



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2178 OF 2012

JOHN MICHAEL ABUODHA.....CLAIMANT

- VERSUS -

KENYA KAZI SERVICES LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 27th July, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 29.10.2012 through Mwangi Mwaura & Partners Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination was untimely and unlawful.
- b) An order the claimant be paid his dues and benefits of Kshs. 287, 554.00 (being service gratuity for 4.5 years Kshs. 23, 592.00; salary for January 2010 to March 2012 Kshs. 157, 280.00; pay for leave days January 2010 to March 2012 Kshs. 12, 314.00; and compensation for loss of earnings Kshs. 94, 368.00)
- c) Costs of the claim and interest.

The claimant's case was that the respondent employed him as a guard in October or November 2008. He served for 4.5 years and resigned from active employment when his pay was Kshs. 7, 864.00 per month. Further in March 2010 the claimant fell seriously ill. He was on sick leave for 3 months and was paid his monthly salary throughout the period of sick leave. The sick leave was extended after lapsing of the 3 months but the respondent did not pay the monthly salaries after the extension. It is the claimant's case that failure to pay the salaries was in violation of section 17 of the Employment Act which protected salaries or wages. It was the claimant's case that under section 17 of the Act, salary was due at the expiry of every month. After a second medical examination as demanded by the respondent, the human resource manager advised him to sign a resignation letter to expedite payment of dues as opposed to dismissal which would delay the payments. The human resource manager asked him to write a second resignation letter. The claimant's case was that he wrote the 1st resignation letter out of his volition but he was asked to write the 2nd letter of resignation by the human resource officer who exerted pressure for him to sign to expedite payment of claimant's final dues.

The reply to memorandum of claim was filed on 21.02.2013 through Waruhiu K'O wade & Ng'ang'a Advocates. The respondent prayed that the suit be dismissed with costs.

The Court has considered the evidence, the pleadings and the submissions. The Court makes the following findings on the matters in issue.

- 1) The Court finds that at all material time there was no dispute that parties were in a contract of service and the claimant was employed in the capacity of a guard.
- 2) There is no dispute that the claimant fell ill and for 3 months of sick leave he was paid full salary. As submitted for the respondent, section 30 of the Employment Act provides for sick leave of 7 days with full pay and thereafter half pay for another 7 days. The Court returns that the claimant's sick leave for 3 months with full pay was more than compliant with section 30 of the Act.
- 3) In this case the evidence is that by the 1st resignation letter and the 2nd resignation letter, the claimant left employment voluntarily. The Court returns that the termination by way of resignation was not unlawful. In any event, if the 2nd letter was invalid, then the 1st one was valid by the claimant's own evidence.
- 4) The claimant was a member of NSSF and therefore is not entitled to gratuity or service pay per exemption in section 35 of the Act.

5) January 2010 to March 2012 will not be payable because clearly the claimant was on unpaid sick leave per section 30 of the Act. There was no statutory or contractual duty for the respondent to pay after the 3 months sick leave with full pay. It would appear the claimant was given time to fully recover before resuming duty but he opted to resign.

6) For the substantial time that leave is claimed, the Court finds that the claimant was on sick leave and in view of full pay of the 3 months of sick leave, the award of leave pay as prayed for is found unjustifiable or oppressive to the respondent.

7) Each party will bear own costs of the suit taking all circumstances of the case into account.

8) As there was no unfair termination, the prayer for one month pay in lieu of termination notice or compensation for unfair termination will fail.

In conclusion the suit is hereby dismissed with orders that each party will bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 27th July, 2018.

BYRAM ONGAYA

JUDGE