



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 13 of 2012**

**FRANKLINE MUREITHI MWANIKI ..... CLAIMANT**

**VERSUS**

**EQUITORIAL NUT PROCESSORS ..... RESPONDENT**

**J U D G M E N T**

By a statement of claim dated 14th May, 2011, the claimant avers that he was employed by the respondent on 15th March, 1996 as a supervisor. The contract of employment according to him was oral.

By a letter dated 25th June, 2010 however, the respondent terminated his services with immediate effect. Accordingly to him the respondent did not assign any reason for the termination. He therefore considered the termination unfair and seeks from the court an order directing the respondent to compensate him.

The claimant further claims one month's salary in lieu of notice, annual leave for two years, rest days from the year 2003 to June 2010 and payment for work done during public holidays from 2003 to June 2010.

The claimant further seeks to be compensated for overtime, service pay and house allowance.

The respondent on the other hand and by a memorandum of response dated 29th May, 2012 while admitting some of the claimant's claims, refutes some of them either on merit or quantum.

The respondent admits the claimant is entitled to one month's salary in lieu of notice and severance pay in the sum of Kshs.84,000.

The respondent however does not admit that the claimant is entitled to any salary arrears stating the same were paid up to the time he left employment. Regarding leave the respondent states the claimant had always taken his annual leave and was only entitled to 11 days of leave by the time he left. The respondent further refuted claimant's entitlement to house allowance since the same had always been paid with other monthly emoluments. Regarding overtime the respondent states that there was no outstanding dues for overtime as the same were settled fully. The Register annexed by the claimant in support of his claim for overtime has been disputed by the respondent stating the same was personal and not countersigned by the respondent's purchasing manager.

On a point of law, the respondent states that the claimant's claim for the period between 2003 and 2008 was untenable since the same were statute barred by virtue of section 90 of the Employment Act.

When the matter came up for hearing on 15th March, 2013, the respondent did not attend hence the case proceeded ex parte. Counsel for the claimant Mr. Mbutia informed the court that he was withdrawing his client's claim for house allowance but pursuing his client's claim for unfair termination, annual leave, rest days, public holidays and overtime.

The claimant in his testimony during the trial reiterated the averments in the statement of claim. It was his testimony that the termination of his job was unfair since the respondent advertised for his job as soon as he left.

It was his evidence that he never went for leave. He stated that he applied for leave but was never approved. According to him he never had any rest days and that he worked on public holidays as well. As a supervisor he stated that he used supervise shifts hence was required to be around throughout.

Concerning overtime, he admitted he was paid Kshs.236,000 leaving a balance, according to him of Kshs.192,400.

He stated one could work up to as much as 200 hours a month hence the allowance paid was not enough.

Regarding service pay, he stated that his employer was not denying his entitlement only that it was willing to pay up to 8 years yet he was claiming fourteen years.

### **1. Unfair termination**

By a letter dated 25th June, 2010 the respondent informed the claimant that they would not require his services with effect immediately and asked him to hand over all the company's property in his possession to the purchasing manager.

The letter went ahead and informed him that he was entitled to one month's pay in lieu of notice, any accrued leave days and any other dues according to labour law requirement.

Going by paragraph 7 of the response to the claim the respondent stated that the claimants dues were duly tabulated as stated in the termination letter but the claimant failed to collect the money as he disputed the quantum.

According to the claimant he was employed on 15th March,1996. This fact has not been disputed by the respondent hence as at the time of termination, the claimant had worked for the respondent for approximately 14 years. Nowhere in the respondent's response has anything been alleged touching on any incompetence or impropriety in the performance of the claimant's work. The letter of 25th June, merely informed him that his services were not needed.

Unlike the repealed Employment Act, the new Act at Section 45(1) prohibit employers from terminating employment contracts unfairly. Subsection (2) of the said section provides that a termination would be considered unfair if the employer fails to prove that the reason for termination is valid and that the reason for termination is a fair reason. The repealed Employment Act unlike the current one did not oblige any employer to provide any reason for termination of employment. This is what may have happened in the claimant's case.

Employment has become a very emotional issue in this country.

The big and continually rising number of unemployed people is something the courts cannot lose site of . It must be the reason behind which Parliament provided in the new Act that an employer seeking to terminate the services of an employee should have a reason for doing so. The claimant was not provided with any reason for termination of his services. All he was told was that his services were not required. Further the manner in which the termination was done was inherently unfair. He was to leave his employment immediately. People in employment have legitimate expectation that while performing these duties as required by the contract of employment, they will continue to have their jobs unless there

is good cause to send them home. Besides an employed person more often than not, has obligations which are predicated upon his or her employment. To ask them to leave on such a short notice unless for good cause is of itself unfair.

