



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1762 OF 2013

YOBESH SIMEON NYAMARIKA.....CLAIMANT

VS

CHINA ROAD & BRIDGE CORPORATION (KENYA).....RESPONDENT

AWARD

Introduction

1. Yobesh Simeon Nyamarika was an employee of China Road & Bridge Corporation (Kenya). He brought this action by a Statement of Claim dated 30th October 2013, amended on 12th June 2014 and further amended on 9th October 2014.
2. The Respondent filed a Memorandum of Reply on 7th March 2014, additional documents on 8th May 2014 and a further bundle of documents on 26th June 2014.
3. At the hearing the Claimant testified on his own behalf and the Respondent called its Assistant Personnel Manager, Delila Wendi Amelilwa. Both parties filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent as a carpenter from 23rd September 2012 up to 16th July 2013 when he was terminated on grounds of redundancy. He was not issued with an appointment letter.
5. On 28th March 2013, the Claimant while in the ordinary course of his duties along the Southern bypass in Nairobi, fell from a bridge resulting to injury to his lower jaw and loss of four teeth.
6. The Claimant was treated at Nakuru Provincial General Hospital and Gibe Dental Centre at a cost of Kshs. 13,200 that the Respondent has failed to reimburse.
7. On 16th July 2013, the Claimant reported the accident at the Directorate of Occupational Safety and Health where he was issued with a claim form. The Claimant presented the claim form to the Respondent for completion but the Respondent declined and instead terminated the Claimant's employment.
8. The Claimant avers that the termination of his employment on the ground of redundancy was unlawful and was meant to avert settlement of the accident claim.

9. The Claimant states that in the course of his employment the Respondent paid him fluctuating salaries, the highest being for the month of May 2013 at Kshs. 27,712. He further states that the Respondent failed to pay him salary for the months of November 2012 and July 2013.

10. Additionally, the Claimant avers that the Respondent deducted union dues from his salary although he was not a member of any union.

11. The Claimant's claim is as follows:

a. Medical expenses.....	Kshs. 13,200
b. Salary for November 2012.....	19,300
c. Salary for July 2013.....	27,712
d. Leave pay.....	27,712.00
e. Unlawful deductions on account of union dues.....	3,163.00
f. Unremitted salaries.....	121,329.00
g. One month's salary in lieu of notice.....	27,712.00
h. Compensation for unlawful termination.....	332,604.00
i. Severance pay.....	115,476.67
j. Certificate of service	
k. Costs plus interest	

The Respondent's Case

12. In its Memorandum of Reply filed on 7th March 2014, the Respondent admits that the Claimant was in its employment as a carpenter from 23rd September 2012 to 16th July 2013 but denies that the Claimant's employment was unlawfully terminated.

13. The Respondent states that the Claimant's employment was governed by a Collective Bargaining Agreement signed between the Respondent and the Kenya Building, Construction, Timber and Furniture Industries Employees Union under which the Claimant was graded as a general tradesman. The Claimant's wages were payable based on the number of hours worked with a minimum of 8 hours a day. The Claimant was also paid a housing allowance on monthly basis.

14. The Respondent denies having received any report of the Claimant falling from a bridge while in the course of his duties nor receiving any claim form for completion. The occurrence of the accident is itself denied. The Claimant was however refunded medical expenses to the tune of Kshs. 10,250.

15. The Respondent pleads that the Claimant worked until July 2013 when he was declared redundant pursuant to the Respondent's administrative requirements. The Respondent's workload had reduced and the services of the Claimant were no longer required.

16. In response to the claim for unpaid salary, the Respondent states that the Claimant was paid his salary for the period worked. The salary fluctuated depending on the hours worked. Explaining the discrepancy between the salary figure reflected on the Claimant's payslip and the one on the bank statement, the Respondent states that the Claimant may have had loan arrangements on account of which he had authorised deductions

17. With regard to union dues, the Respondent states that it was obligated under Section 49(1) of the Labour Relations Act, to deduct agency fees from the Claimant who being unionisable, benefited from the Collective Bargaining Agreement negotiated between the Respondent and the relevant union.

18. It is the Respondent's case that in declaring the Claimant redundant it complied with the law.

Findings and Determination

19. There are three issues for determination in this case:

- a. The salary applicable to the Claimant for purposes of this claim;
- b. Whether the termination of the Claimant's employment was lawful and fair;
- c. Whether the Claimant is entitled to the remedies sought.

The Claimant's Salary

20. The Claimant's actual salary is in contest. He was not issued with a letter of appointment and the payroll presented by the Respondent gives varying figures on gross salary. The Respondent's explanation on the fluctuating salary is that the Claimant's salary was calculated on the basis of the hours worked. On his part, the Claimant asked the Court to adopt the highest figure of Kshs.27, 712 as his salary for purposes of this claim.

