



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.1801 OF 2014**

**CHARLES KYALO MUTHINI.....CLAIMANT**

**VERSUS**

**NAIROBI CITY COUNTY**

**FORMER CITY COUNCIL OF NAIROBI .....RESPONDENT**

**JUDGEMENT**

1. The issues in dispute are the wrongful termination and failure to pay terminal dues.
2. The Claimant filed his claim on 14<sup>th</sup> October 2014. The Respondent filed defence on 26<sup>th</sup> January 2015. The Claimant was heard on his evidence on 1<sup>st</sup> December 2015. The Respondent did not call any witness. Parties agreed to file written submissions and the Respondent filed on 8<sup>th</sup> April 2016. The Claimant did not file written submissions.
3. The Claimant was employed by the Respondent on March 1981 and worked diligently until termination while earning kshs.55, 715.00 per month. Termination of contract was by notice of 30 days or payment in lieu thereof; he had leave of 21 days a year; service pay at 15 days per year, and earned pay for working on public holidays, overtime as work benefits.
4. While the Claimant was working in Kibera Estate extinguishing fire he fell from a house and was injured and sustained spinal injuries which forced him to undergo medical treatment when the Respondent terminated his employment without due cause or compensation or payment of terminal dues. He was therefore terminated on 31<sup>st</sup> December 2013 by retirement which was unfair and contrary to the law.
5. The Claimant is seeking;
  - a) *Compensation of 12 months' salary;*
  - b) *Sick leave pay at one month pay;*
  - c) *Sick leave at half pay for 12 months;*
  - d) *90 days' notice pay in notice;*
  - e) *495 days severance pay at 15 days each year; and*

*f) Costs of the suit.*

6. In evidence, the Claimant testified that upon employment by the Respondent in 1981 he was terminated on 31<sup>st</sup> December 2013 without due cause. He was a Fireman and was promoted to the position of Control Officer in 1997, then station Officer at the Fire Brigade Nairobi City County. At the time of termination he was a Fireman.

7. That while at work firefighting in Kibera he got injured in 1984. A house collapsed on the Claimant and injured his spine, back and head. He was taken to Kenyatta national Hospital unconscious and admitted for 3 weeks. He was transferred to Aga Khan Hospital for a week and then Kijabe Hospital for 2 weeks then Nairobi West Hospital. He was able to fundraise for treatment. The Claimant remained in employment of the Respondent as his salaries were paid. When not in hospital he reported to work.

8. On 31<sup>st</sup> December 2013 the Claimant was terminated by retirement on the reason that he was sick. There was no notice or hearing. In 2005 when he was promoted he was not paid his salary arrears. Other employees were paid.

9. The Claimant is seeking pay for injuries sustained while at work. He was not issued with notice before termination or paid in lieu thereof. He was 53 years old and should have been allowed to work until 60 years and demand pay for 7 years remaining. When he got sick, he only got sick leave as directed by the doctor. He was also not paid for long service of 32 years. Salary was paid but not arrears due upon promotion. As due process was not followed, the Respondent should pay damages.

10. On cross-examination, the Claimant testified that had his case been that of retirement, he should have been given notice. He had taken a loan with Equity bank and therefore suffered loss and damage. The Respondent set out in the letter of termination that his dues would be used to off-set the loan due. Retirement has 3 months' notice or pay thereof. Retirement also comes with long service pay.

11. The accident took place on 8<sup>th</sup> January 1984 and the termination notice stated that the board had recommended that he be retired.

## **Defence**

12. In defence, the Respondent sets out denials to all the Claimant and that the suit discloses no cause of action against the Respondent and is incompetent and should be dismissed.

## **Submissions**

13. The Respondent submitted that the Claimant was retired on medical grounds. The Claimant testified to his medical history and ministry of Labour Work Injury evaluation clinic findings report dated 22<sup>nd</sup> March 2013 was attached to the claim. On 21<sup>st</sup> March 2013 the Claimant was reviewed by 2 doctors and the Respondent County Health Board had on 25<sup>th</sup> April 2013 received a letter regarding the Claimant which formed the basis of his retirement. The board had recommended that Claimant be retired on medical grounds. This was a justifiable reason that is not wrongful or unfair.

14. That retirement is a legal termination of employment. The Claimant was paid all his due salaries. His terminal dues were computed and paid. Claims under Work Injury Benefits Act does not fall within the Employment Act.

15. On the claim of severance pay, this does not arise as there was no redundancy. The Claimant took sick leave and cannot claim payment for the same. The claim for pay at half salary while on leave is not due as full salaries were paid. The terminal dues paid included notice pay. The Claimant was accorded fair hearing and cannot claim compensation.

16. The suit should be dismissed with costs.

## **Determination**

17. By letter dated 20<sup>th</sup> November 2013, the Respondent retired the Claimant on medical ground. This followed a letter referenced in the termination letter and dated 25<sup>th</sup> April 2013 in which the County Health Board allegedly recommended the termination of the Claimant on medical ground. The letter from County Health Board is not attached to the defence.

