



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 184 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

GEORGE NYANDIKO CLAIMANT

-Versus-

CHINA JIANGXI INTERNATIONAL KENYA LIMITED RESPONDENT

J U D G E M E N T

By his Memorandum of Claim dated and filed on 30th July, 2014 the Claimant avers that he was employed by the Respondent on or about 1st August, 2012 and worked until 1st April, 2014 when his services were unilaterally terminated by the Respondent, who refused to settle his terminal dues. He seeks payment of the following:-

- | | |
|---|------------------------|
| (a) Serevance pay [125.25 x 8 x 30 x 2]= | Kshs. 60,120.00 |
| (b) Unpaid Housing Allowance at 15% of the Basic pay
from August, 2012 to = 94,500/ =
1st April, 2014 i.e. 4,500 x 21 | Kshs. 94,500.00 |
| (c) Leave earned and not paid | Kshs. 30,000.00 |
| (d) Leave Allowance | Kshs. 15,000.00 |
| (e) Unlawful termination of employment being the
equivalent of 1 year's salary | Kshs.360,000.00 |
| (f) One month's salary in lieu of notice | Kshs. 30,000.00 |
| (g) Retained salary at Kshs.7,500 for 21 months | <u>Kshs.747,120.00</u> |

Total Kshs.747,120.00

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He further seeks costs and interest.

The Respondent filed a defence on 8th September, 2014 in which it admitted employing the Claimant at a salary of Shs.30,000 per month inclusive of house allowance and other benefits as per letter of appointment dated 25th July, 2012. The Respondent avers that the Claimant was engaged to work on a contract from Lake Victoria South Water Services Board which expired on 30th April, 2014, leading to termination of contracts for all employees including the Claimant. The Respondent avers that it offered to pay the Claimant one months salary in lieu of notice on ex-gratia basis as the Claimant was given notice for termination but the Claimant rejected the payment. The Respondent further avers that the Claimant also declined to collect his certificate of service.

The Respondent offers to pay severance pay at the rate of 15 days per year worked as provided under section 40(1) (g).

When the case came up for hearing the parties agreed to proceed by way of written submissions. They subsequently filed and exchanged submissions together with authorities they wished to rely upon.

Claimant's submissions

The Claimant submitted that he was never issued a letter of appointment and his salary was paid on hourly rate as is evident from the payroll which is attached to his claim as Appendix 7. He states that he was not paid house allowance hence his prayers.

Respondent's Submissions

The Respondent submitted that the contract for which the Claimant was engaged came to an end on 30th April, 2014 having commenced on 1st August, 2012. The Respondent submitted that the reason for termination of the Claimant's contract was the expiry of the contract hence it was a redundancy. It submitted that it is willing to pay severance pay at the legal rate of 15 days per year worked. The Respondent relied on section 35(b) and section 40 of the Employment Act. The Respondent also relied on the case of **FRANCIS MAINA v LEE CONSTRUCTION [2014]eKLR** and **LTUMASIA LESHORONO v JAHAZI MARINE LIMITED [2013]eKLR**. He further relied on **JOHN MWANGI KURIA & 165 OTHERS v ATTORNEY GENERAL & ANOTHER [2014] eKLR** and **MARY KATSAO NGOWA & 36 OTHERS KRYSTALLINE LIMITED [2015]eKLR**.

DETERMINATION

I have considered the pleadings and the submissions of the parties as well as the authorities cited. I have further considered the provisions of the law cited. The issues that arise for determination are the following:-

- 1) Whether the Claimant was unfairly terminated.
- 2) Whether the Claimant was declared redundant.
- 3) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly terminated

In his Memorandum of Claim the Claimant pleaded that he was "unilaterally terminated" on 1st April, 2014 by the Respondent. The letter of termination however stated that the termination was as a result of completion of the project in which the Claimant was working. The Respondent has pleaded that this was a redundancy.

I do not find any unfair termination as the Claimant has not contested the reason given in the termination notice.

This being the case, I do not find any evidence of unfair termination of employment.

Whether the Claimant was declared redundant;

Redundancy is defined under section 2 of the Employment Act as;

“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of

employment at the initiative of the employer, where the services of an

employee are superfluous and the practices commonly known as abolition of

office, job or occupation and loss of employment;

Section 40 provides for the procedure for redundancy, including terminal dues payable to an employee upon redundancy.

The Respondent having admitted that the termination of the Claimant's employment was a redundancy, the court does not need to make any further inquiry on the issue.

Whether the Claimant is entitled to the prayers sought;

The Claimant prayed for several remedies as already set out elsewhere in this judgement.

On the prayer for one months salary in lieu of notice, the court finds that the Claimant was given one months notice by letter dated 1st April, 2014 which is annexed as Claimant's appendix 8 to his claim. The letter notified him of termination of his employment on 30th April, 2014.

The court however notes that the Respondent offered to pay one months salary in lieu of notice on ex gratia basis and awards the Claimant the same as offered by the Respondent.

The Claimant prayed for unpaid house allowance. The Respondent filed a copy of the Claimant's letter of appointment which states that his Salary was Shs.30,000.00 inclusive of house allowances, taxes and stationary payments and benefits as per Kenyan Laws. The Claimant has denied the authenticity of the letter in his written submissions. The Claimant however did not file any reply to defence. Written submissions cannot be used to substitute evidence. Submissions can only be used to state legal positions. Having failed to deny the authenticity of the letter of appointment the court finds that the letter of appointment to be authentic and consequentially, that the Claimant is not entitled to house allowance as the same was included in his consolidated monthly salary.

The Claimant further prayed for terminal benefits at the rate of 30 days salary for each completed year worked. In the written submissions the Claimant seeks severance pay instead which is calculated as $125.25 \times 8 \times 30 \times 2$. I do not understand the basis of such calculation. According to section 40(1) (g) severance pay is calculated at 15 days salary per completed year of service. Having worked from 1st August 2012 to 30th April, 2014, the Claimant only worked for one complete year and I award him Shs.15,000 being 15 days salary for one completed year of service.

The Claimant also prayed for leave earned but not taken. The Claimant's letter of appointment provides for 21 days leave. The Respondent in its submissions stated that the Claimant has not adduced any evidence to support the claim.

According to section 10(7) and 74 it is the Responsibility of the employer to keep all employment records and produce them in any proceedings failing which it is the burden of the employer to prove such facts that should be contained in the employment records. Section 74(1) (f) specifically provides that a written record kept by an employer in respect of all employees shall contain particulars "*of an employees annual leave entitlement, days taken and days due....*" Having failed to produce the said records or to prove that the Claimant took all his earned leave for the period worked, I hold that such leave is due for the period

worked from 1st August 2012 to 30th April, 2014 at the rate of 1.75 days per month being 36.75 days leave which at a salary of Kshs.30,000.00 per month is shs.(30,000.30x36.75) - 36,750.

Leave allowance is not provided for by law or in the claimant's letter of appointment and no evidence was adduced to prove he is entitled to the same. The claim therefore fails. The prayer for payment of compensation equivalent to one years salary also fails as the Claimant has not proved that he was unfairly terminated.

Conclusion

In conclusion I find that the Claimant was declared redundant as admitted by the Respondent and award him the following:-

1) One months salary offered by the Respondent being	Shs.30,000
2) Severance pay at	Shs.15,000
3) Leave earned but not taken	<u>Shs.36,750</u>
Total	Shs.81,750

The Claimant will have only 50% of costs as the Respondent had offered to pay severance pay and pay in lieu of notice.

Judgement Dated signed and delivered this 26th day of May, 2016

MAUREEN ONYANGO

JUDGE