



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 56 OF 2017

[FORMERLY MOMBASA ELRC CAUSE NO 308 OF 2016]

JAMES BUKA BEJA CLAIMANT

VS

ARM CEMENT (formerly known as

ATHI RIVER MINING LIMITED) RESPONDENT

JUDGMENT

Introduction

1. James Buka Beja, the Claimant in this case was a long serving employee of the Respondent from April 1999 until 20th January 2015. He brought this claim seeking compensation for unfair termination and payment of terminal benefits. The claim is documented by a Memorandum of Claim dated 12th April 2016 and filed in court on 15th April 2016. The Respondent filed a Memorandum of Reply on 17th December 2016.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Assistant, Nelly Nzingo Mulewa.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent on 4th April 1999, in the position of Core Driller. He earned a basic monthly salary of Kshs. 9,401 plus a house allowance of Kshs. 3,000.

4. The Claimant avers that his employment was unlawfully terminated on 20th January 2015. Prior to the termination, the Claimant was, by letter dated 12th September 2013, transferred temporarily to the Respondent’s Project at Mwingi. When he returned to his regular station, he was notified that there was no work for him.

5. It is the Claimant’s case that there was no valid reason for the termination of his employment and that he was not given any prior notice. The Claimant further complains that he was not paid his terminal benefits. He now claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 12,401
- b) Unpaid leave for 16 years.....160,272
- c) Public holidays for 16 years.....152,640
- d) Unfair termination.....148,812
- e) Costs plus interest

The Respondent’s Case

6. In its Memorandum of Reply dated 7th December 2016 and filed in court on even date, the Respondent admits having employed the Claimant from 4th January 1999 until 11th February 2015. The Respondent however denies terminating the Claimant and states that the

Claimant himself voluntarily resigned from employment.

7. The Respondent states that by letter dated 26th November 2014, the Claimant was transferred to the Respondent's Plant in Mwingi effective 1st December 2014. The Respondent adds that on 14th February 2015, the Claimant and two other employees, absconded duty. Further, by his letter dated 11th February 2015 which was received by the Respondent on 14th February 2015, the Claimant resigned from employment.

8. By its two letters dated 14th February 2015 and 12th November 2015, the Respondent accepted the Claimant's resignation, effective 11th February 2015. The Claimant's terminal dues were subsequently computed and paid to him.

Findings and Determination

9. There are two(2) issues for determination in this case:

- a) Whether the Claimant has proved a case of unlawful and unfair termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

A Case of Unlawful and Unfair Termination?

10. In response to the Claimant's claim for unlawful and unfair termination of employment, the Respondent states two things; first, that the Claimant absconded duty on 14th February 2015 and second that he sent a resignation letter dated 11th February 2015 which was received by the Respondent on 14th February 2015.

11. The Claimant disowned a handwritten resignation letter filed by the Respondent. According to the Respondent's witness, Nelly Nzingo Mulewa, this letter was received by the Senior Human Resource Officer, Christine Asibula who was not called as a witness. In light of this, coupled with the Claimant's denial of the said letter, the Court finds that the Respondent's averments regarding the circumstances leading to the Claimant's exit from employment were unsupported by any credible evidence.

12. Moreover, the Court was unable to understand why the Respondent found it necessary to issue two letters accepting the Claimant's resignation, one dated 14th February 2015 and the other dated 12th November 2015

13. Further, assuming that it is true that the Claimant had deserted duty from 14th February 2015, what the Respondent should have done was to issue him with a notice to resume work failing which termination of employment on the ground of desertion of duty could be considered (see *Leonard Kahuthu Kibue v St. Hannah's Preparatory School & another [2018] eKLR*). In the absence of any such effort by the Respondent, the assertion that the Claimant had deserted duty also remains unsupported.

14. The result of the foregoing is that the Court rejects the Respondent's line of defence and adopts the Claimant's case that his employment was unlawfully and unfairly terminated.

Remedies

15. Flowing from the foregoing, I award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct prior to the termination. I further award the Claimant one (1) month's salary in lieu of notice.

16. In response to the claim for leave pay, the Respondent produced a leave card showing that the Claimant had utilized his leave up to 2014. The claim for leave pay is therefore without basis and is dismissed. The claim for public holidays was not proved and is also dismissed.

17. In the end I enter judgment in favour of the Claimant in the following terms:

- a) 12 months' salary in compensation.....Kshs. 148,812
- b) 1 month's salary in lieu of notice.....12,401
- Total.....161,213**

18. This amount will attract interest at court rates from the date of delivery of judgment until payment in full.

19. The Claimant will have the costs of the case.

20. It is so ordered.

DATED SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF JUNE 2018

LINNET NDOLO

JUDGE

Appearance:

Miss Marubu for the Claimant

Mr. Kalimbo for the Respondent