such evidence has been served upon the employer together with the summons, warrant, information or complaint.

(5) The powers given by this section for the recovery of sums due from an employer to an employee shall be in addition to and not in derogation of any right to recover such sums by civil proceedings: Provided that no person shall be liable to pay twice in respect of the same cause of action.

The claimant having retired is entitled to 20 days pay for every year worked as provided in the Regulation of Wages (Building and Construction Industry) Order. For the 36 years and 2 months worked at a basic salary of kshs.18,330, the claimant is entitled to payment of retirement gratuity of Kshs.659,880 which I award him.

In summary therefore I enter judgment for the claimant against the respondent in the total sum of Kshs.667,212.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF MAY 2018

MAUREEN ONYANGO

JUDGE