



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NO. 2138 OF 2012**

**RAMA KRISHNARAO ..... CLAIMANT**

**-VERSUS-**

**SAJ CERAMICS LTD ..... RESPONDENT**

**JUDGMENT**

Rama Krishnarao, the claimant herein filed this suit on 23rd October 2012 seeking the following orders against the respondent, Saj Ceramics Ltd:-

1. A declaration that the conduct of the respondent against the claimant in terminating his employment on account of poor performance amounted to a violation of the claimant's constitutional rights and in particular Article 41(1) of the Constitution.
2. A declaration that the claimant's termination of employment was contrary to Section 41 and 45 of the Employment Act and therefore unfair.
3. A declaration that the claimant is entitled to be compensated for:-
  - a. Violation of his constitutional rights as envisaged under Articles and 41(1) of the Constitution.
  - b. Violation of his employment, legal and contractual rights.
  - c. Neglect and refusal by the respondent to fulfill its contractual obligations.
  - d. Injury to the claimant on account of the respondent's breaches.
4. An order compelling the respondents to pay damages for wrongful dismissal.
5. An order that the claimant be compensated as follows:-
  - a. Salary in lieu of two months' notice - two months' salary at Kshs 184,747 a month Kshs 369,494
  - b. Severance payment of fifteen days salary for each of the fourteen years worked based on monthly pay of Kshs 184,747 Kshs 2,586,458
  - c. Twelve months compensation for wrongful termination - 12 months at Kshs 184,747 a month Kshs 2,216,964
  - d. Unpaid 51 leave days Kshs 314,070

e. 11 air tickets to India Kshs 616,000

**TOTAL CLAIM Kshs 6,102,986**

6. The claimant further claims;
  - a. Interest on the above compensation at the rate of 20% per annum from the time of violation.
  - b. Costs of the suit.
  - c. Any other or further reliefs the Honourable court may deem necessary to award.

His case is that he was employed by the respondent on 13th April 1993 as a press supervisor. His terms of employment were contained in a contract dated 20th February 1992. The claimant rose through the ranks to the position of chief engineer, which he held until 26th February 2008. His last salary was Kshs 184,747.

The claimant alleges that he proceeded for authorized annual paid leave to India on 26th January 2008 and resumed duty on 21st February 2008. When he resumed duty he was informed that his employment had been terminated on account of poor performance. He further alleges that through trickery or deception, the respondent asked him to tender his resignation so that it could hide under that and terminate his services (sic). He wrote a resignation letter and another letter asking the respondent to settle his SACCO loan using his salary for the months of February, March and April 2008. He was paid 2 months salary in lieu of notice.

The claimant averred that about July 2008 he initiated a labour complaint against the respondent at the District Labour Office in Industrial Area. The designated labour officer invited the respondent for a joint conciliation meeting on 25th July 2008 at 9.00 am which the respondent failed to attend.

The claimant further averred that sometime in 2009 he again reported a dispute to the Chief Industrial Relations Officer. On 18th June 2012 the Chief Industrial Relations Officer requested the parties each to submit their memorandum to the dispute. On 23rd August 2012 the Chief Industrial Relations Officer released his report with the findings and recommendations to the parties. He recommended that the claimant be paid 2 months salary in lieu of notice, any leave due but not taken, 11 air tickets to India, 12 months salary as compensation and gratuity for 14 years. The claimant accepted the recommendations but the respondent did not. The claimant thereafter filed this suit.

The respondent filed its Reply to the Memorandum of Claim on 27th March 2013. It stated in the reply that the claimant was employed by the respondent on expatriate terms in 1993 as a supervisor in the Press section of its Athi River Factory. In 1997 he was given additional responsibilities to cover maintenance and repair sections. On 28th March 2003 the claimant changed citizenship from Indian to Kenyan.

On 26th January 2008 the claimant proceeded on overseas leave and resumed duty on 23rd February 2008. On 26th February 2008 the claimant tendered his notice of resignation from employment. The reason given in his letter was personal problems, but he did not disclose the nature of the problems. He also requested for payment of his terminal dues and certificate of service. The respondent accepted his resignation and tabulated his terminal dues which was Kshs 314,205. The claimant directed that the terminal dues be paid to SACCO Ceramic to settle his loan. The respondent also issued a certificate of service to the claimant. The claimant acknowledged receipt of his terminal benefits and signed a discharge certificate in favour of the respondent.

The respondent stated that it considered the matter closed until 5 months later on 24th July 2008 when it received a letter from the District Labour Officer, Industrial Area regarding the claimant's complaint about failure to pay his terminal benefits. The respondent replied to the letter confirming willingness to settle the complaint.

