



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2039 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 14th April, 2015)

KITHEKA LENZI.....CLAIMANT

VERSUS

M.R. SHAH CONSTRUCTION COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. On 1/12/2011, the Claimant filed his Memorandum of Claim through the firm of Mbaluka & Co. Advocates against the Respondent a Limited Liability Company Incorporated in Kenya under the Companies Act Cap 486 Laws of Kenya.

The Claimant's Case

2. The Claimant's case is that in or about 1975 the Respondent employed him under an oral contract of service. In September 2011, the Claimant was promoted to the position of supervisor earning a net cumulative monthly salary of 21,000/=.

The Claimant contends that he served Respondent faithfully for 36 years but failed to go for leave dispute being entitled to 21 days leave yearly. He therefore seeks payment of 756 accrued leave days.

The Claimant further avers that he was terminated by the Respondent on 2/7/2009 without notice and he seeks payment of 1 months salary in lieu of notice.

His contention is that he was terminated as a result of the restructuring carried out by the Respondent but without procedures set being following. The Claimant therefore seeks to be paid his service pay salary in lieu of notice, salary arrears, overtime, bones (6 months), leave pay unpaid house allowance and severance pay all totaling 1,308,675/=.

3. The Respondents were served but never filed any defence. On 19/1/2015, however when the parties appeared in court both Counsels agreed to proceed by way of written submissions.

Claimant's Submissions

4. The Claimant submitted that indeed he was an employee of the Respondent following an oral agreement in 1975. The Claimant's further submitted that the Claimant was unlawfully terminated as he

was not given any notice nor reasons for the termination and fair procedure was not following as envisaged under Section 45 and 41 of Employment Act 2007. The Claimant seeks for the prayers sought in his claim.

Respondents Submissions

5. The Respondents submitted that the computation of Claimant's claim based on a salary of 54,275/= is wrong given the Claimant's averment that his salary was 21,000/=. The Respondents have also submitted that service pay for Claimant was paid and remitted every year. They contend that Claimant was paid 3 months salary in lieu of notice. On overtime, bonus and house allowance, the Respondents have submitted that overtime and bonus claim lacks any basis but as for house allowance, they contend that the same was discharged vide a voucher dated 13/7/2011. They also submitted that service pay and severance pay is not tenable.

Issues for determination

6. Upon considering submissions of both parties, the issues for determination are as follows:

a. Whether Claimant's termination by the Respondent was fair and justified.

b. If not what remedies the Claimant is entitled to.

7. On the 1st issue, there is evidence that the Claimant was employed by the Respondent. The Respondent have not denied this. They only deny the salary issue. Unfortunately none of the parties submitted documents for this court to rely on. The appointment letter issued to Claimant was not annexed nor was the termination. However, going by the submissions of both parties, the Claimant worked for Respondent but his exit is not clear. The Respondent submitted that the Claimant was paid 3 months salary in lieu of notice and the Respondent referred to a voucher which was also not exhibited. It is the finding of this court from the submissions presented that the Claimant's services were terminated without due process. No hearing was accorded to the Claimant. In the circumstances the provisions of Section 41 of Employment Act 2007 which states:

"(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make."

were not adhered to, thus making the termination unfair and justified.

8. Give the above findings, it is the finding of this court that the Claimant is entitled to the following remedies:

a. 1 month salary in lieu of notice = Kshs.21,000/=

b. 12 months salary for unlawful termination = 21,000 x 12 = 252,000/=

c. Service pay = ½ salary x 4 years worked as claimed = 41,600/=

d. Other claims of overtime and bones not proved and are therefore not awarded.

TOTAL Awarded = Kshs.314,600/= Less tax deductions

The Respondent will meet costs of this suit.

Dated and delivered in open court this 14th day of April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent