



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1006 OF 2013

PETER KIMUNYU.....CLAIMANT

VS

HIGHLANDS MINERAL WATER COMPANY LIMITED.....RESPONDENT

AWARD

Introduction

1. This action is brought by Peter Kimunyu against his former employer, Highlands Mineral Water Company Limited. The Claimant’s claim is contained in a Statement of Claim dated 2nd July and filed in Court on 3rd July 2013. The Respondent filed a Response on 21st August 2013 to which the Claimant responded on 30th August 2013.

2. At the hearing, the Claimant testified on his own behalf and the Respondent called its Head of Human Resources, Anthony Mwangi.

The Claimant’s Case

3. The Claimant was employed by the Respondent in the position of Sales & Marketing Manager at a monthly salary of Kshs. 140,000 plus medical allowance of Kshs. 5,715. The employment took effect on 11th January 2010 and the Claimant was confirmed in April 2010.

4. In November 2011, the Respondent terminated the Claimant’s employment without notice and without justification. The Claimant states that he was not given any reason for the termination nor was he given any opportunity to be heard prior to the termination.

5. The Claimant’s claim is as follows:

- a) A declaration that the termination of his employment was unfair
- b) Salary and medical allowance for November 2011.....Kshs. 145,715
- c) Medical allowance for January to April 2010.....22,860
- d) 8 weeks’ salary in lieu of notice.....280,000
- e) 12 months’ salary as compensation for unlawful termination....1,748,580

f) Certificate of service

g) Costs plus interest

The Respondent's Case

6. In its Response dated 19th August and filed in Court on 21st August 2013, the Respondent admits having employed the Claimant between 11th January 2010 and 30th November 2011 subject to a three (3) months' probation period. The Claimant was entitled to a monthly salary of Kshs. 140,000 plus a medical allowance payable after confirmation.

7. The Respondent states that in the course of his employment the Claimant became intoxicated thus impairing the performance of his duties. He had been warned severally.

8. The Respondent maintains that the termination of the Claimant's employment was lawful having been served with the 8 weeks' notice and being paid all his dues plus an ex gratia payment for 13 days for the month of December 2011.

Findings and Determination

9. There are two issues for determination in this cause:

- a) Whether the termination of the Claimant's employment was justifiable and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

10. The termination of the Claimant's employment was formalized by letter dated 18th October 2011 which states as follows:

"Dear Sir,

RE: TERMINATION OF EMPLOYMENT

We refer to the above and after considerable organizational review, the Management is notifying you that your services with the Company are no longer required; and as per the terms and condition (sic) of your letter of appointment, you are herewith given 8 weeks' notice of termination, effective from the date of this letter.

You are kindly asked to liaise with the accounts office for finalization of your dues on 30th November 2011. On receipt of this letter, kindly hand over accordingly to Mr. Francis Mwalili.

We wish to take this opportunity to wish you every success in your future endeavours.

Yours faithfully,

HIGHLANDS MINERAL WATER CO. LTD

ASHWIN K. PADIA

CEO"

11. From this letter, it would appear that the reason for the termination of the Claimant's employment was as a result of organizational review within the Respondent Company. This would fall under what is

commonly known as redundancy.

12. However, in its Response to the Claim and even in its final submissions, the Respondent blames the Claimant for misconduct. In ***Yobesh Simeon Nyamarika v China Road & Bridge Corporation (Kenya) (Cause No 1762 of 2013)*** I stated that redundancy and misconduct as reasons for termination of employment are miles apart because while redundancy happens through no fault of the employee in cases of misconduct, the employee is at fault.

13. The only thing I will add is that an employer who proffers the two reasons in the same cause is clearly on a fishing expedition and cannot be said to have established a valid reason for the termination as required under Section 43 of the Employment Act, 2007.

14. Additionally, even assuming either redundancy or misconduct was the reason for the termination, the Respondent made no attempt to follow the procedure set out either under Section 40 for redundancy or Section 41 for misconduct.

15. For these reasons, the Court finds that the termination of the Claimant's employment was substantively and procedurally unfair and the Claimant is entitled to compensation.

Remedies

16. In light of the foregoing findings I award the Claimant six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination process.

17. The Claimant claims medical allowance for January to April 2010 and the Respondent's defence is that the Claimant was not entitled to medical allowance during this period because he was on probation. The relevant part of the Claimant's letter of appointment dated 10th December 2009 states as follows:

"You will be entitled to a medical scheme both inpatient and outpatient."

18. Gauging from the Claimant's pay slips, it would appear that the medical scheme referred to in the letter of appointment was in the nature of a monthly medical allowance pegged at Kshs. 5,715. The only question is whether this benefit was deferred pending confirmation.

19. I have looked at the appointment and confirmation letters and find no such intention. As held by the Court of Appeal in ***National Bank v Pipe Plastic Samkolit (K) Limited [2001] eKLR*** it is not the responsibility of the Court to rewrite contracts between parties. The Court therefore finds that the Claimant was entitled to medical allowance from the date of appointment and his claim in this regard succeeds and is allowed.

21. I further find that the medical allowance formed part of the Claimant's regular monthly emoluments and incorporate it as part of his salary for purposes of this claim.

21. The Claimant told the Court that he was not paid his salary for November 2011 and the Respondent did not provide any documentary evidence to prove its assertion that this salary was paid. This claim therefore also succeeds and is allowed.

22. From the evidence adduced before the Court, the Claimant was given due notice of termination of his employment and is therefore not entitled to notice pay.

23. Finally I make an award in favour of the Claimant in the following terms:

a) 6 months' salary in compensation.....Kshs.874,290

b) Medical allowance for January to April 2010.....22,860

c) Salary for November 2011.....145,715

Total.....1,042,865

24. I further direct the Respondent to issue the Claimant with a certificate of service.

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

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

27. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF AUGUST 2016

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JUDGE

Appearance:

Mr. Githinji for the Claimant

Mr. Kariu for the Respondent