



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1392 OF 2016

JOSEPH MOTE NZUKI.....CLAIMANT

VERSUS

MEMBA MURIUKI.....RESPONDENT

Claimant in person

Memba Muriuki for respondent

JUDGMENT

1. The claimant seeks payment of terminal benefits to wit: -

(i.) One month's salary in lieu of notice Kshs.10,000/=.

(ii.) Outstanding payment in lieu of annual leave not granted for 14 years calculated at 21 days' salary per year Kshs.98,000/=.

(iii.) Service gratuity calculated at 15 days' salary for each completed year of service Kshs.70,000/=.

2. The claimant was employed as a gardener by the respondent from 5th August 2002 to 5th January 2016. The claimant gave notice of resignation on 5th January 2016. The respondent asked the claimant to train the incoming gardener which he did until 11th February 2016.

3. The claimant was not granted annual leave for the 14 years he served the respondent and was not paid in lieu of leave. He claims payment in lieu of leave in terms of Section 28 of Employment Act, 2007.

4. The claimant was not registered with NSSF and no contribution was made on his behalf by the respondent.

5. He claims payment of gratuity in terms of Section 35 (5) as read with Section 36 (6) of the Employment Act, 2007.

6. The respondent filed a statement of defence on 3rd August 2017 in which he pleads that the claimant was his employee as claimed but was granted annual leave days as per his request; did not work during holidays and even got extra days to attend to his court matter. The respondent avers that the claimant

took in excess of the 21 days annual leave he was entitled to.

7. With respect to payment in lieu of notice, the respondent avers that the claimant resigned from employment, served more than one month's notice from 5th January 2016 to 11th February 2016 and is not therefore entitled to payment in lieu of notice.

8. With regard to the claim for service pay, the respondent avers that the employment of the claimant was not terminated and so he is not entitled to payment of service pay.

9. Hearing of the matter was fixed for 27th September 2017 by the court and the hearing notice was served by one Joseph Mote Nzuki on behalf of the court on 9th June 2017. A return of service duly acknowledged by the advocate for the respondent Memba, Muriuki Advocates was filed on 15th June 2017.

10. The claimant attended the hearing but the respondent and his advocate failed to attend the hearing without any explanation.

11. The hearing proceeded ex parte and the claimant who was not represented testified under oath in support of the particulars of claim. He confirmed that he was employed by respondent and earned a monthly salary of Kshs.10,000/=. That he voluntarily resigned from work but was not paid terminal benefits including notice pay, leave pay and service pay.

12. He told the court that he was not registered with NSSF and NHIF and so no contribution was made on his behalf by the employer. He also said that he did not go on leave for 14 years but was given off days from time to time. The claimant prayed the suit be allowed.

Determination

13. Though the respondent did not testify to rebut the testimony by the claimant, the claimant bears the onus of proof of his claim on a balance of probability.

Notice Pay

14. The claim for notice pay is not tenable on the face of the testimony by the claimant that he voluntarily resigned from employment and was allowed to serve more than one month notice and was paid salary during this period. The claim for notice pay is therefore dismissed.

Leave Pay

15. The claimant testified that he worked for 14 years and was not granted 21 days annual leave in terms of Section 28 of the Employment Act, 2007. The respondent failed to testify to rebut this evidence by the claimant.

16. The claimant did not adequately explain whether he had consistently applied for leave and that the respondent failed to grant the same.

17. In the circumstance, the court awards the claimant 21 days leave for the last three years. The rest of the claim is caught by the doctrine of laches. Accordingly the court awards the claimant Kshs.30,000/= in lieu of three years' leave on the basis that an employee is entitled to a full month's salary while on leave.

Service Pay

18. The claimant testified that he was not registered with NSSF for 14 years and the respondent did not therefore contribute social security on his behalf. The respondent did not deny this fact in the statement

of defence but averred that the client is not entitled to service pay because the respondent did into terminate his employment.

19. The respondent completely missed the basis of payment of service pay. Section 35 (5) provides;

“An employee whose contract has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms shall be fixed.”

20. Whereas subsection (b) provides;

“This section shall not apply where an employee is a member of –

(a) a registered pension or provident fund scheme under the retirement benefits Act;”

21. The intention of the legislature is to provide social security on retirement to all employees payable upon termination of employment be it by the employer or by voluntary resignation. The manner of separation is not material for the purpose of Section 35 of the Employment Act.

22. Accordingly, the claimant has proved on a balance of probability that he is entitled to service pay as claimed in the sum fo Kshs.70,000/=.

23. Judgment is entered for the claimant against the respondent in the sum of Kshs.100,000/=.

24. The award is payable with interest at court rates from the date of filing suit till payment in full.

25. Costs to follow the outcome.

Dated, Signed and Delivered on this 24th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE