



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 262 OF 2013

TSUMA KULKEMBAR MZUNGU.....CLAIMANT

VERSUS

RAKESH SOLANKI t/a

SAI CHATRA(formally known as class “A” laundry).....RESPONDENT

J U D G M E N T

INTRODUCTION

The claimant filed this suit against the respondent on 15/8/2013. The suit is founded on an alleged wrongful, unfair and unlawful termination of the claimants services and it seeks to recover accrued employment benefits amounting to Kshs.1,434,480 plus compensation for unfair and wrongful termination, costs and interest.

The respondent never filed defence despite several application for leave which was always granted. The suit was disposed of by way of written submissions following a consent order recorded on 9/12/2013.

CLAIMANTS' CASE

The claimant pleaded and submitted that he was employed by the respondent in 1988 and worked until 29/3/2012 when he was terminated unfairly. By the time of dismissal he was the manager of the respondent at Nyali and his salary was Ksh.25000 per month. He contended that during his tenure of service, the respondents traded in different names which he kept on changing. He started as double “R” laundry, then changed to Leisure Wash Ltd, then Class “A” Laundry and finally Sai Chatra Ltd.

The claimant further contended that during his tenure of office he never went for his annual leave and he used to work for longer hours without payment of over time. He termed his dismissal as unfair and wrongful because it was without any notice or warning letter. He prayed for accrued employment benefits of ksh.1,434,480 made up as follows

- 1. NSSF dues deducted but not remitted for the period between June 2001 and December 2012
.....Kshs.29,040**
- 2. NHIF deductions not remitted between June 2001 to October 2005
.....Kshs.7040**

3. one month salary in lieu of noticeksh.25000

**4. accrued leave days for the 24 years served being ksh.25000 X24 months
.....ksh.600,000**

5. gratuity for the 24 years served being ksh.25000x24 ..ksh.600,000

6. house allowance at 16%X25000 for 24 years served ...Ksh.96,000

7. overtime of 42 hours.

The claimant contended that on 29/3/2012 the respondent agreed in writing to pay gratuity at ksh.20000 per year of service but for only 8 years plus ksh.20000 for leave as exhibit TKM8 which agreement he again reneged and chased the claimant away.

In addition to the employment benefits the claimant prayed for compensation for unfair dismissal, certificate of service, costs and interest.

RESPONDENTS' CASE

The respondent as earlier indicated filed no pleadings to deny or rebut the averments made by the claimant. He however filed submissions which sought to clarify the issues pleaded by the claimant. He contended that the claimant only worked for him for 8 years and his salary was ksh.20000 plus house allowance of ksh.5000 which was all paid. He denied the alleged unfair termination and further contended that upon closure of the company at Diani, he and the claimant mutually agreed to settle the final dues in terms of exhibit TMK 3 and TMK 5.

The respondent denied the claim for the unremitted NSSF a deductions for the period between 2001 and June 2008 on grounds that the claim is time barred. According to the respondent, the claimant had ceased to work on 7/6/2008 and a certificate of service issued to him as per the claimant's exhibit TMK 4. The respondent however admitted to pay remittances for 30 months for the period between November 2009 and December 2012 being ksh.15200/

However denied the claim for NHIF for the period between 2001 and 2005 for the reason that the same is time barred. He however admitted the claim for Ksh.25000 being one month salary in lieu of notice. The respondent denied the claim for leave accruing in the period upto 7/6/2008 when the claimant employment ended as per the certificate of service marked TKM 4 in the claim. He however admitted leave for 3 years preceding the termination of the claimants service in December 2012 being ksh.20000/ for 3 months which sum up to ksh.60000/.

The respondent further denied claim for gratuity for the period ending on 7/6/2008 for being time barred. According to him the claimant was terminated on 7/6/2008 and re-employed in July 2008. He however admitted to pay gratuity for 8 years at the rate of one months basic salary (ksh.20000) as agreed vide the claimants exhibit TKM 8 being ksh.160,000/. He denied the claim for overtime and leave allowance for lack of particulars. Likewise he denied the claim for house allowance on ground that the salary of ksh.25000 per month included house allowance of ksh.5000/ which was full paid. In total the respondent admitted to pay Ksh.260,200/ less statutory deductions.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings and submissions are:

1. whether the claimants employment was wrongfully, unfairly and unlawfully terminated by the respondent

2. whether the prayers sought ought to issue.

Wrongful and unfair termination

Termination of employment is wrongful when the same is done in breach of a contractual obligation regarding notice before termination. On the other hand termination is unfair or unlawful when the same is done in breach of a statutory obligation regarding the procedure and the reason for termination.

In the present case, the contract of employment was not produced in evidence to shade light to the court on the issue of notice for termination. The parties however seem to agree that one month notice was the relevant period and the respondent has conceded the claim for the same. The said admission proves that the termination was wrongful.

On the issue of unfairness, the claimant merely pleaded that the termination was without notice or warning letter. He did not prove that the termination was unfair either on ground of procedure or the reason therefor. The court will therefore dismiss the claim for unfair dismissal because the claimant has not discharged his burden of proving unfairness in his termination.

Reliefs sought

The court agrees with the respondent that the claimant did not serve the respondent continuously but in phases. The claimant's exhibit TKM 4 dated 27/6/2008 is certificate of service showing that he served as manager of Leisure Wash Ltd between may 1995 and 27/6/2008. All his dues or benefits for said period of service became payable as from 27/6/2008 and became time barred 3 years after that date within the meaning of Section 90 of the Employment Act 2007.

The foregoing finding answers in negative the prayer for accrued leave, NHIF, NSSF and gratuities and house allowance save the portions awarded below. The prayer for Notice pay has been admitted and it is granted being ksh.25000/. In view of the findings above the prayer for NSSF is only allowed for the period between July 2008 and December 2012 is granted as admitted by the defence being ksh.15200/. Likewise the prayer for accrued leave is granted only for the 3 years prior to termination which is 3 months at ksh.25000/ totaling to ksh.75000/. The reason for applying the ksh.25000/ per month is that the salary payment vouchers did not specify what was the amount for house allowance. The law puts the burden of giving details of salary on the employer which he defaulted to comply.

Also in view of the earlier findings on the employment phases, the court awards gratuity only for the 8 years served under the class "A" Laundry Ltd. In view of the findings on default to indicate the exact amount of the allowance in the salary vouchers, the court will apply the salary of ksh.25000/ in calculating the gratuities. The sum works to 25000X8 years totaling to ksh.200,000/. The claim for over time and leave allowance is dismissed for lack of particulars and evidence.

Likewise the claim for house allowance is dismissed for reasons that the salary paid to the claimant was consolidated pay. The prayer for certificate of service is granted but a recommendation letter will not be ordered because it is not founded on any law.

DISPOSITION

In the upshot judgment is entered for the claimant for ksh.315,200/ plus interest from December 2012. The claimant will also get certificate of service, costs and interest

Dated, Signed and delivered this 25th day of April 2014

O.N. Makau

Judge

