



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.941 OF 2015

SAID WABERA.....CLAIMANT

VERSUS

CHINA XINHUA NEWS AGENCY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd November, 2018)

JUDGMENT

The claimant filed the statement of claim on 02.06.2015 through Mbaluka & Company Advocates. The claimant prayed for judgment against the respondent for:

a) A declaration that the termination of the claimant's employment by the respondent was unlawful, unfair and illegal and the claimant should be fairly and justly compensated.

b) The respondent to pay the claimant statutory entitlements or terminal dues in the sum of USD 56, 370.00 with interest at court rates arrived at as follows:

i) Severance pay at 0.5 x1, 040.00 x 5 years making USD 2, 600.00.

ii) Payment in lieu of notice USD 1,040.00 (but the prayer was surrendered at the hearing).

iii) Annual salary increment of USD 100.00 per annum USD 500.00.

iv) 60 months salary USD 500 being difference in what was to be earned after confirmation of appointment from November 2009 USD 31,120.00.

v) Transport allowance USD 62.50 per month USD 3, 750.00.

vi) House allowance USD 100.00 per month USD 6, 000.00.

vii) One year salary in compensation for unlawful dismissal USD 12, 480.00.

viii) NHIF and NSSF contributions since November, 2009 to October 2014.

ix) Interest on the above at Court rates.

c) The respondent to pay costs of the suit.

The response was filed on 26.08.2015 through Mohammed Muigai & Company Advocates. The respondent denied that the claimant was entitled to the remedies as prayed for.

The respondent employed the claimant as an editor or reporter from 14.09.2009 to 31.10.2014. The claimant served on probation from 14.09.2009 to 14.12.2009. He was confirmed in employment until 31.10.2014. The claimant worked without a break as a reporter based at the respondent's Africa Regional Bureau, Xinhua News Agency located at Rose Avenue off Ngong Road, Nairobi.

The **1st issue** for determination is whether the claimant was to earn USD 520.00 per month throughout the period of service or after confirmation in appointment he was to earn USD 1040.00 per month as urged for the claimant. The claimant's case was that after confirmation he complained about review of his salary as per terms of the contract but the review was not honoured. The claimant testified that the contract he signed provided that at the end of probationary period the monthly salary would double to USD 1,040.00. In cross examination the claimant stated that he did not file such a contract and that it was in the respondent's possession. In email correspondence of 28.10.2014 the claimant does not specifically state that his salary was to double at the end of probationary period to USD 1040.00 per month. Taking that evidence into account, the Court returns that the undisputed monthly salary throughout the service was USD 520.00 and the evidence is that the claimant was pressing for a higher pay but which parties had not agreed upon.

The **2nd issue** for determination is whether the termination of the claimant's employment was unfair or unlawful. The claimant was terminated from the respondent's employment by the letter dated 31.10.2014 on account of refusal to sign a fresh contract. The claimant testified that he declined to sign because it was in Chinese language which he did not understand. Further, his case was that by signing it would mean the new contract would supersede the earlier one with the consequence that he would lose his service benefits of the accrued service of over 5 years. The Court finds that the claimant had a valid grievance that was with foundation and not irresponsible as envisaged in section 46 of the Act. Thus the Court returns that the claimant was dismissed upon unfair reason namely, initiating a complaint that had foundation and was responsible. On that account the termination was unfair and unlawful. The Court has considered the service of over 5 years; the claimant never contributed to the termination; the claimant desired to continue in service; and the aggravating factor that the reason for termination was an unfair reason barred by the express statutory provision. The Court returns that the claimant will be awarded maximum compensation under section 49 of the Act being 12 months' gross salaries at USD 520.00 per month making **USD 6,240.00**.

The **3rd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court returns as follows:

- a) The evidence is that the claimant was not a member of NSSF and there was no alternative arrangement for pension and the Court returns that the claimant is entitled to service pay in the nature of severance pay as prayed for and under section 35 of the Act and one month pay for each year served would be a fair rate and is awarded **USD 2,600.00**.
- b) The claimant failed to establish the basis of the annual salary increment and the prayer will fail.
- c) The claimant similarly failed to establish the basis for the prayers for 60 months' unpaid salary at USD 100 per month; the prayer for transport allowance; and the prayer for house allowance. The prayers will fail.
- d) The Court considers that NSSF and NHIF dues would be enforceable per relevant statutory provisions and further, the award of service pay would serve enough justice in lieu of NSSF contributions.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the termination of the claimant's contract of service by the respondent was unfair and unlawful.
- 2) The respondent to pay the claimant **USD 12, 480.00** by 15.12.2018 failing interest to be payable thereon at Court rates from the date of the judgment till full payment.
- 3) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 2nd November, 2018**.

BYRAM ONGAYA

JUDGE