



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1621 OF 2014

(Before D. K. N. Marete)

JOSEPH TITUS AKONG'O.....CLAIMANT

VERSUS

MAGNUM ENGINEERS & GENERAL

CONTRACTORS LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by a Memorandum of Claim dated 14th August, 2014. The issue in dispute is therein cited as;

Wrongful and unlawful termination of employment by the respondent and failure or refusal by the respondent to pay terminal benefits to the claimant.

The respondent in a Response to The Memorandum of Claim dated 19th November, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he is a former employee of the respondent since 4th January, 2011 where he had worked continuously until 14th May, 2014 when he was unlawfully terminated from employment. This was by a letter dated 14th May, 2014. He was not paid his terminal benefits. At the time of termination, he earned Kshs.19,921.50, all inclusive.

The claimant's further case is that he had a three year stint of service as at the time of termination. He had not taken or gone on leave and neither did he have any rest days throughout his term. Again, despite diligent and faithful service, **the respondent never appreciated his services but instead terminated his employment and refused to pay his terminal dues.**

He claims as follows;

- | | |
|--|------------------------|
| a) <i>One month's salary in lieu of notice</i> | <i>Kshs.19,912.50</i> |
| b) <i>Leave allowance for three years</i> | <i>Kshs.59,737.50</i> |
| c) <i>Service 15 days per every year worked</i> | <i>Kshs.34,470.00</i> |
| d) <i>House allowance for 3 years @ 6,500 per month</i> | <i>Kshs.234,000.00</i> |
| e) <i>Service gratuity for 3 years</i> | <i>Kshs.59,737.50</i> |
| f) <i>Payment for unfair termination for 12 months</i> | <i>Kshs.238,950.00</i> |
| g) <i>Salary for 24 months remaining period of
Contract ending February 2016</i> | <i>Kshs.477,900.00</i> |

His further case is as follows;

SUBMISSIONS

i) *The claimant submits that he was terminated from employment unlawfully and was never paid salary in lieu of notice. The claimant was never served with a one month's notice, the respondent's action to terminate the claimant was malicious. Therefore the claimant urges this Honourable court to order the respondent to pay his terminal benefits.*

ii) *It is the claimant's submission that the respondent served him with 7 days notice because he received a letter notifying him that he had seven days to terminate his services a letter which he received on 20th May 2014 although it is dated 14th May 2014 therefore on 21st May 2014 the respondent terminated the claimant's employment and refused to pay his terminal benefit as tabulated above and urge the Honourable court to find the respondent responsible to pay his terminal benefits.*

iii) *It is the claimant's submission that during the period of termination of his employment by the respondent, the respondent failed to comply with the dictates of the employment Act Laws of Kenya and therefore urge the Honourable court to order the respondent to pay his terminal benefits.*

He prays as follows;

- | | |
|--|-----------------|
| a) One month's salary in lieu of notice | Kshs.19,912.50 |
| b) Leave allowance for three years | Kshs.59,737.50 |
| c) Service 15 days per every year worked | Kshs.34,470.00 |
| d) House allowance for 3 years @ 6,500 per month | Kshs.234,000.00 |
| e) Service gratuity for 3 years | Kshs.59,737.50 |
| f) Payment for unfair termination for 12 months | Kshs.238,950.00 |
| g) Salary for 24 months remaining period of
Contract ending February 2016 | Kshs.477,900.00 |
| h) Cost of this suit. | |
| i) Interest in (a) to (h) above. | |
| j) Any other relief as the court may deem and just to grant. | |

The respondent's case is that the claimant was terminated as a result of some structured adjustments at the workplace. This also affected other positions in the establishment.