After this there was no further communication on the matter until 16th March 2009 when the respondent received a letter from the Chief Industrial Relations Officer, Ministry of Labour Headquarters demanding payment to the claimant of service pay, 51 leave days and 11 air tickets. The respondent replied to the letter stating that the claimant was not owed any terminal benefits.

Thereafter there was no communication until 18th June 2012 when the respondent received a letter from a conciliator over the refusal to pay the claimant's terminal benefits. The respondent replied to the letter on 28th June 2012 denying owing the claimant any terminal benefits. The conciliator held a meeting with the claimant and the respondent on 19th June 2012 where the respondent produced documentary proof of the claimant's resignation and payment of his terminal benefits. On 27th August 2012 the respondent received the report of the conciliator. The respondent wrote to the conciliator stating that the findings and recommendations were not acceptable and raising concerns over the decision of the conciliator. The respondent thereafter received the demand letter from the claimant's advocates.

The case came up for hearing on 4th June 2014 when the case did not proceed. On 10th November 2014 the parties sought and were granted leave to proceed by way of written submissions to speed up the conclusion of the case. Both parties thereafter filed and exchanged written submissions.

In its written submissions filed on 10th December 2014 the claimant has set out the issues for determination as follows:-

- i. Whether the claimant's employment was unlawfully terminated.
- ii. Whether the claimant was paid his entire terminal benefits, if not,
- iii. Whether the claimant is entitled to the reliefs sought.

The respondent however raised the following issues:-

1. Whether the matter came to court procedurally
2. The applicable law
3. Grounds.

I will collapse the issues by both parties under the following heads:-

1. Applicable law and procedure.
2. Whether the claimant's employment was unlawfully terminated.
3. Whether the claimant was paid his entire terminal benefits.
4. Whether the claimant is entitled to reliefs sought.

### **1. Applicable Law and Procedure:-**

In the ruling on the preliminary objection filed in this case by the respondent on grounds that the claim was time barred, I held that this claim having arisen before the effective date of the Employment Act 2007, was covered by the repealed Employment Act (1976). I also considered the application of the Trade Disputes Act (Cap 234) (also repealed) and the Labour Relations Act (2007) and held that the claimant's case did not fall under either the Trade Disputes or Labour Relations Acts as both legislation only cover disputes in which trade unions are involved. The claimant herein was not a member of any trade union and therefore neither the Trade Disputes Act (repealed) nor the Labour Relations Act (2007) apply to him.

The respondent submitted that the report of the Labour Officer was of no legal effect as it was made in contravention of the law.

I agree with the respondent that the pre-industrial court procedure was flawed. However, I would not trash the whole case because of the flawed pre-court procedure. According to the Trade Disputes Act the

recommendation of a conciliator was not binding on any party unless it was accepted by both parties. The recommendation of the Labour Officer herein having been rejected by the respondent is not binding on it. The case is therefore properly before the court for determination.

## **2. Whether the claimant's employment was unlawfully terminated by the respondent.**

The claimant alleges that his resignation was instigated by the respondent's deceit and was therefore not voluntary. It was submitted for the claimant that he would not have come all the way from his native home in India to submit a resignation within 5 days of his return.

For the respondent it was submitted that the claimant's employment was not terminated, but he resigned voluntarily. It was the respondent's further submission that the claimant's allegation that his employment was terminated on account of poor performance was not true as the claimant had been in the respondent's employment for 14 years. The claimant maintained a clean record and his performance earned him promotions from the position of a Press Vertical Drier Supervisor to the position of Chief Engineer at the time of his resignation. It was further submitted for the respondent that the claimant had not adduced any evidence of poor performance to warrant disciplinary action and the allegations by the claimant of trickery and deception are far fetched and should be rejected by the court.

It was the respondent's further submission that the claimant did not raise the issue of constructive dismissal in his dispute at the Labour Office and the same was an afterthought, that no evidence had been adduced by the claimant to prove constructive dismissal. That the claimant was an educated person who knew his rights and obligations and could not therefore justify the claim of trickery and deception.

I have considered the evidence adduced in the Memorandum of Claim and the defence. The claimant does not deny that he resigned. He only alleges the resignation was prompted by trickery and deception by the respondent.

To put this matter into perspective it is important to reproduce the letter of resignation.

The claimant's letter of resignation which was written by hand is reproduced below.

