



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 9 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 10th November, 2014)

JAFETH ANGOLO MATANGCLAIMANT

-VERSUS-

SURJI SINGH RESPONDENTS

JUDGMENT

The claimant filed his claim on 21.1.2013 through the firm of Wanjiku Mwaura & Co. Advocates claiming unlawful dismissal. It is the claimant's case that he was employed by the respondents from January 1998 as a metal turner earning a salary of Kshs 8,000/= per month. He annexed his NSSF statement as proof that he was employed by the respondents who used to remit NSSF contributions to the Fund.

The claimant avers that he worked for respondents well until 2010 when he wrote the respondents a letter seeking to retire due to age (**App-2**). The respondents however refused to grant the claimant's request and instead locked him out of work and also never paid him his retirement dues. The claimant claims that he used to work from 7.30 am to 6 pm and was not paid any overtime and never went on leave. His salary was Kshs 9,000/= per month as per **App-3**. His advocate wrote to respondents a demand letter in respect of the dismissal (**App-4**). He states that he was unfairly terminated and seeks to be paid terminal benefits as enumerated in his claim.

In cross examination the claimant stated that he has no certificate of training. He denies he was given a loan of Kshs 100,000/=. He wrote a letter asking to retire on 30.8.2010 and also wrote another letter to personnel on 30.7.2011. He had been on duty all along. His last day on duty was December 2010 and he states that he didn't earn from September 2010. In December 2010, the respondents ordered the watchmen to lock him out. He states that he was employed in 1993.

The respondents filed their reply to defence on 3.5.2013 through the firm of Otieno Ragot & Co. Advocates. They also called 2 witnesses whose contention is that the claimant worked for the respondents as a guard and he stayed in their compound. He last came to work on 13.9.2010. They deny chasing him away. RW2 admits that claimant asked to be retired in September 2010 and he kept coming asking for his dues on retirement but he was told he couldn't be paid because he absconded.

Having heard both parties, the issues for determination are:-

1. **Whether claimant retired or was dismissed or absconded.**
2. **Whether claimant is entitled to any remedies.**

On 1st issue **App-II** in claimant's list is a letter dated 30.8.2010, where claimant sought to retire with effect from 15.9.2010 citing his age. In the meantime, it appears he ceased working for respondents after this period as his letters indicate so. The respondents aver he absconded duty and RW2 states that he absconded duty and that is why he was not paid his dues. The RW2 also stated that he was aware the claimant wanted to retire and he admitted that the last time he worked was in September 2010 and then he kept coming asking for his dues.

The evidence of RW1 and RW2 seem contradictory with one stating that the issue of retirement was not known and the other stating otherwise. The finding of this court is that the claimant intended to retire from duty and he wrote a letter to that effect which RW2 is aware of. The issue of absconding duty does not arise.

Having retired from duty due to his apparent old age was the claimant entitled to any benefits. The claimant worked for respondents from 1998 as a metal turner. It is evident that claimant was a member and contributor of NSSF and so by virtue of S. 35(6) of Employment Act 2007, he is not entitled to payment of service pay. The claimant is therefore allowed to collect his dues from NSSF. He however sought to be paid underpayment of salary for 12 years. The claimant has however not established how much he was earning as against wages orders. No evidence is adduced before court as proof of his actual entitlement. I therefore find that the claimant though having retired, there are no terminal dues owed which are proved and I therefore award no amounts. Each party shall bear it's costs.

HELLEN S. WASILWA

JUDGE

10/11/2014

Appearances:-

Ochuka for claimant

Owino for respondents

CC. Wamache