The respondent further denies non-payment for untaken leave, house allowance and even terminal dues. It is her contention that the claim is an afterthought and unfounded. In any event, the claimant's letter of termination was copied to the labour officer, Embakasi. This is expressed as follows;

9. *Further to paragraph 8 above the Respondent states that;*

a) *claimant was not entitled to payment of one month's salary in lieu of notice because this was termination on grounds of redundancy and any termination on such grounds does not entitle an employee to payment of one month's salary in lieu of notice under the Employment Laws.*

b) *the claimant's outstanding due were all cleared and therefore contests the claim in part (a), (c), (d), (e), (f) and (g) of paragraph 8 of Memorandum of Claim and puts the Claimant to strict proof thereof (Attached is a computation analysis of the Claimant's final dues and payment voucher dated 23rd May, 2014).*

c) *in response to the contents of part (b) of paragraph 8 of the Memorandum of Claim, the respondent states that the claimant was allowed leave days and was paid for them for the period he worked for the respondent and the claimant will be put into strict proof for making allegations to the contrary during the trial of the suit.*

The respondent prays and submits that;

a) *The claimant was paid all his terminal dues and was given a Redundancy notice and is therefore not entitled to any salary or one month's pay as in cases of normal termination of employment.*

b) *The claimant's house allowance was included in his daily pay as per the contents of the contracts of employment.*

c) *The claimant was allowed leave and cannot therefore claim the same.*

d) *There can be no basis to claim damages for wrongful dismissal and unfair termination of employment because the right procedure was followed when the claimant was given a redundancy notice.*

e) *There can be no basis to claim severance pay as the Respondent paid NSSF contributions for the Claimant while in its employment.*

f) *There can be no basis to claim punitive damages and costs of the cause in that the claim has no basis in law.*

The matter came to court variously until 16th October, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions reiterates his case of unlawful termination of employment. It is his submission that at the time of termination of employment, the claimant contract of service was due for a further 24 months and therefore the termination was unlawful. This was without any reasonable cause.

Further, the claimant was never served with notice of termination by the respondent and neither was he accorded audience and explained of the reasons for termination in a language that he understood, or at all.

The claimant further discounted section 40 (1) (f) and (g) of the Employment Act, 2007 as follows;

40(1) (f) "the employer has paid an employee declared redundant not less than one month's notice or one month's wage in lieu of notice

And

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than 15 days for each completed year of service".

He submits that the respondent did not comply with this and therefore there was no redundancy.

The respondent in her written submission dated 2nd November, 2018 posits that the claimant was terminated on grounds of structural adjustments at the work place. This is expressed in the respondent's letter of termination dated 14th May, 2014. This, she submits, is permitted in law and practice.

The respondent in support of her case sought to rely on the authority of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where the court observed as follows;

"In the circumstances, I find that, if the appellant was to continue in business, it had to find a way of controlling its operational expenses. There was not much the appellant could do about the competitive environment it operated in or the unstable fuel costs. Those were factors beyond its control. It could only take action on factor(s) it had control over such as its wage bill. It contended that, in the circumstances if found itself in, it had no option but no reorganize its operations to tame its huge wage bill. How did it go about it?"

This was also upheld in the authority of **Tobias Ongaya Auma & 5 others vs Kenya Airways [2007] eKLR** where the court held thus;

"Further, it is not the role of any tribunal to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations".

I agree with the claimant. The respondent displays a notice of termination on grounds of redundancy but does not apply the law on redundancy in the process of termination. This is also not applied in the computation of the terminal benefits of the claimant. I therefore find a case of unlawful termination of employment of the claimant by the respondent and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. One (1) months salary in lieu of notice.....Kshs.19,912.50

ii. Service pay of 15 days for every year of service

= $15/30 \times 19,912.50 \times 3$Kshs.29,868.75

iii. Six (6) months compensation for unlawful termination of employment = $6 \times 19,912.50$Kshs.119,475.00

Total of claim.....Kshs.169,256.25

iv. The costs of the claim shall be borne by the respondent.

Dated and signed this 29th day of November 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 3rd day of December 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Nyaberi instructed by Maari Nyaberi & Associates Advocate for the claimant.
2. Ms Atieno holding brief Kamunde instructed by Albert Kamunde & Company Advocates for the respondent.