The court therefore reaches the conclusion that the claimant services were unfairly terminated within the meaning of Section 45 of the Employment Act.

Where the court finds that an employee's services has been unfairly terminated, it has power under Section 49(1) of the Act to award up to a maximum of one years wages or salary. This claimant merits an award under this Section and the court exercising its discretion in the light of the circumstances under which the claimant was terminated awards him 7 months wages as reasonable compensation for unfair termination of employment.

## **2. Severance pay**

The court having found that the claimant was unfairly terminated within the meaning of Section 45 of the Employment Act and awarded him section 49(1) compensation, the question that needs to be inquired into is what would have been the proper way to terminate the claimant's employment if indeed the respondent no longer needed his services? It is curious to note that upon termination of the claimant's employment, the respondent advertised for the filling of the position in respect to which he was informed his services were not required. One can only deduce two things from the respondent's action: first, someone wanted him out of the way and did not care what the law requires if his services were to be lawfully terminated. Second, he was declared redundant without following the procedure set out in the Act. The second position appears more plausible since the respondent has expressed the willingness to pay him severance pay in the sum of Kshs.84,000.

Section 40(1) of the Employment Act provides that an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the conditions set thereunder. Nothing shows the claimant was a member of a Union therefore his termination should have been notified to him in writing and the labour officer. There is nothing on record to show this was done. The Act further requires that in selecting employees to be declared redundant due regard should be paid to seniority in time to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy; further the employer must pay all leave due in cash and given the employee concerned one month's notice or wages in lieu thereof. Although the respondent claims to have paid the claimant all his leave dues which he disputes, nothing has been pleaded or annexed to the pleadings to show that prior to terminating the services of the claimant regard was had to his seniority, skill, ability and reliability as required by the Act.

The claimant claims severance pay for the period worked which he calculates at Kshs.68,694. The respondent has however offered Kshs.84,000. The provisions of the Act constitute a minimum an employer can pay. Nothing prevents an employer offering more as is the case here. Judgment is therefore entered for Kshs.84,000 on account of severance pay.

## **3. Leave, Holiday and rest day**

Concerning rest day, under section 27(2) of the Act, an employer shall be entitled to at least one rest day in every period of seven days. The Act further in section 74 makes it mandatory for an employer to keep written records of all employees and the record shall contain among others the particulars of an employee's weekly rest days specified in section 27.

Section 75 makes it an offence to falsify such records.

The claimant raised the issue of rest days in his statement of claim and the only response the respondent gave was that the claimant took his paid leave during his employment. Rest day is different from leave and if the respondent wanted to reasonably rebut the claimant's claim for rest days it would have annexed the record of the claimant's rest days as required by section 74 of the Act. In absence of such, this claim

succeeds and is hereby awarded as prayed. The same applies for the claim for public holidays.

#### **4. Overtime**

Regarding claim for overtime this court is reluctant to make such award since the payslips exhibited by the claimant himself show that allowance in lieu of overtime was paid. He has not either by way of pleadings or evidence distinguish between the overtime paid through his payslip and the ones he was claiming. To this extent this claim is disallowed.

#### **5. Leave**

Section 28(1) of the Act provides that an employee shall be entitled after every twelve consecutive months of service to not less than 21 working days of leave with full pay. Subsection 4 of the same section provides that the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period. The claimant in his statement of claim states that he is claiming leave for two years but does not specify for which period. No evidence was adduced during the trial to elucidate this either. In the circumstances the court is unable to allow this claim as it is unclear for which 2 year period is the leave being claimed.

In conclusion the court makes the following award:-

1. 7 months salary as compensation for unfair termination.

$$(8,500 \times 7) = 59,500$$

2. Kshs.84,000 – severance pay.

3. Kshs.94,154 for rest days.

That is to say the court awards the claimant the sum of **Kshs.237,654** as compensation for unfair termination of his employment and related claims as set out in his statement of claim. It is so ordered.

Dated at Nyeri this 10th day of May 2013.

**Abuodha J. N**

**Judge**

Delivered at Nyeri this 10th day of May 2013.

**Delivered in open Court in the presence of Mbuthia for the Claimant and Gathaara for the Respondent absent.**

**Abuodha J. N**

**Judge**