



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO.1387 OF 2014**

**SAMUEL KAMAU IRUNGU ..... CLAIMANT**

**VERSUS**

**RITZ ENTERPRISES LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. The issue in dispute is not set out but the prayers are made on the basis of terminal dues owing and compensation.

2. The Claimant was employed by the Respondent on 12<sup>th</sup> January 2009 as a general worker at a salary of kshs.7, 630.00 which was increased to kshs.12, 581.00 per month. The Claimant was promoted to a Store Worker but on 30<sup>th</sup> April 2014 he was terminated on medical grounds. The Claimant was offered kshs.37, 037.00 which he found too low for the terminal dues owing after long service. That upon retirement on medical grounds the Claimant is entitled to full payment of terminal dues and benefits accrued in the entire period worked.

3. The claims are for;

- i. *2 ½ months' salary in lieu of notice* = 17,325
- as per General order 17,325 x 2 ½* = 43,313
- ii. *Prorate leave for 4 months 4/12 x 30 = 9.9 days = 10 days*
- Daily rate = 666 x 10 = 6,660*
- iii. *Co-operative shares* = 7,000.00
- iv. *Retirement benefits/service gratuity at the rate of 28*
- days for each completed year = 17,325 / 26 = 666*
- = 666 x 28 = 18,648 x 5* = 93,240
- v. *Certificate of service*
- Total amount due* = Kshs.150, 213**

4. The Claimant is also seeking costs of the suit and interest on the amounts due.

5. In evidence to support his claim, the Claimant testified that upon his employment by the Respondent he worked diligently until 30<sup>th</sup> April 2014 when he was stopped on the grounds that he was unwell. On 26<sup>th</sup> April 2014 he was given permission by the senior supervisor to go to Mbagathi Hospital where he was treated. He had chest problems with TB and had to be on medication for a year. He was given a letter to take to the respondent, which letter said that he had to remain under medication for a year while on rest. The Respondent officer advised the Claimant to go home and wait to be called back but at 2pm he was called and told to read a letter with his terminal dues which in his view was not adequate. On 30<sup>th</sup> April 2014 he was issued with a termination letter but did not sign it as he did not agree with the contents as the Respondent stated that the letter from mbagathi Hospital was self-explanatory and that the Claimant was sick, should be given his dues. The Claimant then demanded for payment of all his terminal dues but the Respondent has failed to pay.

6. On cross-examination the Claimant testified that when he submitted his medical report to the Respondent it indicated that he was supposed to rest for a year. He needed treatment for a year. The Doctor also reported that the Claimant should have retired with immediate effect. That on getting this report, the Respondent told the Claimant to go home and wait for their call as the doctor had recommended that he should stop work. The Respondent then offered kshs.37, 000.00 as terminal dues which was not correct. This amount was sent to the bank account and his wife withdrew the money. That he had not expected such an amount in his account and he only realised later after the wife had withdrawn it.

7. The Claimant also testified that there was a CBA [Collective Bargaining Agreement] that stated he was entitled to be paid 2 ½ months' notice under retirement on medical grounds but does not have such CBA. The Respondent computed dues at Kshs.37, 037.00 and posted to his account.

## **Defence**

9. In response, the Respondent state that the Claimant employed in their packing section and was later deployed to the stores department. The Claimant left work on 24<sup>th</sup> April 2014 for being unwell and was admitted at Mbagathi Hospital. He then called the Respondent and said that he wished to be paid his terminal dues to enable him pay for his medical expenses. Such dues were computed and posted to the claimant's account at Ksh.37, 037.00 and an addition was his full April 2014 salary, leave for 3 months and co-operative shares. The Claimant voluntarily left employment without giving notice. That there are no dues owing to the Claimant and the claim should be dismissed.

10. In evidence, the Respondent called Paul Madara Ashioya, the Administrator and Accountant. He testified that the Claimant was employed by the Respondent from 2009 to 2014, on 24<sup>th</sup> April 2014 he got sick and was granted sick off. He brought back a medical report directing the Respondent to retire the Claimant on medical grounds. The Respondent did not terminate the claimant, the claimant's doctor recommended retirement on medical grounds with immediate effect and the Respondent had to comply. All terminal dues were paid;

- a. *Service pay at Kshs.33, 857.00*
- b. *Leave at Kshs.2, 357.00*
- c. *Co-operative shares Kshs.7, 000.000*

*Total Kshs.43, 214.00*

*Less tax Kshs.37, 037.00*

11. These amounts were paid by a bank deposit as the Claimant had already been granted retirement and not at work. The Respondent does not owe the Claimant any other dues. There is no provision for notice at 2 ½ months. When the Respondent got the doctor's letter there was no option for notice. The Claimant paid for his own medical bills. The Respondent did not contribute to the medical condition of the claimant. It was unfortunate that he got sick. The Claimant was not aware of the CBA and he was not

aware that his own doctor had recommended a retirement and hence his termination of employment. His doctor contributed to the termination and not the respondent.