18. On 19<sup>th</sup> December 2013, the Claimant lodged appeal against his termination by retirement on medical ground. The Claimant noted that he had not received the referenced letter from the County Medical Board dated 25<sup>th</sup> April 2013. There is no response to this letter attached by the respondent. I take it that the matters set out in the appeal by the Claimant were never challenged. The defence is left bare and with mere denials.

19. Termination of employment by retirement is a lawful reason. However such reason must be genuine, fair and reasonable in each case. Before termination of any form of employment, notice and reasons for the same must be issued to the subject employee. This is to enable the employee challenge the same by being an opportunity to be heard. Section 43 of the Employment Act requires that;

*43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

20. It is therefore not sufficient that an employer has reason(s) for terminating an employee, there must be prove that the same are genuine. This must be brought to the attention of the employee and the employee should be given a chance to give reasons as to why he should be kept in employment.

21. In this case, it is not denied that the Claimant got injured while on duty in 1984. He received treatment from various hospitals and his salaries were paid. He was promoted through the ranks to the position of Fireman. His termination of employment by retirement was in December 2013 after serving for 32 years of which 29 he was receiving treatment due to injury. There is no evidence that upon the Ministry of Labour assessment of the Claimant and reference to the Respondent County Health Board, that the Claimant was called to be heard that the Respondent was in the process of terminating his employment with them.

22. There is no prove that after the Claimant had served for over 29 years since 1984 with an injury he suddenly deteriorated so badly that he had to be retired on medical ground in 2013. Where indeed the Respondent found the Claimant was not well and required to attend treatment for long periods and therefore could not attend to his work, this is not demonstrated. What is on record is promotions of the claimants through the ranks over the period after he was injured. Also, the Respondent failed to set out that they gave the Claimant the legal protection under section 41 of the Employment Act before the Claimant was terminated. The letter from the County Health Board, though not attached, should not have been used as the sole determinant to the continued employment of the claimant.

23. I find the Respondent went on a spree targeted at terminating the claimant's employment for a reason that was not genuine, lacked fairness and was unreasonable. Such is not permissible under democratic societies such as ours. Section 45 of the Employment Act sets out that any termination of employment that lacks fair procedure and substantive reasons is unfair and compensation is due under section 49 of the Employment Act.

## **Remedies**

24. The Claimant is seeking compensation at 12 months' pay. I find an award of the maximum compensation as appropriate in this case taking into account the long service of the Claimant and fundamentally the unfair practices by the Respondent in terms of procedure and substantive fairness. The Claimant is awarded kshs.668, 580.00 in compensation.

25. The Claimant for sick leave is made on the basis that the Claimant was given medical leave by his doctors but not by the respondent. However time off work must be approved by the employer. Where the Claimant was advised by the doctor to be on sick leave, immediately, soon thereafter or upon taking such medical leave and in accordance with section 30 of the Employment Act, such leave should have been brought to the attention of the Respondent for approval. A certificate from the medical practitioner should have also been produced with the Respondent as the employer so as to keep such record and as prove of reasonable absence from duty. The claim is declined.

26. Sick leave half pay for 12 months is claimed. The basis for this claim is not set out. This is declined.

27. 90 days in lieu of notice is claimed on the basis that upon retirement, the Claimant should have been given sufficient notice of 3 months of payment in lieu thereof. The court has found the termination by retirement on medical ground as unfair and redressed the same as above. Notice pay of 30 days is due. The Claimant is awarded Kshs.55, 715.00 as notice pay.

28. The Claimant is seeking 495 days severance pay at 15 days per year for 33 years' service. The basis of this claim is that the Claimant served the Respondent throughout these years and was not awarded for the same. However severance pay relate to claims for redundancy pursuant to section 40 of the Employment Act. From the pleadings and evidence, I did not find any evidence leading to a case of redundancy. The Claimant testified that he was unionised but did not set out under which union or whether there was a collective agreement regulating his service pay or long service award. Where such exists, in the computation of terminal dues, the Respondent should take this into account. However in this regard the claim for severance pay is declined.

29. The claim for 7 years due under his contract of employment was not pleaded and only arose in cross-examination. I find this as an afterthought. Such is declined.

30. Costs are due as the Claimant had good cause to file his claim with the court upon the respondent's failure to Respondent to his appeal dated 19<sup>th</sup> December 2013.

**In conclusion, judgement is hereby entered for the Claimant against the Respondent for payment in compensation at Kshs.668, 580.00; notice pay at kshs.55, 715; and costs of the suit.**

**Orders accordingly.**

**Delivered in open court at Nairobi and dated this 19<sup>th</sup> day of September 2016.**

**M. MBARU**

**JUDGE**

In the presence of

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