



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI
INDUSTRIAL CAUSE NO. 21 OF 2012

STEPHEN NDIRANGU NDUNGO.....CLAIMANT

VERSUS

WANJUKI MUCHEMI.....RESPONDENT

JUDGMENT

1. The claimant in this suit brought the respondent to this court seeking compensation for unlawful termination of his services as well as his terminal dues which he has tabulated at paragraph 5 of the memorandum of claim.
2. The background to this suit is that the claimant who was employed by the respondent as an office assistant initially in 1984, was at the time of termination serving as a Senior Court Clerk earning a monthly salary of Kshs.9,616 as at the time of his termination on 28th November, 2003.
3. During the hearing, the claimant testified that his services were terminated in November, 2003 without being issued with any termination letter. According to him, he was verbally told by a Mr. Kibira that his services were terminated because the previous day he was spotted in the company of a Mr.Ng'ang'a, an employee of the respondent whose services had earlier been terminated by the respondent.
4. It was his evidence that by the time of his termination he had salary arrears for the year 2002 which the office of the respondent forwarded to him under cover of their letter dated 5th May, 2004. He further testified that the respondent had paid Kshs.40,000 of the sums demanded.
5. The respondent on his part denied the allegations by the claimant stating that he is non-suited against the claimant and that the claim is in any event statute barred hence incompetent and should be struck out. The respondent did not call any witness at the trial but cross-examined the claimant.
6. In cross-examination he stated that he did not demand his dues immediately as the respondent kept promising him that he would resolve the matter.
7. In the submissions filed on behalf the claimant by Mr. Kariuki, he submitted that there was clear evidence that the claimant was an employee of the respondent and that his services were terminated unlawfully and unfairly.
8. Concerning liability to pay, counsel submitted that the respondent acknowledged owing the claimant and made part payment of his claim and that the part payment was made before the expiration of the prescribed period in the Limitation of Actions Act. Counsel further submitted that such acknowledgement or part payment has the effect of making time run afresh under

section 23(3) of the Limitation of Action Act. To support this contention counsel relied on the case of **Abdi S. Rahman Shire -v- Thabiti Finance Co. Ltd. No. 76 of 2000.**

9. The respondent on his part submitted that the applicable law at the time the cause of action accrued was cap (sic) 206 and not Labour Relation Act.
10. Concerning the quantum of the claim counsel submitted that the claimant in his demand letter only demanded Kshs.56,120 hence the only amount in respect of which judgment, if any, should be entered.
11. Counsel further submitted that the employment contract was entered into in 1984 and therefore the Employment Act, 2007 is not applicable since the Act does not have a retrospective effect.
12. Concerning house allowance, counsel submitted that according to the appointment letter, the salary was all inclusive hence the claim for house allowance does not lie.
13. Regarding overtime, counsel submitted that after promotion in 1991 the claimant's reporting time to work changed since he no longer needed to come early or leave late for purposes of office cleaning.
14. In conclusion counsel submitted that the claimant can only be awarded Kshs.56,120 which is the compromised amount less Kshs.30,000 already paid.
15. From the foregoing, it would seem that both parties are in consensus that the claimant was terminated from employment. They are further both in agreement that some measure of compensation should be made. Their point of departure however is the quantum and heads of compensation payable.
16. The respondent has argued that the contract of employment having been entered into 1984, the applicable law should be the repealed Employment Act, Cap 226. To this, the court is of the contrary view in that the applicable Law ought not to be determined as at the date of entry into contract of employment but rather by the date when the cause of action accrued. That is to say when the claimant's contract was terminated. According to the claimant, his contract of service was terminated in November, 2003. To this extent, the applicable law was the repealed Employment Act (Cap 226) and not the Employment Act, 2007. This suit was initially filed as CMCC No. 58 of 2008 but later transferred to this court by dint of the Industrial Court Act and the Constitution which confer exclusive jurisdiction to this court over employment and labour relation matters.
17. Having found, that the applicable law was the repealed Employment Act, the issue of Limitation does not arise since the cause of action being founded on contract, it ought to have been brought within 6 years of the accrual of cause action. The claimant was terminated in November, 2003 hence the six years ought to have lapsed in November, 2009. This suit was filed in 2008 hence was still within the limitation period.
18. Regarding the heads and formula for compensation, both the repealed Employment Act and the current Act provide for the heads and formula for compensation. These Acts provided for the minimum applicable in absence of a contract to the contrary. That is to say parties could not contract below the minimum provided by these Acts.
19. Under the repealed and the current Act an employee is entitled upon termination, to notice equivalent to the period in respect of which salary or wages are paid or payment in lieu thereof. Further, as a minimum, an employee is entitled to housing or housing allowance, leave with pay and rest days.
20. The claimant was not given notice of termination of employment or payment in lieu thereof. He is therefore entitled to one month's salary in lieu of notice. He stated he was not paid for November, 2003 though he worked. He is further entitled to his salary for November, 2003. The

claimant ought to have been housed by the respondent or given a house allowance. No evidence was produced before court that he was either housed by the respondent or paid house allowance. He is therefore entitled to 1/3 of his basic salary as house allowance but from November, 2003 only as any claim earlier than this would be statute barred. The NSSF deductions are further awarded as prayed however the claim for overtime fails as the same has not been adequately proved.

21. In conclusion the court awards the claimant as follows:-

	<u>Kshs.</u>
(a) Salary for November, 2003	9,616
(b) One month salary in lieu of notice	9,916
(c) House allowance for the year 2003 at 1/3 monthly salary	38,468
(d) Leave allowance for the year 2003	9,616
(e) NSSF deductions	4,985

	72,296
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22. This amount shall be less Kshs.40,000 which the claimant has acknowledged receiving. The claimant shall have interest on the decretal sum together with costs of the suit.

23. It is so ordered

Dated at Nyeri this 27th day of May, 2014.

ABUODHA N. J

JUDGE

Delivered in open court in the presence of Mr. Mahan Advocate holding brief for Mr. Kariuki for the Claimant and in the absence of Amuga & Co. Advocate for the Respondent.

ABUODHA N. J

JUDGE