12. Upon cross-examination, the witness testified that there was a CBA in force but the Claimant was not terminated under clause 7 or 25 on termination and retirement benefits, but in accordance with his doctor's recommendation. The Claimant chose his doctor. There was no notice required under the recommendation as it was directing his immediate retirement on medical grounds.

### **Submissions**

13. The Claimant submitted that the amount paid in terminal dues at Kshs.37, 037.00 is too low and does not constitute the full terminal dues for the years worked. Employment is not disputed to have been between 2009 to 2014 a period of 5 years the last salary at kshs.12, 581.00. upon retirement of medical grounds the Claimant was entitled to 2 ½ months' notice pay which amounts to Kshs.43,313.00; prorated leave for 4 months at kshs.6,660.00; co-operative shares at Kshs.7,000.00; and service gratuity at 93,240.00.

14. The Respondent submitted that the letter of termination submitted by the Claimant is not authentic to be relied upon as it is not signed similar to a sale agreement that the court found not authentic as it had not been signed in the case of **Agricultural Finance Co-operative & Another versus Julia Muthanje Joseph [2013] eKLR**. The Claimant left work voluntarily and was not retired by the respondent. To support the respondents' case is the claimants' doctor report dated 24<sup>th</sup> April 2014 that directed the Respondent to retire the Claimant with immediate effect. This did not give the Respondent notice of retirement. The medical report was presented to the Respondent by the claimant's representative and the amount of Kshs.37, 037.00 was paid on 30<sup>th</sup> April 2014. A further sum of kshs.6, 177.00 was paid to the Claimant via cheque on 25<sup>th</sup> May 2014.

15. The Respondent also submitted that the claim for 4 months leave is not supported by any evidence. The Respondent has already paid prorated leave of 3 months and nothing more is due to the claimant. All co-operative shares due were paid. The service gratuity was paid at kshs.33, 857.00 and the claim for Kshs.93, 240.00 does not arise. In any case, for the 5 years served, 23 days for each year should be kshs.48, 227.00. Less what the Claimant was already paid, the only balance is kshs.14, 370.00. The computations made by the Claimant are erroneous as his basis is that he earned a salary of Kshs.17, 325.00 which is not the case. The claim should therefore be dismissed with costs.

### **Determination**

16. As noted above, the Claimant does not set out the issue in dispute in his pleadings. Such a matter should be addressed as per the Rules of the Court, see Rule 4(e). This is important to state, as with it, the other party is able to respond appropriately and the court is certain as to what is in dispute so as to give appropriate reliefs. What is set out in the claim is the payment of terminal dues that the Claimant has contested were not computed properly.

17. There is no letter of termination setting out the reason or reasons for the cessation of employment by the claimant. The letter dated 30<sup>th</sup> April 2014 is for the computation of terminal dues, amounting to Kshs.37, 037.00. This letter is however not signed by the Respondent and was contested as not being authentic. However, the evidence of the parties is clear.

18. The Claimant testified that he developed chest problems and went to Mbagathi Hospital where he was given a medical report to take to his employer with a recommendation that he should be on medication for a year and also take a rest for the year. The Claimant was then given a letter with his final dues, he did not agree with the computation and therefore refused to sign it. I take it then this is the letter that the Respondent has contested as having not been signed. It is however clear that the contents of this letter is as stated by the Claimant and confirmed by Paul Ashioya in his evidence for the respondent.

19. There is therefore no letter of termination issued to the claimant. What led to his exit was his doctor letter directing that he should take medication and rest for a year. The Claimant emphasised that he was retired on medical grounds. That his doctor said he should stop working with immediate effect. That the Respondent failed to pay his for all his dues for the time worked.

20. There is an extract from a CBA attached to the memorandum of claim. There is evidence as to what duration/years the CBA extract covers. Page 12 of the CBA extract is Clause 27 which state that;

*Duration and Effective Date:*

*The whole of this Agreement shall be effective from 1<sup>st</sup> July 2010 and shall remain in force for a period of 2 years.*

21. I take it then that this CBA remained applicable for the duration ending 30<sup>th</sup> June 2012. This CBA was to remain in force until a further amendment was made. Without any other CBA submitted to the court, this shall suffice.

