



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 2122 OF 2012**

**RICHARD MUTINDA MUTUA.....CLAIMANT**

**VS**

**PETER KAMAU KINYORO AND CYRUS KAMAU THUMBI**

**T/A PETKAS GENERAL AGENCIES.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by way of Memorandum of Claim filed on 19th October 2012 and amended on 6th February 2013 seeks compensation for unlawful termination of employment and payment of terminal dues. The Respondent filed a Reply on 27th November 2012.
2. The matter was heard on 5th February and 23rd June 2014 with the Claimant testifying on his own behalf and Benson Mwenda Mbutia together with Cyrus Kamau Thumbi testifying for the Respondent. The parties filed written submissions in July 2014.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as an Accountant effective 1st February 2007. On 13th March 2012, the Claimant wrote to the Respondent expressing his wish to retire upon attaining the age of 50 years. After receiving the Claimant's letter, the Respondent terminated his employment verbally and did not pay him his terminal dues.
4. The Claimant's claim is as follows:
  - a) Salary for 13 days worked in March 2012.....Kshs. 8,750
  - b) 1 month's salary in lieu of notice.....17,500
  - c) Leave pay for 2007-2011.....72,000
  - d) Severance pay for 5 years.....87,500
  - e) Normal overtime.....520,580
  - f) Overtime for Sundays and public holidays.....71,307

- g) Prorata leave pay for January and February 2012.....2,461
- h) 12 months' salary in compensation for unlawful termination.....210,000
- i) Certificate of service
- j) Costs and interest
- k) Any other relief the Court may deem just to grant

### **The Respondent's Case**

5. In the Memorandum of Reply filed on 27th November 2012, the Respondent admits having employed the Claimant as a Clerk but denies terminating his employment. On the contrary, the Claimant opted to resign by his letter dated 13th March 2012. The Respondent further denies issuing the letter of appointment marked 'RMM1' in the Claimant's pleadings.
6. The Respondent admits the following as payable to the Claimant:
- a) Salary for 13 days worked in March 2012.....Kshs. 7,583.55
  - b) Prorata leave pay.....2,041.60
  - c) Leave pay for 2 years.....24,500.00

7. By way of counterclaim, the Respondent claims one month's salary in lieu of notice since the Claimant did not serve the requisite notice.

### **Findings and Determination**

8. The issues for determination in this case are as follows:
- a) Whether the Claimant resigned or was terminated;
  - b) Whether the Claimant is entitled to the reliefs sought

### **The Mode of Separation**

9. According to the Claimant, the Respondent terminated his employment upon the Claimant's request to retire at the age of 50 years. The Respondent on the other hand states that the Claimant resigned from employment without giving the requisite one month's notice.
10. The Claimant's letter dated 13th March 2012 reads in part:

*“I wish to retire since I have attained the age of 50 years.*

*I feel I should retire and take the remaining time with my family because my body can no longer work for long hours. Therefore, I would wish to tender my notice as from 13th March 2012 to allow you prepare my final dues for settlement since I joined your firm on 1st February 2007 up to 13th March 2012.*

*I appreciate your good Industrial Relations that we have had for the last five years.”*

11. A reading of this letter indicates that the Claimant wished to stop working for the Respondent effective 13th March 2012, the same day he wrote his letter. In normal human resource practice, retirement unlike resignation is a foreseeable event that is driven by attainment

of a certain age by an employee.

12. The Claimant pegs his desire to retire on his attainment of 50 years as well as his stated inability to work for long hours. There is no mention of ill health and the Court therefore drew the conclusion that the Claimant's wish to retire was driven by age. This was not a unforeseen occurrence and there was therefore no reason for the Claimant not to give adequate notice of his intention to retire.

13. An employee proceeding on retirement is not normally under pressure to wind up his time in order to take up another job. The Court was therefore unable to understand why the Claimant would wish to commence his retirement on the same day that he wrote to the Respondent in this regard.

14. It seems to me that the Claimant actually intended to resign and was in a hurry to do so, probably to take up another assignment. Moreover, since he wished to leave the Respondent's employment with immediate effect he cannot turn around and say that his employment was terminated.

### **Reliefs**

15. In view of the foregoing findings the Claimant's claim for unlawful and unfair termination of employment fails and is dismissed. The claim for one month's salary in lieu of notice is also dismissed. Additionally, the Court found no basis for the claim for severance pay and the claim for overtime was not proved.

16. With regard to the claim for leave pay, the Respondent did not produce any leave records to disprove the Claimant's claim. This claim therefore succeeds and is allowed. The admitted claims for salary for 13 days worked in March 2012 and leave pay for 2 years are also allowed.

17. The Claimant did not give the prerequisite notice and the Respondent's counterclaim for one month's salary in lieu of notice therefore succeeds and is allowed.

18. In the final analysis I make an award in favour of the Claimant in the following terms:

a) Leave pay for 5 years (17,500/30x26x5).....	Kshs. 75,833
b) Salary for 13 days worked in March 2013.....	<u>7,583</u>
Total.....	83,416
Less notice pay .....	(17,500)

**Amount payable.....65,916**

19. The Respondent is directed to issue the Claimant with a certificate of service.

20. Each party will bear their own costs. The award amount will attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF NOVEMBER 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Miss Wambani for the Claimant

Mr. Momanyi for the Respondent