



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 199 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 25th September 2017)

CHARLES ONDIEKI MATOGO.....CLAIMANT

VERSUS

BIZONE PRINTING & PACKAGING LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed his Memorandum of Claim on 18/2/2015 through the firm of Njagagua & Associates Advocates contending that he was wrongfully dismissed by the Respondent who refused, failed or neglected to pay him his rightful terminal dues.
2. It is the Claimant's case that he was employed by Respondent from 3rd July 2006 to 18th September 2013 on a basic pay of Kshs.28,530/= and other payments which were reviewed subsequently to 30,530/= at time of tendering his resignation on 18/9/2013 (COM.1).
3. It is the Claimant's case that he served the Respondent diligently for 9 years. That on 15/9/2013 while he was away from work on a doctors recommended sick leave, he realized that his advance salary had not been posted to his account as was customary practice every mid-month. He called Production Manager one Savio Antao to inquire about it and he was asked to go and discuss the issue with the Director.
4. He obliged and attended a meeting on 19.9.2013 and he was informed that there were rumors that he got employment with another company and that the company was willing to increase his salary. The Claimant upon consideration of employment terms proposed tendered his resignation on 18th September 2013.
5. On 19/9/2013 he was served with a notice to show cause letter sent to his rural home in Kisii by registered post. On 23rd September 2013, the Respondent sent him a dismissal letter by registered post.
6. The Claimant avers that upon termination, he was not paid his terminal dues. He seeks to be paid his severance pay for years of service. He seeks to be paid his 5 days annual leave, days worked in September 2013, one months salary in lieu of notice, house allowance, and unfair damages all totaling 620,575/= plus costs.
7. The Claimant exhibited before this Court his union membership card and a demand notice from his advocates dated 31/10/2014.
8. The Respondent filed their Memorandum of Reply and Counter claim on 20/3/2015 through Ashitiva

& Company advocates. They contend that the Claimant was not a member of any union. They also aver that the Claimant was to report back to work on 16th September 2013 which he failed to do without any reason or explanation. On 1/9/2013, they got reliable information that he had been employed by a rival company. They also discovered that the letter from the doctor recommending sick leave was not genuine.

9. They also aver that the Claimant tendered his resignation letter without one month notice as provided by law and on 4th December 2013, he wrote another letter affirming the position he had taken on 18th September 2013 on resignation from his employment.

10. They also aver that they never terminated the Claimant's services but that the Claimant resigned on his own without giving notice. They also aver that even if they terminated the Claimant's services, they did it according to the laid down procedures.

11. They deny that the Claimant is entitled to prayers sought. They also aver that the Claimant is not entitled to house allowance since his salary was consolidated. They have counter claimed for payment of Kshs.30,530/= being one month's pay in lieu of notice.

12. I have examined all the evidence on record from both parties plus submissions filed. My simple understating of this claim is that the Claimant resigned from work which he has confirmed in his paragraph 10 of his Memorandum of Claim. Any other action taken after this date including a show cause letter and a dismissal letter were superfluous. The Respondent have confirmed the resignation and also counter claimed for 1 months' salary in lieu of notice from the Claimant.

13. It is therefore this Court's finding that any claim of wrongful dismissal will not be in line with the Claimant's own submissions.

14. I will rely on the pleadings herein and hold that indeed the Claimant resigned as stated and his only entitlement are terminal benefits.

15. The appointment letter of Claimant does not give details of the terms of engagement and therefore the Respondents assertion that the salary was consolidated inclusive of house allowance cannot be ascertained. Under Section 10(7) of Employment Act:

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.

16. In absence of a written detailed contract, this Court finds that the Respondents have not proved that the salary was consolidated inclusive of house allowance. I therefore find that the Claimant is entitled to payment of house allowance which is an entitlement under Section 31(1) and (2) of Employment Act which states as follows:-

1) “An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

2) This section shall not apply to an employee whose contract of service:-

a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

17. The house allowance has by custom and wage been awarded at 15% of salary which is = 15% of 30,520 = $15/100 \times 30,530 \times 86$ months = $0.5 \times 30,530 \times 86 = 393,837/=$.

18. I also award the Claimant 15 days salary for each year worked being 7 years = $0.5 \times 30,530 \times 7 = 106,855/=$.

TOTAL = 500,692/=

19. Given that Claimant resigned without giving the requisite notice I also find the counter claim is proved and allowed. He total thus awarded to Claimant is 500,692 less 30,530 = **470,162/=**.

20. Plus costs.

Read in open Court this **25th day of September, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mugogo holding brief for Kazugu for Respondent – present

No appearance for Claimant