



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1567 OF 2013

GEORGE MBITHI MUKWEKWE.....CLAIMANT

VERSUS

PEGRUME LTD.....RESPONDENT

JUDGEMENT

1. The memorandum of claim was filed on 27th September 2013. The respondents entered appearance on 16th October 2013. No defence was filed. On 29th September 2015 the matter came up in Court for hearing, the respondents were absent despite service and Affidavit of Service sworn by James Mbuvi filed on 28th September 2015. The Claimant withdrew prayer (b) of his claims – a declaration that by terminating the services of the Claimant the Respondent acted illegally and in contravention of the relevant labour laws.
2. The Claimant filed written submissions with regard to other issues in the memorandum of claim.
3. The claim is that from 1st March 1991 to 21st May 2012 the Claimant was an employee of the Respondent working as a telephone technician at a monthly salary of Kshs.35, 405.00. Parties agreed that termination of the employment contract would require one month notice or payment in lieu. The Claimant was terminated without notice in May 2012 and no reasons were given.
4. The claim is for accumulated salary arrears and terminal dues amounting to kshs.452, 101.00 being for salary arrears from June 2011 to 30th April 2012; unpaid leave for 2012; and severance pay for 22 years.
5. Upon the withdrawal of the claim for unfair termination, the Claimant submitted that upon employment by the Respondent he was terminated without notice or being given reason. His net salary was Kshs.30, 208.00 as at June 2011 and upon termination there were salary arrears not paid amounting to Kshs.200, 368.00 for June 2011 to April 2012. The Claimant was also entitled to leave for 2012 that was not taken and not paid for. That the reason given was that there was change of business for different products which needed new skills. Such translated to redundancy under the provisions of section 40 of the Employment Act and therefore, the Respondent failed to comply with the law and severance pay is due. The Claimant served for 22 years and is entitled to 15 days' pay for each year all being Kshs.332, 288.00 as severance pay.
6. The claim are for;
 - a. Salary arrears Kshs.200,368.00
 - b. Leave for 2012 kshs.30,208.00

c. Severance pay Kshs.332,288.00

7. The Claimant is also seeking costs of the suit.

Determination

8. As set out above, on 29th September 2015, the Claimant withdrew his prayer No. (b) And opted not to call any evidence and filed written submissions. Such withdrawal of payer (b) is reiterated in the submission. This payer was seeking for;

A declaration that by terminating the services of the Claimant the Respondent acted illegally and in contravention of the relevant labour laws.

9. With such withdrawal of this part of the claim, the Claimant compromised a major part of his claims. With it went the bulk of what may have been awarded in remedies under any provisions of the law that the Claimant has claimed over his termination. This is so because, the issues in dispute are listed as;

- a. Unfair/unlawful termination of employment
- b. Accumulated unpaid salaries
- c. Terminal dues

10. Therefore, upon the withdrawal of prayer (b), the issue in dispute with regard to unfair/unlawful termination of employment were compromised. A further compromise to the claim was the option taken by the Claimant that he did not wish to tender any evidence, rather file written submissions. at the end of the day, what remained of the entire claim was the terminal dues claimed and despite the suit not being defended, such can only be granted upon prove.

11. The claims for terminal dues relate to;

- a. notice pay;
- b. Accumulated salary arrears from June 2011 to April 2012; and
- c. Severance pay.

12. The letter of termination dated 21st May 2012, the reason for termination is given as;

... due to rapid changes in the industry the company has decided to change its line of business to different products, these products need new skill sets in the field of data communication.

The company will therefore not be able to justify or sustain your employment. In keeping with your employment you are hereby given one (1) month notice.

The company has decided to release you forthwith on full pay until the end of June 23rd. ...

13. It is therefore apparent that the Claimant was given notice before termination and his last day with the Respondent was 23rd June 2012 by which date his terminal dues were to be paid. Such terminal dues are not indicated. In the absence of any defence, the Court is denied such evidence. However, notice was given and the Claimant cannot claim payment in lieu of such notice. Section 35 and 40, both require issuance of the requisite notice. With the compromises above, I take the Respondent had complied with the issuance of notice to the Claimant as noted in the letter of termination dated 21st May 2012. Such will not be awarded.

14. The claim for accumulated salary arrears is on the basis that from June 2011 to April 2012 there were salary arrears. The pay slips attached as annexures to the memorandum of claim do not indicate which month or year they relate to. The pay slips indicate that the Claimant had a gross pay of kshs.35,

405.00. In the submissions, the Claimant has not set out as to how the salary arrears arose. A sum of Kshs.200, 368.00 is set out, there is an annexure marked "GMM 3" with various figures but their relationship to the claim for salary arrears are not set out. It is not clear how such an amount of kshs.200, 368.00 is arrived at. The Claimant does not submit on the link to the claim and his submissions. Such is left bare. Annexure "GMM 3" is stamped by the Respondent and though not signed, the relationship between the claim of Kshs.200, 368.00 and the figures set out therein is the duty of the Claimant to establish. The Court is not satisfied, even in the best effort to find so, that the Claimant has any claim for salary arrears.

15. Any termination arising out of a redundancy situation that has arisen due to no fault of the employee must comply with the provisions of section 40 of the Employment Act. The letter of termination issued to the Claimant was on the basis that the Respondent business had changed and the services of the Claimant were no longer required as they had become obsolete. Upon such a situation, any affected employee is entitled to a severance pay.

16. The letter of appointment is dated 1st March 1991 and termination was effective on 23rd June 2012. The Claimant had then served for 21 full years. He is entitled to 15 days' pay for each complete year for a severance pay. On a gross pay of Kshs.35, 405.00 per month for 15 days each year and for the 21 years the Claimant is entitled to Kshs.371, 752.50. Such is due.

In conclusion, on the pleadings and submissions made, judgement is hereby entered for the Claimant against the Respondent with an award of kshs.371, 752.00 as severance pay. Costs are also awarded.

Orders accordingly.

Delivered in open Court at Nairobi this 2nd day of March 2016.

M. Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

.....

.....