



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1993 OF 2011

HARON MUEMA NYENZE.....1ST CLAIMANT

GILBERT KIMILU KIMULI.....2ND CLAIMANT

VERSUS

EMRAY ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants brought this suit on 22.1..2011 claiming the following:

- a. Unpaid salaries for the 1st and 2nd Claimants for the period of the trial (April 2010 to February 2011)
- b. One (1) months salaries in lieu of notice for both the 1st and 2nd Claimants at Kshs.18,912.65/= and Kshs.20,400/= respectively .
- c. Severance pay for the years worked by the Claimants at the rate of 15 days for each completed years of service.
- d. Unpaid leave days; with 1st Claimant having two (2) years and 2nd Claimant having one (1) year.
- e. Certificate of Service.
- f. Interest on (a), (b), (c) and (d) above at Court rates until payment in full.
- g. Costs and all other accumulated rights and interest of the Claimant in this suit.

2. The Claimants aver that they were employed by the respondent who was contracted by Bamburi Cement Company Limited and on 29.4.2010 they were arrested and charged with theft following a complaint by Bamburi Cement Company Limited. It is the claimants' case that the respondent told them to stay away from work until their Court Case was completed but when they were acquitted on 21.2.2011 and reported back to work on 24.2.2011 they were told by the respondent's Site Manager that their services were terminated.

3. The respondent admitted that she terminated the claimants after absenting themselves from work for 10 months without leave. She further admitted that the claimants and other employees reported a dispute at the Labour Office and the same was resolved and their redundancy dues deposited at the Labour office. She therefore prayed for the suit to be dismissed with costs.

4. The suit was heard on 22.2.2018 when the first claimant testified as Cw1 but it was reported by counsel that the second claimant died before the trial. The respondent called no witness at the close of the hearing. After the hearing, the counsel for two sides filed written submissions.

Claimant's Case

5. Cw1 testified that he was employed by the respondent on 13.11.2016 as a packer operator earning Kshs.18,912.65 per month. He worked until April 2010 when he was arrested on allegation that he and the second claimant had stolen from Bamburi Cement who had outsourced labour from the respondent. After the trial, they were acquitted on 20.2.2011 and they immediately reported back to work. However the site

manager told them that their job had ended. They reported a dispute at the Labour Officer and thereafter he was called to collect Kshs.20,546. He was however not satisfied and brought this suit because the pay was little considering the fact that he never went for any leave and had not been paid the salary for April 2010.

6. Cw1 denied ever absconding duty and contended that after arrest he was released on bail and reported back to work but the respondent's Site Manager told him to first finish the case and then report back.

Analysis and Determination

7. There is no dispute that the claimant was employed by the respondent there is also no dispute that the claimant was arrested and charged in court and later acquitted and that upon reporting back to work he was told that his job had ended. There is further no dispute that the matter was reported to the Labour office and the claimant was paid Kshs.20546. The issues for determination are:

- a. Whether the claimant was unfairly terminated.
- b. Whether he is entitled to the reliefs sought.

Unfair termination

8. The claimant testified that after being charged with criminal offence he was released on bond and reported back to work but the Site Manager Mr. John Kituku told him to first finish his case and thereafter report back. That, after acquittal on 21.2.2011, he reported back to work on 24.2.2011 the Site Manager told him that his job had ended. The said Site Manager has not testified herein to deny the allegations by the claimant.

Consequently, the Court makes a finding that the claimant was terminated with other employees even before reporting back on 24.2.2011 going by the conciliation proceedings produced and the defence filed herein.

9. The nature of termination was not for no fault on his part but through redundancy. The foregoing finding is founded on paragraph 7 of the defence and the payment voucher for payment of redundancy dues marked HG – 5C in the claimants documents. Paragraph 7 of the defence states as follows

“7. The respondent admits that the claimants reported and/or lodged a complaint with the Machakos District Labour Officer under the Ministry of Labour and that the dispute was duly resolved by the Labour Officer in the presence of the Claimants, the union officials and the Respondents Representatives upon which it was resolved that the claimants among others be paid what was referred to as redundancy benefits and/or dues and which dues upon calculation by the District Labour officer were deposited with the Ministry of Labour and later paid out to the Claimants who acknowledged such payment as follows:

i. First ClaimantKshs.20,846

ii. Second ClaimantKsh.34,629”

10. On the other hand, the payment voucher (HG-5C) is an acknowledgement of receipt of Kshs.209,826 as deposit from the respondent towards Redundancy benefits for her employees. Among the 9 employees, the first claimant appear as number 5 in the list on the over leave of the said voucher. The question that follows is whether the redundancy was done in compliance with section 40 of the Employment Act.

11. The said provision requires in mandatory terms that before terminating an employee on account of redundancy, the employer shall first serve a one month notice on the employee or his union if he is a member, and the area Labour Officer. Thereafter the employer is required to undertake a fair selection of the employees to be laid off and then one month salary in lieu of notice, all their accrued leave days and other employment benefits. Finally, the employer to pay the employee severance pay at the rate of 15 days' pay per year of service. In this case, the said mandatory procedure was not followed as the claimant was never served with any prior redundancy notice nor was his union and the Labour officer.

Relief

12. The claim for salary for April 2010 to February 2011 is allowed being Kshs.189,126.50. The said claim is allowed because the claimant's allegation that he was serving a suspension ordered by the Site Manager, Mr. Joseph Kituku was not rebutted since the Manager never testified herein. In addition the claimant is granted one month salary in lieu of notice being Kshs.18,912.65 as prayed because there is no evidence that prior notice was served on the claimant before the redundancy.

13. I also grant the claim for severance pay at the rate of 15 days' pay per year being $Ksh.18,912.65 \times 15/26 \times 4 = 37,825.30$ considering the Kshs.20,846 paid through the Labour Officer after termination, the net severance pay due is Kshs.16,979.30. The claim for leave for 2 years he was on suspension is dismissed because the claimant was at all material times not working and I have awarded him full salary. Finally, the claim for certificate of service is granted as prayed because it is the right of every employee under section 51 of the Act.

Disposition

14. For the reasons stated above that the first claimant was terminated on account of redundancy, I enter judgment for him in the sum of Kshs.225,018.45 plus costs and interest from the date of filing suit. He will also get certificate of service. The said award shall be paid subject to any relevant statutory dues.

Dated, Signed and Delivered in Open Court at Nairobi this 19th day of June, 2018

ONESMUS N. MAKAU

JUDGE