



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 29 OF 2017

(BEFORE D. K. N. MARETE)

GEORGE MOSETI.....CLAIMANT

VERSUS

HAYER BISHAN SINGH & SONS LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 8th June, 2017. The issue in dispute is herein cited as;

Constructive Dismissal/Unlawful Dismissal/Unfair termination without payment of terminal benefits.

The respondent in a Respondents' Statement of Response dated 3rd July, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he secured employment with the respondent which employment commenced on 1st March, 2012. He in so doing signed a letter of appointment.

The claimant's further case is that by a notice dated 1st November, 2015, the respondent notified him of intended termination of service with effect from 1st December, 2015 per clause 4 of the letter of appointment. In this notice of redundancy he was entitled to terminal benefits but the respondent has failed to pay the same. This is despite service.

He prays as follows;

- a. *An Order to compel the Respondent to pay terminal benefits.*
- b. *An Order to compel the Respondent to pay costs.*

The respondent's case is a denial of the claim.

It is her further case that the claimant was employed for a particular project – the construction of Ejinja – Bumala Road (C30) – Contract No.KeNHA/RD/D&C/443/2011. As the project was near completion, the claimant was served with a redundancy notice on 1st November, 2015 and issued with 2 months notice with effect from 1st November, 2015 to 31st December, 2015 at the close of which his terminal

benefits would be paid.

Her further case is that he (claimant) was asked to proceed on his annual leave for 36 days from 16th November, 2015 to 31st December, 2015 and resume on 2nd January, 2016 when his benefits will be paid. He did not return to work and a memo on his desertion was dispatched to him.

The respondent in the penultimate aver that this suit does not disclose any or any reasonable cause of action, is misconceived, bad in law and an abuse of the process of this court.

The matter came to court severally until 6th November, 2017 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant 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 was wrongful, unfair and unlawful? The claimant in his written submission dated 27th November, 2017 reiterates his case of unlawful termination of employment. It is his submission that in determining the claimant's employment, the respondent never took into account the seniority, skill and ability of the claimant. Again, his stint of service lasting 31/2 years was a considerable long period of service and fell within the confines of section 41 (c) of the Employment Act, 2007. He was therefore not material for termination.

The respondent does not furnish any written submissions, or at all. This is despite service. She probably chooses to go by her case as presented.

In this kind of scenario, a determination can only be made on a test of a balance of probability. I also note that the respondent never got out of his way to demonstrate desertion from duty by the claimant. The case therefore tilts in his favour. I therefore find a case of unlawful termination of employment of the claimant by the respondent.

On finding of unlawful termination of employment, the claimant becomes entitled to the relief sought.

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

i. One (1) months salary in lieu of notice..... Kshs. 14, 320.00

ii. Two(2) months salary as compensation for unlawful

Termination of employmentKshs.28,640.00

Total.....Kshs.42,960.00

iii. The costs of this claim shall be borne by the respondent.

iv. The costs of the claim be and are hereby assessed at Kshs.60,000

Delivered, dated and signed this 15th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Rono instructed by J.K. Rono & Company Advocates for the claimant.
2. No appearance for the respondent.