



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1299 OF 2012

DAVID MAINA MUCHAICLAIMANT

VERSUS

VICTORY CONSTRUCTION COMPANY LIMITED RESPONDENT

Claimant in person

Mr. A.I. Onyango for Respondent

JUDGMENT

1. The Claimant seeks payment of terminal benefits and compensation for unlawful and unfair termination of employment set out in the Memorandum of Claim dated 27th July, 2012 and filed on 1st August, 2012.

Facts on which the Claim is premised

2. The Claimant was employed by the Respondent on 15th July, 2007 as a casual labourer. He helped the Surveyor as a turn boy, hand-packing and other menial work along the road under construction.
3. He worked continuously up to the 4th January, 2010. He reported to work at 7.30 a.m. in the morning until 5.00 p.m. in the evening and worked six days a week. Saturday was a half day and Sundays were off-days.
4. During the period, he was not granted leave, though he applied.
5. On 4th January, 2010, the Claimant was told by the Site Agent that he had received a call from the head office to the effect that the work load had gone down and that the employees including the Claimant should stop working. Many employees were affected and only a few were left.
6. No letters of termination were given. They were paid for the days worked.
7. The Claimant was paid Ksh.6,000.00 gross salary per month. National Social Security Fund

(NSSF) and National Hospital Insurance Fund (NHIF) was deducted.

8. The Claimant was not called back to work again.
9. He claims;
 - a. service pay for 3½ years at 15 days salary for each completed year of service
 - b. one month salary in lieu of Notice
 - c. payment in lieu of 21 leave days per year for four (4) years in the sum of Ksh.13,440.00
 - d. compensation for unlawful and unfair termination equivalent to 12 months' salary in the sum of Ksh.27,840.00 and
 - e. provision of certificate of service
10. The Claimant told the court that he was now engaged in a shoe making business and prayed to be paid as claimed plus interest and costs.
11. The Respondent filed a Response to the claim dated 25th November, 2013.
12. The Respondent denies the particulars of claim stating that the Claimant was lawfully terminated by operation of the law since he absconded from work upon being paid his dues. That his whereabouts were not known to the Respondent until he filed this suit.
13. The Respondent admits having received a demand notice but denies owing the Claimant any money at all.
14. RW1, was Mr. Kireal Singh, a Director of the Respondent Company. He admitted that the Respondent had employed the Claimant in 2007 and he worked for the Respondent till 2010.
15. RW1 told the court that the Claimant absconded from duty upon receiving his salary for February, 2010. That he did not see the Claimant again until he met him in court. He prayed that the claim be dismissed with costs.
16. The witness was hard-pressed to produce work record of the Claimant, but had none. He was not able to explain if the Claimant went on leave or not and whether he was entitled to payment of service pay

Determination

17. The court believes the testimony by the Claimant that he and his colleagues were retrenched on 4th January, 2010, due to fluctuation of work at the construction site.
18. It is clear that the Respondent did not comply with the provisions of Section 40 of the Employment Act, by;
 - a. paying the Claimant, one month's salary in lieu of Notice
 - b. paying the Claimant for leave days owed for the four years period, the Claimant had worked
 - c. paying the Claimant service pay at the rate of 15 days salary for each year completed
19. The Respondent had erroneously treated the Claimant and his colleagues as casual labourers contrary to the provisions of Section 37 of the Employment Act.
20. Accordingly, this being a case of unprocedural retrenchment the court finds that the Claimant is entitled to;
 - a. Ksh.4,800.00 being one month's salary in lieu of notice
 - b. Ksh.9,600.00 being service gratuity at the rate of 15 days salary for four (4) years

- c. Ksh.13,440.00 being payment in lieu of four(4) years untaken leave
- d. the court also awards the Claimant five(5) months' salary for the unprocedural and hence unfair retrenchment in the sum of Ksh.24,000.00

Total award to the Claimant is Ksh.51,840.00

21. The award is payable with interest at court rates from the date of Judgment to payment in full and the Respondent to pay the costs of the suit.

Dated and Delivered at Nairobi this 17th day of April, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE