



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 179 OF 2013

SAMSON ANTHONY MUHIA.....CLAIMANT

-VERSUS-

KIRINYAGA CONSTRUCTION (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 21st March, 2014)

JUDGMENT

The claimant filed the statement of claim on 17.06.2013 through J. W. Kiniti & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) **A declaration that the claimant's services were wrongfully and unfairly terminated.**
- b) **Reinstatement of the claimant to his position without loss of benefits or in the alternative an order that the respondent do pay the claimant his terminal dues of Kshs.1,747,600.00 comprising 3 months' salary for pay in lieu of termination notice; eight years' service being Kshs.273,600.00; maximum 12 months compensation of Kshs.684,000.00; house allowance of Kshs.540,000.00; leave pay of Kshs.57,000.00 and the refund of Sudan Fares Kshs.22,000.00.**
- c) **Costs and interests at court rates from the date of filing the claim until full payment.**
- d) **Any other further or better relief that this honourable court may deem just to grant.**

The respondent filed the statement of defence to statement of claim on 18.07.2013 through P. K. Mbabu & Company Advocates. The respondent prayed that the claim be dismissed with costs. The claimant filed a response to the defence on 22.11.2013. The case was heard on 25.02.2014 when the claimant gave evidence to support his case and the respondent's witness was Joseph Waigwa, the respondent's Director.

The facts of this case are as follows.

It is not disputed that the claimant was employed by the respondent in the capacity of a plant mechanic supervisor as per the offer of appointment dated 15.4.2005 being **exhibit A** and which the claimant accepted. The claimant was deployed to work at the respondent's main workshop at a place known as Chaka.

The claimant served until he was redeployed from the main workshop to Naromoru-Munyu-Karisheni

Road Project by the internal memo dated 19.12.2012 being **exhibit B** on the claim. The claimant's responsibilities at the field deployment were repair and maintenance of machines on site as per instructions given by one Simon Waweru, the in-charge at the field workshop.

It was the claimant's testimony that the redeployment was in fact a demotion because as the mechanic supervisor by appointment, he could not receive instructions from the in-charge at the field workshop that held a junior rank to that of the claimant. The claimant wrote the internal memo dated 06.01.2013 being **exhibit C** on the claim. The claimant raised grievances about the redeployment stating, among other things, he had served well at the main workshop in Chaka; he deserved a promotion in view of his previous good performance; the repair and maintenance duties were lower and therefore, he would not achieve his full potential; his position at the Chaka main workshop had been given to his junior; and the change was not in line with his initial appointment as the mechanic supervisor. The claimant requested in that memo to meet the management to discuss the grievance.

About 14.04.2013, the claimant testified that the respondent's personnel officer telephoned the claimant at 5.00 pm and later at a meeting as requested on phone, the officer conveyed to the claimant that Mr. Waigwa (**RW**) had directed that the claimant goes home and wait for his terminal dues. The claimant demanded a termination letter but it was not given to him. The claimant subsequently travelled to the respondent's head office in anticipation of terminal dues. After the verbal termination, the claimant testified that he heard from his workmates that he had been terminated on account of inciting staff at the Chaka main workshop to go on strike following the claimant's redeployment. The claimant testified that he had been called by the respondent's management to speak to the staff as the management negotiator for the staff to resume work. RW testified that after the claimant spoke to staff upon request by the management, the workers resumed work and the management by inference concluded that the claimant had incited the workers and that is why the workers had obeyed him to resume duty following the strike. The strike had taken place about 4 to 3 weeks prior to the claimant's termination.

It was not disputed that at termination the claimant's consolidated pay was Kshs.57,000.00. The claimant had left employment on 14.04.2013 with full pay for April, 2013.

The issues for determination are whether the claimant's termination was unfair; and whether the claimant is entitled to the remedies as prayed for. The court makes the following findings:

1. The claimant received oral information of his termination. Prior to that communication, the claimant was not accorded a notice or a hearing as provided in section 41 of the Employment Act, 2007. The court has considered the evidence and finds that at termination and at the hearing of the suit, it was not established that the claimant had incited the staff to strike as was alleged by the respondent. The court finds that the reason for termination, namely inciting staff to go on strike, was not a valid reason as envisaged under section 43 of the Act. In the circumstances, the court finds that the termination was unfair. The court finds that the claimant has not been shown to have contributed to his termination and in any event, the claimant had presented a genuine, responsible and well founded grievance about what he considered to be unfair redeployment and demotion. The court has noted that the claimant had served the respondent for several years. In the circumstances, the court finds that the maximum 12 months gross pay under section 49(1) (c) will meet the ends of justice in this case and the claimant is awarded **Kshs.684,000.00** as prayed for.
2. As submitted for the respondent, the claimant has not by evidence established the claims and prayers for pay for leave; and refund for Sudan fares. The court finds that the prayers will fail.
3. As submitted for the respondent, the court finds that the claimant is entitled to only one month pay in lieu of the termination notice and as per section 35(c) of the Act. Accordingly, the claimant is awarded **Kshs.57,000.00**.
4. The claimant has prayed for house allowance. It is not in dispute that the parties agreed upon a consolidated pay throughout the employment relationship. Under section 31(1) of the Act, it is clear that where the contract of service contains a provision for consolidated basic wage or salary of employee with

an element that part of the pay is to be used as rent, then the employer will not pay the employee a separate pay for housing accommodation. The court finds that the respondent was accordingly exempted under the section and the prayer for house allowance shall fail.

5. The claimant did not urge a case for reinstatement and no submissions were made in that regard. The court finds that the prayer was thereby abandoned.

6. The claimant testified that he was a member of the National Social Security Fund (NSSF). As submitted for the respondent, the claimant is not entitled to service pay as per section 35(6) (d) of the Employment Act, 2007.

In conclusion, judgment is entered for the claimant against the respondent for:

1. A declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant **Kshs.741,000.00** by 1.05.2014, in default, interest to be payable from the date of the judgment till full payment.
3. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 21st March, 2014**.

BYRAM ONGAYA

JUDGE