



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1666 OF 2014

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

MAURICE NDIKU KILONZOCLAIMANT

VERSUS

DAWA LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Maurice Ndiku Kilonzo filed his Statement of Claim on 23rd September 2014 through the firm of Joe N. Mwanthi & Company Advocates seeking orders against the Respondent as follows:

1. **Three months salary in lieu of notice $43,000 \times 3 = 129,000/=$**
2. **Service gratuity of 15 days for the 10 complete years worked = $43,000 \times 15/30 \times 10 = 215,000/=$**
3. **Accrued leave 8.5 days = $8.5/21 \times 43,000 = 17,405$**

TOTAL = 447,405/=

2. He also sought orders for damages for unlawful/wrongful termination plus interest and costs of this suit.

3. By a consent before this court the parties agreed on the following terms:

1. ***Claimant be entitled to 1 month salary in lieu of notice = 43,000/=.***
2. ***Salary for July and August 2014 = 86,000/=.***
3. ***Accrued leave in sum of Kshs.17,405/=.***
4. ***Party and party costs."***

4. The parties also agreed to put in written submissions on service pay and quantum on compensation payable.

5. In respect of the above consent the parties have filed their submissions whereby the Claimant has submitted that the claim on service pay is viable and should be paid or/and gratuity. This, they based on the letter of termination given to the Claimant where the Respondent agreed to pay 15 days as service pay for each year worked.

They cited **Elijah Kipkoros Tonui vs Ngara Optician t/a Bright Eyes Limited (2014) eKLR** by J. Rika who held that Membership to NSSF should not bar an employee being paid service as the court should look at the Social Security route that confer overall greater benefit on the employee.

6. On quantum, the Claimants aver that the Claimant was unlawfully terminated and so is entitled to 12 months salary as damages as provided for under Section 49 of Employment Act.
7. The Respondents on the other hand submitted that service pay is not payable as it is precluded under Section 35 (6) of Employment Act in that the Claimant was a contributor to the NSSF.
8. On termination, the Respondents submitted that the same was lawful as the Claimant was suspended from employment because of his questioning by police on the 30th June 2014, and Claimant was terminated from 1st July 2014.
9. I have considered submissions from both parties. On issue of service pay – Section 35 (5) & (6) of Employment Act states as follows:

“5. An employee whose contract of service has been

terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

6. ***This section shall not apply where an employee is a member of:***

- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;***
- (b) a gratuity or service pay scheme established under a collective agreement;***
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and***
- (d) the National Social Security Fund.”***

10. Section 6 (d) couched is mandatory term precludes payment of service pay to an employee who is an employee of NSSF. That being the case I find that the Claimant is not entitled to that prayer.

11. On damages, the parties have partially consented to the payment of certain dues to Claimant including payment of 1 months salary in lieu of notice. It is in tandem with a requirement that the process of termination must be in line with Section 41 of Employment Act which provides for fair hearing before termination. There is no indication that the Claimant was accorded due process before his termination. I therefore find that the termination was unfair in that regard.

I award Claimant 6 months salary accordingly as compensation for unlawful termination:

= 6 x 43,000/= 258,600/=

Read in open Court this 17th day of June, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wasongo holding brief for Mwanthi for Claimant - Present

No appearance for Respondent