" **To**

**Ms Saj Ceramics Ltd**

**P. O Box 45244**

**NAIROBI**

**KENYA**

**Sub: Resignation for the post of Chief Engineer**

**Respected Sir,**

**Due to some personal problems, I am resigning from my post. This is notice of two months period.**

**Please pay all my dues as early as possible and with service letter.**

**Thanking your Sir,**

**RAMA KRISHNARAO."**

On the same day the claimant wrote another letter asking for payment of his terminal dues. The letter is reproduced below:-

" 26.2.2008

**Ms. Saj Ceramics Ltd**

**P. O Box 45244**

**NAIROBI**

**Please pay my dues for the February, March & April month salary to SACCO Ceramics. The amount of Ksh 314,205 to settle my loan amount.**

**Thanking you sir**

**RAMA KRISHNARAO."**

On the same date the respondent replied as follows:-

**"26th February 2008**

**Dear Mr. Rao,**

**RE: TERMINAL AND FINAL DUES**

**Below please find terminal and final settlement of your dues amounting to Kshs 314,205/=, derived as follows:-**

**Net salary for the month of February - 96,037.00**

**Net salary for the month of March 2008 - 107,484.00**

**Net salary for the month of April 2008 - 110,684.00**

**Kindly acknowledge receipt at the foot of this letter.**

**Yours faithfully**

**Saj Ceramics Ltd**

**Atul Parmar**

**Managing Director**

**I Rama krishnarao acknowledge receipt of Kshs 314,205 being final settlement of my terminal dues and I have no further claims whatsoever from the company.**

**Signature ..... Date 26.2.2008."**

In his claim the claimant alleges that his employment was terminated on account of poor performance and by use of trickery and deception. The claimant has not given any particulars of the trickery and deception. He has not stated who in the respondent's organization deceived and tricked him or how he was tricked. He has not even given particulars of when the trickery or deception took place. The letter of resignation cites personal problems as the claimant's grounds for resignation. The claimant also wrote a letter asking for his terminal dues to be paid as early as possible and also asked for service letter. He was paid the same day and he signed a certificate discharging the respondent. He did not make any complaint immediately until July 2008 when he filed a complaint at the Labour Office. These circumstances are not consistent within a person who has been unfairly terminated or tricked into writing a resignation letter.

I find that the claimant has not proved either unfair termination or trickery and deception by the respondent.

### **3. Whether the claimant was paid his entire terminal benefits.**

Having found that the claimant has not proved that he was unfairly terminated or tricked and deceived into resignation, the termination of his employment is presumed to have been by way of resignation. According to the Employment Act in force at the time of the resignation, he was expected to be paid salary to the date of termination. The claimant was paid salary for February, March and April, 2008. He thereafter signed a certificate of discharge confirming that he had no further claims whatsoever from the respondent. The Employment Act (1976) (repealed) did not provide for payment in lieu of notice where an employee resigned and did not serve the notice period.

I therefore find that the claimant was not only paid his full terminal dues, but that he was actually paid more than what was provided under the law applicable at the time. He thereafter discharged the respondent from any further liability.

### **4. Whether the claimant is entitled to reliefs sought.**

Having found that the claimant resigned and was paid his full terminal benefits and further that he signed a discharge certificate, he is not entitled to any further benefit. I will however consider each of the claimant's prayers.

#### **a. Pay in lieu of notice.**

This was paid and the claimant acknowledged payment. He resigned on 26th February and was paid February, March and April 2008 salaries.

#### **b. Severance pay.**

Severance pay is only payable in the event of redundancy. The claimant was not declared redundant and is not entitled to the same.

#### **c. Twelve months compensation.**

Having resigned under the Employment Act (1976) (repealed) the claimant is not entitled to 12 months compensation. First, because his employment was not unfairly terminated and secondly because the compensation was introduced in the Employment Act (2007) which was not in force at the time of termination of the claimant's employment.

#### **d. Unpaid 51 days leave.**

The claimant did not adduce any evidence on how the 51 days leave claimed accrued. It is instructive that the claimant resigned only a few days after resuming duty from annual leave of one month in India. He also signed a discharge to the effect that he had been paid his full terminal benefits and had no further claim against the respondent.

I find that the claimant has not proved that he was owed any leave.

#### **e. 11 Air tickers to India.**

Having failed to prove that he had outstanding leave at the time of resignation, the claimant cannot justify the claim for 11 air tickets. In any event the contract signed by the claimant provided for one air ticket after completion of his two year contract. The claimant stated that he continued working without any renewal of the contract. If he continued enjoying the same terms then it means he was entitled to one air ticket every 2 years. The claimant did not adduce any evidence as to whether he ever travelled to

India on the company's expense over the 14 years he worked with the respondent. He also admitted in his claim that he had just returned to Kenya from India with a ticket provided by the respondent.

I therefore find that the claimant has not proved that he is entitled to 11 air tickets to India.

The upshot is that the entire claim is dismissed with no orders for costs.

**Dated and signed at Kisumu this 16<sup>th</sup> day of June, 2015.**

**MAUREEN ONYANGO**

**JUDGE**

**Delivered in Nairobi this 7<sup>th</sup> day of July, 2015.**

**HELLEN WASILWA**

**JUDGE**

*In the presence of:*

..... for claimant(s)

..... for respondent(s)