



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1973 OF 2014

JONATHAN MULONZI NYAMAI.....CLAIMANT

- VERSUS -

MAREBA ENTERPRISES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th June, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 05.11.2014 through Namada & Company Advocates. The amended memorandum of claim was filed on 16.02.2015. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's summary dismissal from employment was unlawful and unfair.
- b) A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c) An order for the respondent to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs. 938, 942.00 (including unpaid salary for June 2001 to December 2001 Kshs.26, 687; unpaid salary January 2002 to December 2002; unpaid salary January 2003 to August 2003; unpaid salary July 2007 to 2009 Kshs. 126, 222.00; a salary in lieu of notice Kshs.12,000.00; pay in lieu of annual leave for 2000 to 2014 Kshs.144, 000.00; service or gratuity at 15 days' salary for 30 years when NSSF was not remitted Kshs.210, 000.00; 12 months' compensation for unfair termination Kshs.210, 000.00).
- d) Interest on (c) above from the date of filing suit till payment in full.
- e) Costs of the suit plus interest thereon.

The response to the amended claim was filed on 19.05.2015 through Hayanga & Company Advocates. The respondent prayed that the claimant's claim should be dismissed with costs.

The respondent employed the claimant as an office messenger effective 01.09.1979.

The claimant's case is that on 30.06.2014 he reported on duty as usual and he was summoned by the respondent's human resource manager one Maurice and informed that his services were no longer required. The claimant's further case is that the said Maurice informed him not to report at work anymore because the General Manager one Mrs. Mitchel Adjibodou had ordered as much. Further, the claimant pleads that he was not paid terminal dues or any other benefits. At termination his monthly salary was Kshs.12, 000.00.

The respondent's case is that by the letter dated 27.06.2014 the respondent notified the claimant of the impending closure of the company and it could therefore not sustain its operations and the claimant was subsequently paid his benefits.

The **1st issue** for determination is whether the termination of the claimant's contract of employment was unfair. The claimant testified that he was terminated on 03.06.2014 when he received a letter to go home. The letter of 27.06.2014 was as follows,

"Dear Sir/Madam,

RE: MR. JONATHAN MULONZI

The above named person was working with us as office cleaner and as a messenger. He was responsible with offices

cleanliness and short office errands from 1st September, 1979 until retirement in 2005. Owing to his good employment record; he was hired on contractual basis from 2005 to June 2014 on the same capacity.

While working with us, we found him to be honest, diligent and a person of high integrity capable of working under minimum supervision.

We highly recommend Mr. Jonathan Mulonzi for employment. He is a team player and would be a great asset to any organisation.

Yours sincerely,

Signed

General Manager,

Mareba Enterprises Limited”

He lamented that he had no notice of termination or a hearing prior to the termination and he was dissatisfied with the turn of events. He filed the present suit after he received a negative reply to the demand letter.

The claimant in cross examination admitted that he received the letter of 27.06.2014 addressed to him by the respondent's General Manager stating that due to hard economic conditions in the industry culminating in low sales, the respondent was unable to sustain its operations and the respondent would therefore close on 30.06.2014. The letter stated that the respondent was concerned about the claimant's welfare and was committed to clearing the claimant's last month's salary as soon as resources were available. The letter addressed to the claimant dated 18.10.2014 stated that the respondent had closed on 30.06.2014 and confirmed computed claimant's dues at Kshs.39, 906.20.

It is clear from the evidence that the claimant was terminated on account of redundancy. He had worked for many years in the service of the respondent from 1979. He was not given a month's notice as per section 40 of the Employment Act, 2007. The notice to the area labour officer was not served as provided under the section. The Court returns that the termination was unfair. Considering the period worked, that the claimant never contributed to his predicament and the termination was abrupt, the claimant is awarded 12 months' salaries under section 49 of the Act in compensation for the unfair termination making **Kshs. 144, 000.00**. While making that award the court considers that the respondent acknowledged owing the claimant salary arrears per letter dated 31.12.2005 and there is no evidence of the payment though the same may be time barred.

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

- a) The claimant prays for unpaid salary for June 2001 to December 2001 Kshs.26, 687; unpaid salary January 2002 to December 2002; unpaid salary January 2003 to August 2003; and unpaid salary July 2007 to 2009 Kshs. 126, 222.00. The suit was filed on 05.11.2014. 12 months from the last of the claims for unpaid salaries 2009. The Court returns that the claims for unpaid salaries were a continuing injury. Under section 90 of the Employment Act, 2009 the claims should have been filed within 12 months from cessation of the continuing injury. The claims will therefore fail as time barred.
- b) The claimant was dismissed without notice and is awarded a salary in lieu of notice **Kshs.12, 000.00**.
- c) The claimant prays for pay in lieu of annual leave for 2000 to 2014 **Kshs.144, 000.00**. Under section 28 of the Act the claimant was entitled to the leave earned up to the last day at work. Section 40 of the Act entitled the claimant to leave pay for all outstanding annual leave. There was no evidence of a contractual term to forfeit annual leave not taken. The Court returns that the claimant has established that he was entitled to the leave and he was not accorded the leave. He is awarded as prayed for.
- d) The claimant prayed for service or gratuity at 15 days' salary for 30 years when NSSF was not remitted Kshs.210, 000.00. The claimant confirmed in his testimony that he was not claiming NSSF dues as he had already been paid those dues. The prayer is deemed abandoned or not justified.

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

- 1) The respondent to pay the claimant **Kshs.156, 000.00** by 01.08.2018 failing interest to be payable at Court rates from the date of the judgment till full payment.
- 2) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 29th June, 2018.

BYRAM ONGAYA

JUDGE