22. Under the CBA set out above, clause 25 allowed retirement. Clause 25(b) contemplates retirement of an employee due to ill-health where a doctor's report is required. Upon such submission of a medical certificate by the employee, the employer such as the Respondent has the duty to send such an employee to their doctor for further confirmation. In this case, and on the evidence of the Respondent witness Paul Ashioya, upon the Claimant submission of his doctor's report, which recommended immediate retirement, the Respondent did not exercise its right under clause 25(b) of the CBA. They computed the terminal dues and proceeded to pay.

23. Under clause 25 of the CBA, the dues antecedent to the employee are set out under sub-clause (c) thus

- i. *Required notice*
- ii. *Retirement benefits at the rate of twenty eight (28) days' pay for each completed year of service*
- iii. *Any other remuneration.*

24. The duration required for termination notice under clause 25 is not stipulated. This can be found at clause 7 of the CBA thus;

*Employees with more than 5 years' service will qualify for 2 ½ months' notice or wages in lieu.  
Employees with over 10 years will qualify for 3 months' notice or wages in lieu.*

25. The bands therefore set are for different notice periods and the due payable where notice is not given. Employees with service of less than 5 years have a one (1) month notice or payment in lieu; employee with over 5 years have 2 ½ months' notice or payment in lieu; and those with over 10 years have 3 month notice or payment in lieu.

26. The benefits of the applicable CBA are not contested by the respondent.

27. In this case therefore, the fact of the Claimant employment on 12<sup>th</sup> January 2009 being clear and the end date being 30<sup>th</sup> April 2014 make it a period of over 5 years of service. The circumstances leading to the claimant's retirement arise from ill-health. The Respondent did not contest such retirement which should have prompted them to send the Claimant to their doctor so as to confirm the urgent need for the Claimant to retire on such grounds. To therefore require the Claimant to issue notice before taking retirement on ill-health and yet fail to account for the responsibility bestowed upon the employer under the CBA is an effort to deny the Claimant his terminal dues under the applicable CBA.

28. This is a court of justice and the rules of equity apply. Save for the ill-health, the Claimant would have remained at work. Where the Respondent doubted the report from the claimant's doctor on the need

to immediately retire him, such did not take away the respondent's rights under the CBA to refer him to their doctor for confirmation of the same. The immediate payment of the terminal dues upon presentation of the medical report is evidence that the Respondent did not wish to exercise their right. This should not be visited upon the Claimant so as to deny him the notice pay due as a result. Such notice is contemplated under the CBA and Paul Ashioya for the Respondent confirmed in his evidence that indeed there existed a CBA. Without any other CBA being produced as a follow up to the CBA produced by the Claimant, I find the notice pay due to the Claimant is for 2 ½ months as he served for a period of over 5 years.

29. I take note that the Respondent in an effort to make good the situation have since paid some terminal dues which is inclusive of gratuity at 22 days for each completed year. Such is not contemplated under clause 25, rather a retirement benefit at 28 days for each completed year of service. I note that other remunerations, benefits the Claimant was entitled to have since been paid – co-operative shares and leave prorated for 3 months which is what is due to the Claimant at 6 days' pay.

**Dues payable**

30. On the last salary paid at Kshs. 12,581.00, the notice pay due to the Claimant is at 2 ½ months. The Claimant is awarded kshs.31, 452.50 as notice pay.

31. Leave due has already been paid. This is declined.

32. The retirement benefits are at 28 days' pay for each year served. On the salary of Kshs. 12,581.00, for 28 days' pay amounts to 11,742 and for the 5 full years all being Kshs.58, 711.30. As noted above, the Claimant was paid service pay that is not contemplated under retirement package, which has retirement benefit at a higher rate. To therefore make the Respondent pay under each head would be a double pay for service benefit. Upon the Claimant being paid Kshs.28, 160.00 what is due Kshs.30, 551.30.

33. Co-operative shared though claimed have since been paid. This is declined here.

34. A Certificate of Service is due under section 51 of the Employment Act. It should accompany the termination letter or notice. Such notice was not issued to the claimant. However such certificate is a right. It should be issued.

**Judgement is therefore entered for the Claimant against the Respondent in the following terms;**

- a. **Notice pay awarded at Kshs.31,452.50;**
- b. **Retirement benefit awarded at kshs.30,551.30;**
- c. **The Respondent to issue the Claimant with a Certificate of Service; and**
- d. **Costs granted at 50%.**

**Orders accordingly.**

Delivered in open court at Nairobi this 25<sup>th</sup> day of February 2016.

**M. Mbaru**

**JUDGE**

In the presence of

Court Assistant: Lilian Njenga

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