



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 243 OF 2016

CHARLES MBINYE MUINDI.....CLAIMANT

VERSUS

P N MASHRU LIMITED.....RESPONDENT

J U D G M E N T

IINTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent on 20/1/2016. The respondent denies that the termination was unfair and avers that it was done within the terms of contract which allowed either party to the contract to terminate the contract by serving a 30 days prior notice. The respondent further avers that after the termination, she paid the claimant all his terminal dues including salary in lieu of notice and prayed for the suit to be dismissed and an order be made against the claimant for refund of the severance pay of ksh.12500 which was allegedly paid to him erroneously.
2. The issues for determination are whether the contract of service was unfairly terminated, whether the claimant is entitled to the reliefs sought, and whether the respondent is entitled to refund of ksh.12500 paid to the claimant as severance pay after the separation. The parties agreed to dispense with oral hearing and instead adopted the respective written witness statements and the documentary evidence filed and proceeded to file written submissions to dispose of the suit.

CLAIMANTS CASE

3. The claimant's statement was filed on court on 23/3/2016. He stated that he was employed by the respondent on 21/10/2014 as a mechanic and worked until 19/1/2016 when he was summoned to the HR managers office and served with a letter terminating his services effective 20/1/2016. He contended that the termination was unfair and unlawful because no reason for the termination was cited and no hearing was accorded to him before the termination. He further contended that he was not given a certificate of service after the termination but he was given a cheque for ksh.43000 but with no particulars of items paid. He therefore prayed for compensation for unfair termination, one month salary in lieu of notice plus severance pay totaling to ksh.337500 less the KSH.43000 paid after the termination.

DEFENCE CASE

4. The respondents HR Officer Mr. Salim Joha filed his statement on 14/4/2016. He admitted that the claimant was employed by the respondent on 21/10/2014 as a mechanic on permanent terms. That his

starting salary was ksh.22000 but later it was increased to ksh.25000 per month. That the parties had signed a written contract providing for termination by either party giving the other one months termination notice or paying one month salary in lieu of notice. That acting pursuant to the foregoing term of the contract, the respondent terminated the claimants services by her letter dated 19/1/2016 and thereafter paid him ksh.43519 inclusive of 30 days salary in lieu of notice. That the claimant voluntarily received the said payment and a certificate of service and signed without coercion.

5. Mr. Salim was surprised by the claimants suit even after he was erroneously paid service pay as while a contributor to the NSSF he was disqualified by Section 35(6) of the Employment Act from such benefits. He therefore prayed for the refund of the said service pay to the respondent and the suit be dismissed.

ANALYSIS AND DETERMINATION

6. There is no dispute that the claimant was employed by the respondent from 21/10/2014 to 19/1/2016 when he was terminated. There is also no dispute that after the termination the claimant was paid ksh.43519. The issues for determination are:

- (a) Whether the termination was unlawful.
- (b) Whether the reliefs sought by the claimant should be granted.
- (c) Whether the claimant should refund ksh.12500 paid to him as severance pay after termination.

Unlawful termination

7. Under Section 45(2) of the Employment Act, termination of contract of service by the employer is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure. In this case the claimant contends that he was summoned to the HR officers' office on 19/1/2016 and issued with a letter terminating his services without any reason whatsoever and without according him any hearing. He describes the termination as unfair. The respondent on the other hand states that the termination was fair and lawful because it was done under Clause 23 of the contract of employment which entitled either party to terminate the relationship by notice or payment of salary in lieu of notice.

8. There is no dispute that Clause 23 of the contract of service between the parties herein allowed either party to terminate the contract by a notice of one month or payment to the other party of one month salary in lieu of notice. The said Clause is in consonance with Section 36 of the Act which protects the freedom of contract between parties to employment contracts. I therefore see nothing wrong with the respondents exercising his freedom of contract of service as he did because she complied with the contract by paying the claimant one month salary in lieu of notice. In that case the reason and the procedure followed in terminating the contract of service was fair within the provisions of Section 36 and 45 of the Act. I do not find merits in the claimant's contention that he was not accorded a hearing before the termination within the meaning of Section 41 of the Act. In my view such provisions is only applicable when the termination is grounded on a misconduct, physical incapacity or poor performance.

9. Let me however state here that it would be more appropriate for employers wishing to terminate contracts under Section 36 and the termination clause of the contract, to state that specifically in the termination notice. By so doing then employees will not be left guessing as to the reason for their termination and that way avoid unnecessary litigations. In addition should the employees insist on suing for unfair termination or redundancy, the employers will have an easier time in court by pleading the law and contractual stipulations as their defence in the same way as a terminating employee. Deciding otherwise would mean that the principle of freedom of contract for employers has been erased from the law books which is, and cannot be the case. Having so observed, I wish to further state that the court jurisdiction is only limited to enforcing the right of the parties to the contract including right to terminate it as I have done herein.

Reliefs sought by the claimant

10. In view of the finding herein that the termination of contract of service was fair and lawful and the fact that the claimant was paid one month salary in lieu of notice after termination, I dismiss the claim for further payment of salary in lieu of notice and compensation under Section 49 of the Act. I have perused the tabulation of the terminal dues dated 25/1/2016 filed by the respondent and found that ksh.25000 was paid to the claimant in lieu of notice. I have also noted from the said tabulation of final dues that ksh.12500 was paid to the claimant after termination as severance pay for one completed year of service.

Refund of ksh.12500 to the respondent

11. The respondent contends that she erroneously paid the ksh.12500 as service pay to the claimant after termination. That the said sum should be refunded because the claimant was disqualified under Section 35(6) (d) of the Act from that benefit because he was a contributing member of the NSSF. I however dismiss that claim for lack of merit because the claimant did not receive it through fraud or coercion. I will therefore treat it as a gratuitous payment made to him by the respondent on separation. In addition, the said claim is not tenable because it is not founded on a counterclaim in the pleadings.

DISPOSITION

12. For the reason that the termination of the contract of service was done with the provisions of the law and the contract, I dismiss the suit with no order as to costs save for the order of the certificate of service.

Dated, signed and delivered this 13th October 2017

O. N. Makau

Judge