



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1783 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 17th April, 2015)

MARTIN MULESHE SHIROKO.....CLAIMANT

VERSUS

WANJOHI CONSULTING ENGINEERS LIMITEDRESPONDENT

JUDGMENT

Introduction

1. The Claim is premised upon an Amended claim filed in this court on 15/1/2015 by M’Njau & Mageto Advocates. The Respondent is a Consulting Engineering Firm.

Claimant’s case

2. The Claimant aver that on 4/11/1983 he was employed by the Respondent as an Assistant Inspector of Works at a **monthly** salary of Kshs.8,400/= and site allowance of Kshs.600/= per month without a house allowance. He annexed his appointment letter marked MM1 as an exhibit. At the time of his exist, his salary was 27,048/= per month. The Claimant avers that he worked for the Respondent diligently without any problem and served on various projects.
3. The Claimant avers that on 4/6/2013, he was served with a retirement letter informing him that he was to retire at the end of that month. The same is annexed as Annexure MM4.

Having worked for 30 years, the Claimant wrote to the Respondent asking them to pay him his retirement package so as to clear his obligations including a loan he was servicing.

His claim is that the retirement was unprocedural – that due process was not followed. He therefore seeks for payment of 3 months salary in lieu of notice, 21 leave days, house allowance for 36 months 15% of his basic = 460,592, pay for 30 years,

underpayment from 1990 – June 2013 1,439,529/=

Gratuity payment at 20 days for 30 years = 2,921,184 compensation for 12 months = 730,296/=,

Site allowance 600 x 12 x 30 = 216,000/=

Overtime based on working hours at 6 am to 6 pm daily = 128 hours per month, holiday pay, rest days, certificate of service and costs of this suit – all total 17,841,940/=.

Respondent's case

4. The Respondents filed their response to the Statement of claim on 19/12/2013 through the firm of Waiganjo & Company Advocates. Their contention is that indeed the Claimant worked for them and earned 8,400/= per month on entry but the salary rose to 21,775/= per month at time of exit.

The Respondents deny ever underpaying the Claimant. They also aver that, the Claimant knew of the firms retirement age and they communicated the exit date in accordance with the Claimant's terms of employment. That further the contract of employment provided for termination of service by either party giving the other a fortnight's notice or fortnight's salary in lieu.

In response to the claim for a retirement package, the Respondents aver that they made monthly contribution to the NSSF to provide the Claimant's retirement package and so they are not supposed to pay the Claimant anything.

5. On issue of underpayment the Respondents aver that the Claimant was employed as a managerial and executive staff being an Assistant Inspector of Works whose managerial responsibilities included staff supervisor and making reports of daily operations as well as keeping records of deployment of plant and labour.

They therefore aver that being a consulting firm of engineers, Legal Notice Number 94/2004 on the Regulation of Wages (Building and the Construction Industry/Order 2004 does not apply to them.

The Respondents further aver that they acknowledged the reconciliation efforts made by the Labour Officer. They however ask this court to dismiss the claim with costs.

Issues for determination

6. Upon considering the evidence of both parties plus submissions filed herein the issues for determination are as follows:

- a. **Whether Claimant was unfairly terminated by Respondent.**
- b. **Whether Claimant is entitled to remedies sought.**

7. On the 1st issue, the Claimant was indeed employed by the Respondent on 4th November 1983 as an Assistant Inspector of Works at a salary of 8,400/= per month. His salary was reviewed over time and at time of exit it was 27,048/= as per Appendix MM 3 dated 17th September 1996 though his pay slip for June 2014 reads 21,775/=. The review downwards is not explainable.

8. On 4/6/2013, he was served with a letter of retirement MM 4 notifying him that he had attained the retirement age of 65 and hence was to retire at the end of June 2013.

From the understanding of this communication, the Claimant was not terminated but was retired upon attaining the retirement age. He even wrote a letter exhibit MM 5 thanking the Respondent for having allowed him to serve them and asking them for some tip-off send off.

It is my finding that the Claimant was not terminated but he retired upon attaining the retirement age. The only complaint the Claimant had was not being given adequate notice on the impending retirement and wished he had been given 4 months notice.

9. Section 10 of Employment Act provides the details what should be included in an employment contract. Section 10(2) states that the contract shall state:

(2) A written contract of service shall state:-

- (a) the name, age, permanent address and sex of the employee;**

- (b) *the name of the employer;*
- (c) *the job description of the employment;*
- (d) *the date of commencement of the employment;*
- (e) *the form and duration of the contract;*
- (f) *the place of work;*
- (g) *the hours of work;*
- (h) *the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;*
- (i) *the intervals at which remuneration is paid; and*
- (j) *the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and*
- (k) *any other prescribed matter.*

It is important here to note that Section 10(2) (e) above envisages a position where the employee is informed of the form and duration of the contract.

The Claimant's contract however failed to indicate when the contract was to come to term as envisaged by law. When the Respondents therefore decided in June 4th to retire him at the end of that month, fair administrative action was not accorded to him.

I therefore find that his contention for a longer period to notify him that his retirement was due was necessary.

Having found as above, what are the remedies the Claimant is entitled to. I do find that the Claimant is entitled to the following orders which I now grant:

1. *3 months salary in lieu of notice = 6 x 27,048 = 81,144*
2. *House allowance not paid = 15% of 27,048 x 36 = 146,059/=*
3. *Site allowance as per the contract not paid = 600 x 12 x 30 = 216,000/=*

TOTAL Awarded = Kshs.443,203.2/=

4. *Certificate of Service.*

Gratuity prayed for is not granted as the Claimant was a member and contributor of NSSF.

The Respondent to pay costs of this suit.

Dated and delivered in open court this 17th day of April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wathome holding brief Mageto for Claimant

No appearance for Respondent