



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.24 OF 2014

(Before D. K. N. Marete)

JOSEPH KIPCHIRCHIR KETER.....CLAIMANT

VERSUS

NANDI TEA ESTATES LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Statement of Claim dated 24th September, 2013. The issues in dispute are cited as;

1. *In the matter of complainants and jurisdiction on cases of dispute between employers and employees an in the matter of employment termination (Section 87, 47 and 49 of the Employment Act No.11 of 2007 Laws of Kenya)*
2. *In the matter of violation of fundamental rights and freedoms under the bill of rights Constitution of Kenya.,2010.*

The respondent vide a Response to the Claim dated 16th October, 2013 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on 6th March, 2013 he was employed by the respondent as a casual worker but subsequently on 2nd November, 2003 incorporated as a permanent employee in the position of a watchman. He earned a salary of Kshs. 10,800.00 and a daily overtime of three hours at Kshs. 66 per hour. He served the respondent dedicatedly, unsavory until November when he was taken ill for prolonged chronic allergy that affected his work. Subsequently, he was retired on medical grounds with effect from 14th September, 2011 with a

promise of payment of all terminal dues per the Collective Bargaining Agreement. This was also to include his gratuity. This, however, was not made good and therefore this suit.

It is the claimant's contention this denial of compensation by the respondent was unlawful and unprocedural and therefore this claim for damages. Again, several attempts at a resolution of the dispute by the claimant were made to the respondent that these were ignored by the respondent. This also applies to a demand and notice of intervention to sue made to the respondent. He prays for;

1. *One (1) month salary in lieu of Notice Kshs.10,800, overtime for 3 hours per day at the rate of*

Kshs.66/= per hour.

2. Compensation and/or General damages for the unpaid terminal dues and gratuity.
3. Leave allowance for the year 2011.
4. Costs and interest.
5. Any other relief this Honourable court may deem fit to grant.

The respondent in opposition to the claim denies that the claimant was a permanent employee. She also denies the contention that the claimant was retired on medical grounds or even promised payment of gratuity on terminal dues per the Collective Bargaining Agreement as he was not unionised. Again, clause 32 of the Collective Bargaining Agreement is not applicable as he had not done ten (10) years in employment.

4. The Respondent vehemently denies the contents of paragraph 5 and 6 of the statement claim and more particularly the respondent denies:-

(a) That, the claimant was retired on medical grounds.

(b) That, the claimant was promised to be paid gratuity or terminal dues as per the CBA because the claimant was not a member.

(c) The Respondent has never promised the claimant payment of any gratuity or terminal dues as alleged in the claim.

(d) That, under CBA (2010/2011) the claimant was not entitled to Gratuity as per Clause 32 because he had not completed 10 years of service, neither was he retired on medical grounds.

(e) That, the Respondent denies that the claimant is entitled to any compensation or damages of any kind and puts the claimant to strict proof.

The respondents further case is that the claimant resigned voluntarily from employment vide a letter of resignation dated 7th September, 2011 which was passed to the Divisional Manager.

“That, the Respondent's resignation letter dated 7th September, 2011 was handed over and address (sic) to the Divisional Manager Taito Division A.F. Akello on 8th September, 2011.”

He was paid all terminal dues on resignation and all other and later claims are a fraud.

5. IN RESPONSE to the entire claim, the Respondent states:-

a) That the claimant voluntarily resigned from employment.

b) That, the Respondent's resignation letter dated 7th September, 2011 was handed over and address to the Divisional Manager Taito Division A.F. Akello on 8th September, 2011.

c) That, the claimant was paid all his dues after resignation.

d) That, letter purporting to retire the claimant on medical grounds by F.A. Akello – Divisional Manager Taito is not dated and the signature is forged and the matter is

under police investigation at Nandi Hills Police Station.

e) That, the claimant was not terminated from employment. He resigned.

f) The claimant resigned on 8th September, 2011 and the medical reports were made and signed in 2012 and 2013 long after the claimant had resigned from employment with the respondent.

The claimant reiterates his case vide a Reply to the Respondents Response to the claim dated 15th November, 2013 where he emphasizes his claim for compensation as prayed.

The issues for determination therefore are;

1. Whether the claimant resigned or was retired on medical grounds?
2. Whether the claimant was retired on medical grounds?
3. Whether the claimant was due payment of his terminal dues and gratuity?
4. Who bears the costs of this suit?

The claimant in his written submissions dated 15th February, 2016 he show cases and reiterates his claim. She cites the following issues for determination and analyses and answers them in his favour.

1. **NAIROBI ICC NO. 912 OF 2013 Sheila Caroline Ciiru -vs- The Sarora Stanley.** *In this case the claimant's services were terminated by the respondent on medical grounds. She thus sought pay for the days she worked in March, retirement gratuity, 3 months in lieu of notice, annual leave for 2010, leave travelling allowance, compensation for occupational injury, 12 months compensation for unfair termination and general damages. The court entered judgment for the claimant for leave allowance, gratuity and costs of the suit.*
2. **NAIROBI ICC NO.871 OF 2012 Elijah Kipkoros Tanui -vs- Ngara optician t/a Bright Eyes Limited.** *In this case the claimant retired on medical grounds. He sought for the respondent to pay him his terminal dues for the years worked (gratuity, outstanding annual leave, unremitted NSSF contributions and any other relief in the circumstances.) The court entered judgment for the plaintiff, unremitted NSSF contributions, outstanding annual leave pay and costs.*

Gratuity was not granted for reason that under Section 35 (5) of the Employment Act service pay is payable only to employees who are not covered under the different social security mechanisms elaborated under Section 35 (6) of the said Act.

The respondent, in her written submissions also reiterates his defence as per the reply to claim. She cites the following as issues for determination in the circumstances and most of which she answers in the negative. These are;

1. *Was the claimant retired on medical grounds and if so, is letter dated 14th September, 2011 on retirement valid?*
2. *Was the claimant terminated?*
3. *Is the claimant entitled to gratuity?*
4. *How long did the claimant work for the company?*
5. *Does the law allow the claimant to be paid gratuity?*

6. *Were letters on retirement on medical grounds issued before or after the claimant had resigned.*

She submits the CBA and a letter of resignation dated 7th November, 2011 in support of her defence. This is besides a History card.

The respondent further enclosed the following documents;

1. *Resignation letter dated 7th September, 2011.*
2. *Witness statement of Defence by TAITO DIVISION MANAGER, MR. AKELLO denying signing the letter on retirement dated 14th September, 2011.*
3. *Witness Statement of Defence by the estate accountant MR. BERNARD LANGAT.*
4. *MEDICAL REPORT dated 13th December, 2012 from the Medical Board -MOI TEACHING AND REFERRAL HOSPITAL issued well after the claimant had resigned.*
5. *UNDATED letter from Nandi Hills Hospital retirement on medical grounds.*
6. *EMPLOYMENT HISTORY CARD of claimant showing that he was employed on 1st November, 2003 and resigned on voluntarily basis on 7th September, 2011.*
7. *Copy of Collective Bargaining Agreement for the year 2010/2012 showing that the claimant was not entitled to Gratuity by virtue of Clause 32 (a) of C.B.A.*
8. *DISCHARGE SUMMARY from Nandi Hills District Hospital dated 20th August, 2012 was issued when the claimant had resigned from Employment as a watchman at Nandi Tea Estate and was issued with a Certificate of Service dated 7th October, 2011.*

The 1st issue for determination is whether the claimant resigned or was retired from employment on medical grounds. It is the claimant's case that he was retired on medical grounds which position is denied by the respondent. The claimant in annexure to the claim annexes proceedings of medical board, particulars of medical history, a letter of retirement on medical ground, various pay advice slips and NHIF medical card in support of his case. He also reiterates his case and position in his written submissions dated 15th February, 2016.

The respondent in her defence and written submissions denies the claim and submits that the claimant resigned from employment on his own volition and therefore the futility of the claim. In a witness statement by Fredrick A. Amboga the Divisional Manager of the respondent reiterates this position.

“the plaintiff resigned from work on his own volition on 8th September, 2011. The proceeding of Medical Board at Moi Teaching and Referral was done on 29.11.012, a year later when he was no longer an employee. The letter from the Nandi Hills District Hospital is a form used to claim NSSF and I indicated early that he resigned.

On the Retirement letter from Nandi Tea Estates Ltd purported to have been written to him by me, I can positively confirm that the letter is a

forgery. At no time has my signature resembled that. The name F.A.Akello does not appear in my letters in that format. I have never written any official letter without a date, month and year as shown on the said letter.

Termination on 22nd September is UNTRUE. He requested for unpaid (casual leave) w.e.f 7th September, 2011 to 30th September 2011. This was entered in the History card. On

8th September, 2011 be brought a resignation letter.”

She annexes a letter of resignation dated 7th September, 2011, a record of NSSF contributions and the date of stoppage besides an extract from the CBA indicating that the claimant would in any event not be due for payment of gratuity for not having put in ten (10) years of service as provided by paragraph 32 of the subsisting CBA.

The respondent further submits a case of fraud and forgery of the letter of retirement adduced by the claimant. This is the same for medical records adduced and annexed by the claimant in support of his claim.

The claimant does not attempt to controvert or in any manner rebut the evidence of contradiction of his case as submitted by the defence. He chooses to entirely remain mum on the subject but overtly reiterate his claim. Even his reply to the respondents response to claim and written submissions do not in any manner address this. These only restates his case.

This is a matter where the test of a balance of probabilities and preponderance of evidence clearly applies. This is because the cases of the parties cases tend to be ones of your word against mine. This court is minded to determine as to where, on a balance of probabilities and even preponderance of evidence this matter would flow. I find that this case tilts towards the defence and hold as such. The claim is therefore dismissed with costs to the respondent.

On such a finding, the other issues in dispute are relegated to the periphery and may not apply. That is all.

Delivered, dated and signed this 15th day of April 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Mwanguni instructed by Nyachiro Nyagaka & Company Advocates for the Claimant.
2. Mr. S.K. Kitur & Company Advocates for the Respondent.