



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2047 OF 2012**

**GEORGE MUSYOKA MUTHUI.....CLAIMANT**

**v**

**PHOENI PAPERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. George Musyoka Muthui (Claimant) instituted legal proceedings against Phoeni Papers Ltd (Respondent) on 8 October 2012 and he stated the Issue in Dispute as Termination on account of redundancy of George Musyoka Muthui and failure by the Respondent to pay terminal benefits to the Claimant.

2. Although the Respondent accepted service of Notice of Summons, no *Response* was filed.

3. On 18 October 2018, the Deputy Registrar scheduled the Cause for hearing on 24 October 2018. The Claimant was directed to serve a hearing notice upon the advocate on record for the Respondent.

4. When the Cause came up for hearing as scheduled, there was on file an affidavit of service attesting to service of hearing notice upon Onesmus Langat & Co. Advocates, and that the firm refused to accept service.

5. The Court has looked at the record and established that the said firm did not formally apply to cease from acting and therefore to all intents and purposes it is still formally on record.

6. The Claimant gave sworn testimony and filed submissions on 29 November 2018 (2 weeks after agreed date).

7. The Court has given due consideration to the pleadings, evidence and submissions and condensed the Issues for determination as itemised hereunder.

**Unfair termination of employment**

8. The Claimant stated in testimony that he was employed by the Respondent in 2003 as a production worker (employment contract dated 1 April 2004 was produced) and that on 1 December 2011 he was appointed as a supervisor.

9. On the circumstances leading to separation, the Claimant testified that on 1 March 2012 his employment was terminated without notice or being afforded an opportunity to be heard.

10. The Claimant's testimony remaining unchallenged and considering the provisions of sections 35(1)(c) and 41 of the Employment Act, 2007 as read with section 47(5) of the same Act, the Court finds that the Claimant has established that the termination of his employment was unfair.

*Compensation*

11. Because the Claimant served for about 9 years, the Court will in consideration of the length of service award the equivalent of 9 months gross wages as compensation (Claimant's gross monthly wage was Kshs 11,000/-).

*Pay in lieu of notice*

12. The Claimant is also awarded the equivalent of 1 month pay in lieu of notice in terms of the termination clause in the appointment letter.

## **Breaches of contract/statute**

### **Leave**

13. An employee is entitled to at least 21 days annual leave with full pay. The Claimant testified that for the duration of employment he did not go on annual leave.

14. For the leave, the Claimant sought Kshs 86,715/-.

15. The accrual of annual leave is circumscribed by section 28(4) of the Employment Act, 2007, and therefore the Claimant may only validly lay claim to leave for the last 18 months to dismissal.

16. The Court will therefore allow this head of claim in the sum of Kshs 6,768/- for the last 8 months to separation.

### **Underpayments**

17. Underpayments may flow from payment of wages below the contractually agreed rates or prescribed and gazetted minimum wages.

18. The Claimant did not anchor this head of claim on pay below the contractually agreed rates. At the same time he did not draw the attention of the Court to any particular *Regulation of Wages Order* applicable to the sector the Respondent was operating in. This head of claim was not proved.

### **Gratuity Service benefit**

19. If by *gratuity service benefit* the Claimant meant *service pay* as envisaged by section 35(5) of the Employment Act, 2007, he would not be entitled to the same as the contract letter indicate he was making contributions towards the *National Social Security Fund*.

20. And if there was a contractual rather than statutory foundation for *gratuity service benefit*, the same was not proved in Court.

### **Overtime**

21. The Claimant sought Kshs 8,460/- on account of work during public holidays but did not prove the particular holidays or years in which he worked without pay and the Court finds this head not proved.

### **Conclusion and Orders**

22. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(i) Pay in lieu of notice    Kshs 9,483/-

(ii) Leave                      Kshs 6,768/-

(iii) Compensation        Kshs 99,000/-

TOTAL                              **Kshs 115,251/-**

23. The other reliefs are declined.

24. Claimant is denied costs for having filed submissions late without tendering any explanation.

**Delivered, dated and signed in Nairobi on this 7<sup>th</sup> day of December 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant        Mr. Mwangi instructed by M.P. Mwangi & Co. Advocates

For Respondent    Onesmus Langat & Co. Advocates

Court Assistant    Lindsey