



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 151 OF 2016

ROBERT CHARO KARISA.....CLAIMANT

VS

NJUCA CONSOLIDATED COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim brought by way of Memorandum of Claim dated 22nd February 2016 and filed in court on 24th February 2016 is for compensation for unlawful termination of employment and payment of terminal dues.

2. The Respondent filed a Statement of Reply on 18th May 2016 but did not call any witnesses, in spite of being afforded the opportunity to do so. The Claimant testified on his own behalf. Both parties filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a security guard on 12th March 2009. He was later promoted to the position of Day Security Supervisor at the Respondent’s site in Mariakani Weighbridge. He earned a daily rate of Kshs. 420.

4. The Claimant pleads that his employment was terminated on 14th December 2015, without any justifiable cause and in violation of due procedure. He claims the following:

- a) 1 month’s salary in lieu of notice.....Kshs. 10,920
- b) Unpaid leave for 6 years.....52,920
- c) Public holidays for 6 years.....50,400
- d) Service pay for 6 years.....37,800
- e) Unfair termination.....131,040
- f) Costs plus interest

The Respondent’s Case

5. In its Statement of Reply dated 17th May 2016 and filed in court on 18th May 2016, the Respondent admits having employed the Claimant as a casual labourer in its security section at its Mariakani Yard. The Respondent states that in late 2015, rampant theft was reported at the Mariakani Yard, prompting rotation and/or reassignment of employees in a bid to curb the theft.

6. In the said rotation, the Claimant was transferred to Chaani area upon which he decided to tender a resignation letter dated 16th December 2015, citing family commitments. The Respondent therefore denies terminating the Claimant’s employment.

Findings and Determination

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

a) Whether the Claimant has made out a case for unlawful termination;

b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

8. The Claimant testified that on 14th December 2015, while at work, he received a message from the Night Supervisor, Vitalis Ndege to the effect that he should not report to work the following day on 15th December 2015. Prior to this, the Security Manager, one Mr. Kigen had complained that the Occurrence Book was not well written.

9. The Respondent denies terminating the Claimant’s employment and states that it was the Claimant who resigned from his employment. In support of its case, the Respondent produced a resignation letter dated 16th December 2015, allegedly written by the Claimant. The Claimant however disowned this letter and denied resigning from his employment.

10. The Respondent did not call any evidence to show how the said letter was delivered and it was not clear to the Court who in the Respondent’s establishment received the letter. This would have been crucial evidence in view of the Claimant’s denial. In the absence of any such evidence, the Court assigns nil probative value to the letter dated 16th December 2015, with the result that the Respondent’s averment that the Claimant resigned remains unsupported and unsubstantiated.

11. It follows therefore that the Claimant’s testimony that his employment was unlawfully and unfairly terminated was uncontroverted.

Remedies

12. The Court therefore finds in the Claimant’s favour and awards him nine (9) months’ salary in compensation. In arriving at this award, I have taken into consideration the Claimant’s length of service and the Respondent’s conduct in the termination transaction. I also award the Claimant one (1) month’s salary in lieu of notice.

13. The Claimant testified that he never went on leave and the Respondent did not adduce any contrary evidence. The claim for leave pay therefore succeeds and is allowed.

14. Regarding the claim for service pay, the Claimant told the Court that the Respondent remitted his National Social Security Fund (NSSF) dues for only five (5) months. It would appear therefore that the Respondent did not consider NSSF as a serious social security mechanism.

15. In *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited [2014] eKLR* my brother **Rika J** held that basic membership to NSSF, which is not accompanied by regular remittances by the employer, does not disentitle an employee from accessing service pay under Section 35(5) of the Employment Act, 2007.

16. I am persuaded by the holding in the *Ngara Opticians Case* (supra) and considering the dismissal performance by the Respondent in making NSSF remittances to the Claimant’s account, I find that the Claimant is entitled to service pay.

17. The claim for public holidays was not proved and is dismissed.

18. Ultimately, I enter judgment in favour of the Claimant as follows:

a) 9 months’ salary in compensation.....	Kshs. 98,280
b) 1 month’s salary in lieu of notice.....	10,920
c) Leave pay for 6 years (420x21x6).....	52,920
d) Service pay for 6 years (420x15x6).....	<u>37,800</u>
Total.....	199,920

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

20. The Claimant is also entitled to a certificate of service and costs of the case.

21. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY 2018

LINNET NDOLO

JUDGE

Appearance:

Miss Kitoo for the Claimant

Miss Kisingo for the Respondent