21. The Respondent's witness, Delila Wendi Amelilwa told the Court that the Claimant's monthly salary ranged from Kshs. 15,000 to 17,000. Section 20 of the Employment Act places the responsibility of preparing and providing an itemized pay statement on the employer.

22. From the evidence on record, the Claimant was a regular employee of the Respondent. He would therefore have been entitled to a fixed monthly salary made up of a basic salary and house allowance and if he worked for extra hours he would then be entitled to overtime compensation.

23. However, looking at the payroll produced by the Respondent, the Claimant's entire pay was calculated on the basis of actual hours worked. In my view, this method which is applicable to employees on piece work cannot be applied to a regular employee. That being the case, the Court adopts the figure of Kshs. 27,712 as the Claimant's salary for purposes of this claim.

The Termination

24. In its Memorandum of Reply filed on 7th March 2014, the Respondent states that the Claimant's employment was terminated on the ground of redundancy. However, the Respondent's Assistant Personnel Manager, Delila Wendi Amelilwa testified that the Claimant himself asked to be terminated. Further still, in the final submissions filed on behalf of the Respondent some misconduct is assigned to the Claimant.

25. Why then was the Claimant's employment terminated? From the Respondent's side it is difficult to tell. On the one hand, it is redundancy while on the other, it is misconduct. Redundancy and misconduct as grounds for termination of employment are miles apart. While redundancy happens through no fault of the employee, in cases of misconduct the employee is alleged to be at fault.

26. From the foregoing, the Court is inclined to believe the Claimant's testimony that the termination of his employment was aimed at forestalling his claim under the Work Injury Benefits Act. Since this claim is pending before another court I will say no more on this issue.

27. What is clear is that whether the Claimant's employment was terminated on account of redundancy or misconduct, the Respondent's action was in violation of Sections 41 and 43 of the Employment Act,

rendering the termination both substantively and procedurally unfair.

Remedies

28. In light of the foregoing findings I award the Claimant six (6) months' salary in compensation for unfair termination of employment. In making this award

I have taken into account the Claimant's length of service and the unlawful conduct of the Respondent as set out above which in my view amounts to an unfair labour practice. I further award the Claimant one (1) month's salary in lieu of notice.

29. With regard to the claim for unlawful deductions on account of union dues, the Respondent takes the position that since the Claimant benefitted from a Collective Bargaining Agreement negotiated between the Respondent and Kenya Building, Construction, Timber and Furniture Industries Employees Union, then agency fees was due from the Claimant to the Union.

30. Relying on a three Judge Bench decision of this Court in *Kenya Hotels and Allied Workers Union v Attorney General & 6 Others [2015] eKLR*, Counsel for the Respondent submitted that under Section 49(1) of the Labour Relations Act, a unionisable employee who enjoys the benefits of a Collective Bargaining Agreement negotiated by a trade union ought to pay agency fees to the union.

31. In advancing its argument however, the Respondent omitted an important requirement to the effect that levying of agency fees is grounded on a ministerial order granted to the relevant trade union. There being no evidence of such an order, this Court finds that the deduction of union dues from the Claimant's salary amounts to an unauthorized deduction and all the sums thus deducted are recoverable from the Respondent.

32. In the course of the trial, a curious phenomenon where the salary amounts reflected on the Claimant's pay slip differed with what eventually ended up in the Claimant's bank account emerged. Apart from a general statement that the Claimant has some loan obligations, the Respondent did not offer any evidence to explain this strange occurrence.

33. Employee wages are protected and an employer who allows the salary of an employee to somehow disappear without explanation must make amends. The claim for unremitted salaries therefore succeeds and is allowed.

34. In the absence of evidence of payment of the claimed salaries for November 2012 and July 2013, this claim must also succeed. I additionally allow the claim for prorata leave.

35. The Claims for medical refund and severance pay were however not proved and are dismissed.

36. Ultimately I make an award in favour of the Claimant in the following terms:

- a. 6 months' salary in compensation.....Kshs.166,272
- b. 1 month's salary in lieu of notice.....27,712
- c. Unlawful deductions on account of union dues.....3,163
- d. Unremitted salaries.....121,329
- e. Salary for November 2012.....19,300
- f. Salary for 16 days worked in July 2013 (27,712/30x16).....14,780
- g. Prorata leave pay for 8 months (27,712/30x1.75x8).....12,932

Total.....365,488

37. I direct the Respondent to reissue the Claimant's certificate of service in accordance with Section 51(1) of the Employment Act.

38. The Claimant will have the costs of this case.

39. The award amount will attract interest at court rates from the date of the award until payment in full.

40. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF JULY 2016

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JUDGE

Appearance:

Miss Mumbo for the Claimant

Mr. Makori for the Respondent