



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 907 OF 2010

BENSON P.N.MURUGAMI.....CLAIMANT

VERSUS

COMPRITE KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Tuesday, 19th April, 2016)

JUDGMENT

The statement of claim was filed on 13.08.2010 and a response to the claim on 13.09.2010. The claimant's suit is based upon the amended memorandum of claim filed on 24.10.2012 filed through Nyabena Nyakundi & Company Advocates. The claimant has prayed for an award and orders against the respondent for:

- a. A declaration that the claimant's termination was illegal, unlawful, null and void.
- b. A declaration that the claimant's employment was terminated wrongfully.
- c. The claimant to be paid in full terminal benefits as set out under paragraph 18 herein above being gratuity for 31 years of service being Kshs.1, 550,000.00; 12 months compensation of Kshs. 601, 920.00; pay in lieu of annual leave for 2008 being Kshs.35, 112.00; pay for overtime Kshs. 1, 200, 000.00; 3 months pay in lieu of termination notice Kshs. 150, 480.00; 10 days holiday for two Kshs. 300,000.00; certificate of service; and the total claim being Kshs. 3, 843, 473.00.
- d. The honourable court does issue orders as it may deem fit and just to grant.
- e. Interest on the above at court rates.

The amended response to the memorandum of claim was filed on 27.11.2012 through Rastam Hira & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

The court invited both parties for hearing on 18.04.2016 as per the notice of hearing issued by the deputy registrar dated 31.03.2016. The respondent and the respondent's advocate failed to attend court and the hearing proceeded ex-parte. The claimant relied on the documents on record and testified to support his case.

The parties are not in dispute that the respondent employed the claimant on probationary terms of service as a computer programme trainee by the letter dated 1977. The claimant was confirmed into permanent and pensionable service and was promoted through the ranks to the position of Bureau Manager as at 31.12.2008 when the claimant's service with the respondent came to be terminated.

The **1st issue** for determination is whether the termination of the claimant's employment was unfair. The claimant's testimony is that on 19.12.2008 the respondent held an annual staff party. The respondent's

managing director one Salim A. Talib asked the claimant to take a seat next to the managing director (the said Talib). In the process, the managing director informed the claimant that the claimant would retire effective January 2009. The claimant demanded a termination letter. No termination letter was given until sometimes in January 2009 when the claimant was locked outside his station of deployment. Later the respondent issued the letter dated 14.01.2009 conveying that as per the discussion in December 2008, the claimant had informed the respondent that he wished to retire at the end of 2008 and that the letter served as a formal communication to that effect.

There is no evidence that the claimant offered and requested to retire at the end of 2008. In such circumstances, the court returns that there was no agreement that the claimant would retire effective January 2009. The court finds that the respondent's unilateral decision to retire the claimant from employment upon a fictitious request by the claimant to retire was not a genuine and valid reason to terminate the employment. The court finds that the reason for termination was not therefore valid and genuine as at the time of the retirement and, the retirement amounted to unfair termination. The court returns that the termination of the employment was unfair under section 43 of the Employment Act, 2007 as there was no valid reason for termination.

The **2nd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

- a. The claimant has prayed for maximum compensation of **Kshs.601, 920.00** under section 49(1) (c) of the Employment Act, 2001. By the letter of 14.01.2009 the respondent has confirmed that the claimant was the longest serving employee, he served with a clean record from June 1977 to 31.12.2008, he was honest in all work situations, and the respondent was willing to provide all information on the claimant's service. The court has considered the long service of over 31 years, the willingness and desire of the claimant to continue in employment, and the clean record of service that was exemplary. The court has considered that the claimant did not contribute to the termination of his employment by way of the offending retirement decision by the respondent. The court returns that the claimant is entitled to the **Kshs.601, 920.00** as prayed for.
- b. The claimant has prayed for gratuity at one month pay for each of the 31 years of service being Kshs. 1, 554, 960.00. The claimant confirmed that he was a member of the NSSF and was also a member of the contributory pension scheme run by the respondent for its employees. As per section 35(6) (d) of the Employment Act, 2007 the court returns that the claimant was not entitled to gratuity or service pay in view of the NSSF and other pension provided by the respondent for the claimant's benefit.
- c. The court returns that the claimant is entitled to **Kshs. 50, 160.00** being pay in lieu of the annual leave for 2008 and in line with the claimant's evidence that leave for 2008 was due but not yet taken due to abrupt termination in December 2008.
- d. The claimant prays for overtime for Kshs.1,200,000.00 being pay for overtime served on continuous work day and night for two months when the respondent worked on the Kenya Airways public share offer and the respondent did not allow the claimant to leave the work place due to need for his unbroken availability for consultations. The claimant further testified that he worked throughout the day on some Saturdays and public holidays and was not paid. The evidence for the overtime claims was the check-in and check-out register which was in the respondent's possession and having been served with the notice to produce, the respondent had failed to reply or file the same in court. The letter of 4.03.1978 designated the claimant's working hours as Monday to Friday 8.15am to 12.30pm then 2.00pm to 5.00pm and Saturdays 8.15am to 11.45am. The court has considered the claimant's evidence and on a balance of probability, the court returns that the claimant has established that he worked overtime as claimed and he is awarded **Kshs.1, 200,000.00** as prayed for.
- e. The claimant testified that whenever the company performed well he was given a holiday at a costal hotel together with his adored spouse. He was actively involved in such trips because he was responsible of keeping and surrendering receipts to the respondent's office and the cost of a full board had last been Kshs.30, 000.00 for two per day during off season. It was the claimant's case that the respondent, in line with that tradition, offered to him, as per the letter dated 14.01.2009, a 10 days holiday in Mombasa Neptune Hotel but which the respondent had failed to

honour despite the claimant's request that the same be honoured. The court has considered the evidence and finds that the claimant is entitled to the **Kshs. 300, 000.00** for 10 days' holiday during off season for the claimant and his dear wife and as was prayed for.

- f. As the letter dated 14.01.2009 meets all the requirements for a certificate of service, the court returns that the prayer for a certificate of service will fail as the respondent has already complied.
- g. The claim for three months pay of **Kshs. 150, 480.00** in lieu of the termination notice is based on the relevant contractual term and the court finds that no termination notice was issued and the claimant is entitled as prayed for.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination of the claimant's employment by the respondent was illegal, unfair and unlawful.
2. The respondent to pay the claimant **Kshs.2, 302, 560.00** by 01.07.2016 in default interest at court rates to be payable thereon from the date of this judgment till full payment.
3. The respondent to pay costs of the suit.
4. The claimant to serve this judgment upon the respondent and the respondent's advocates by close of Wednesday 20.04.2016.

Signed, dated and delivered in court at **Nairobi** this **Tuesday, 19th April, 2016.**

BYRAM ONGAYA

JUDGE