



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 722 OF 2016
FULGENCE MSANGACHI MGHOLO.....CLAIMANT
VS
HAKIKA TRANSPORT SERVICES LIMITED...RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Fulgence Msangachi Mgholo against his former employer, Hakika Transport Services Limited. The claim is documented by a Memorandum of Claim dated 27th September 2016 and filed in court on even date. The Respondent's defence is contained in a Response dated 8th February 2017 and filed in court on even date.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Rajab Yeri Kombe. The parties further filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a Mechanic from August 1994 until 4th March 2016, when his employment was terminated. At the time of termination, the Claimant earned a monthly salary of Kshs. 23,000.
4. The Claimant avers that the termination of his employment was without justifiable cause and in violation of due procedure. He therefore claims the following:
 - a) One month's salary in lieu of notice.....Kshs. 23,000
 - b) Service pay for 22 years..... Kshs. 253,110
 - c) Leave pay for 22 years..... Kshs. 354,354
 - d) 12 months' salary in compensation..... Kshs. 276,000
 - e) Leave allowance for 22 years..... Kshs. 253,000
 - f) Costs

The Respondent's Case

5. In its Response dated 8th February 2017 and filed in court on even date, the Respondent denies the Claimant's claim for unfair termination and states that the employment came to an end upon the Claimant attaining retirement age as per company policy.
6. The Respondent further states that the Claimant was paid all his dues. The Respondent adds that the Claimant was a registered member of National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) to which all his dues were duly remitted. With regard, to the claim for leave pay, the Respondent states that the Claimant had exhausted all his leave days.

Findings and Determination

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

- a) Whether the termination of the Claimant’s employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

8. The termination of the Claimant’s employment was communicated by letter dated 31st March 2016 stating thus:

“RE: TERMINATION OF YOUR SERVICES

THIS IS TO INFORM YOU THAT YOUR SERVICES HAVE BEEN TERMINATED WITH EFFECT FROM 04TH MARCH 2016.

YOU HAVE WORKED WITH US W.E.F August 1994 TO MARCH 2016 AS A MECHANIC.

WE WISH YOU SUCCESS IN YOUR FUTURE ENDEAVOUR.

YOURS FAITHFULLY,

(Signed)

YERI KOMBE

PERSONNEL OFFICER”

9. This letter does not disclose the reason for termination. However, the Claimant himself told the Court that at the material time he had attained retirement age. Moreover, prior to the termination letter, the Claimant had been issued with a one month’s termination notice effective 1st March 2016. The claim for unfair termination is therefore without basis and is dismissed.

Remedies

10. The Claimant makes a claim for one month’s salary in lieu of notice. From the record, it is evident that the Claimant was given a one month’s termination notice. It would however appear that he was not required to serve notice. Indeed, the Respondent’s Human Resource Manager, Rajab Yeri Kombe told the Court that the Claimant worked until 4th March 2016 upon which he was asked to proceed on a one month leave.

11. The question in the mind of the Court was this; did the Respondent require the Claimant to utilize his leave during the notice period? The law is clear on this; leave and notice pay are mutually exclusive rights and an employer cannot trade off one with the other.

12. Section 38 of the Employment Act, 2007 provides that if an employer decides to waive the notice period in favour of an employee, the employee is entitled to full pay over the notice period. The law also requires that at termination of employment, any pending leave be paid in cash.

13. It seems to me that the Respondent gave termination notice to the Claimant with the right hand but took it away with the left hand by sending him on leave during the notice period. The action by the Respondent in this regard has no basis in law and the Court finds and holds that the Claimant is entitled to one month’s salary in lieu of notice.

14. Regarding the claim for leave pay, the Claimant conceded that he had utilized all his leave days save for the year 2016. I therefore allow prorata leave for three (3) months in 2016.

15. The Claimant was evidently a contributing member of NSSF and the Respondent duly remitted his dues. Under Section 35(6) of the Employment Act, he is not entitled to service pay. The claim for leave allowance was not proved and is dismissed.

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

- a) One month’s salary in notice pay.....Kshs. 23,000
- b) Prorata leave for 2016 (23,000/30x1.75x3).....4,025
- Total.....27,025**

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

18. The Respondent will pay the costs of the case.

19. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF SEPTEMBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mrs. Kyalo for the Claimant

Mr. Onyango for the Respondent