



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 35 OF 2015**

**DICKSON ODUOR OTIENO.....1<sup>ST</sup> CLAIMANT**

**MOSES WANYONYI WEKESA.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**BIDCO OIL REFINERIES LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 13<sup>th</sup> October, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 04.03.2015 through M’Njau and Mageto Advocates. The claimants prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimants’ employment was unfair.
- b) An order compelling the respondent to pay the claimants a total sum of Kshs. 2, 137, 556.00.
- c) An order compelling the respondent to issue to the claimants their respective certificates of service within 14 days from the date of delivery of the judgment.
- d) Costs and interest of the suit at court rates.
- e) Any other or further relief which the court may deem fit, just and expedient to grant.

The response to the memorandum of claim was filed on 17.03.2015 through Guram & Company Advocates. The respondent prayed that the claimants’ claim against it be dismissed with costs.

By consent, parties opted that the suit to be determined on the basis of the pleadings, documents and submissions on record and without calling witnesses.

There is no dispute between the parties that they were in employment relationship. The 1<sup>st</sup> claimant’s employment was terminated by the letter dated 28.01.2015 titled “**Settlement of final dues**”. The letter forwarded a cheque of Kshs.41, 869.00 being final dues as there would be no further claim from the respondent whatsoever. The letter required the 1<sup>st</sup> claimant to sign in acknowledgement and acceptance of the same but the claimant failed to sign. The 2<sup>nd</sup> claimant’s employment was terminated by a similar letter dated 28.01.2015 forwarding a cheque of Kshs. 34, 893.00 but the 2<sup>nd</sup> claimant similarly refused to sign the same.

The circumstances prior to the separation of the claimants and the respondent are documented as resolutions between the respondent and the claimants' union, Kenya Chemical and Allied Workers Union. The resolutions are dated 23.12.2014. It is stated that the claimants left employment voluntarily due to anticipated intimidation by the superiors. It is documented that the respondent had made efforts to investigate the issue and that there had been no such intentions to intimidate the claimants but the claimants had refused to resume duty. In the circumstances, the meeting had resolved that the claimants were only entitled to payment for unutilised leave days; for the 1<sup>st</sup> claimant Kshs.41, 869.00 and the 2<sup>nd</sup> claimant Kshs.34, 893.00.

To answer the 1<sup>st</sup> **issue** for determination, the court returns that the termination of the claimants' employment was by agreement per the resolution dated 23.12.2014. Thus, the claimants' alleged unfair termination has not been established and the prayers in that regard will fail.

The 2<sup>nd</sup> **issue** for determination is whether the claimants are entitled to the other remedies as prayed for. The court makes findings as follows:

- a) As the separation was by agreement, pay in lieu of termination notice will fail and the 3 months pay in that regard was not justified.
- b) The termination was by resolution of 23.12.2014 and the claimants have not established that they worked in January 2015. The claim for pay in January 2015 will therefore fail.
- c) There was no evidence and justification for pay of house allowance, accrued leave balance, service pay, rest days, public holidays, and overtime as prayed for. In particular, the material on record shows computation of pay for every day worked including over time. In that regard, the court returns that on a balance of probability, the respondent paid the claimants all the dues while the claimants were in the respondent's service. There appears to have been no grievance about those claims at all material times and the claims will fail.
- d) As the termination was not unfair, the claimants would not be entitled to compensation under section 49 of the Employment Act, 2007.
- e) The claimants are entitled to a certificate of service being a statutory prescription.

In conclusion the suit is hereby determined with orders that the respondent will deliver to each claimant a certificate of service by 01.11.2017 and each party to bear own costs of the suit.

**Signed, dated and delivered in court at Nyeri this Friday, 13<sup>th</sup> October, 2017.**

**BYRAM ONGAYA**

**JUDGE**