



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 24/2013

(formerly Nairobi No. 1182/2012)

(Before Hon. Justice Hellen Wasilwa on 12th June, 2013)

PETER MUTURI GACHUGACLAIMANT

VERSUS

HAYER BISHAN SINGH & SONS LTDRESPONDENTS

JUDGMENT

The claimant herein filed his Memorandum of Claim on 12.7.2012. He claims allowances, payment of terminal benefits and damages for unlawful and wrongful termination.

The claimant's case is that he was employed by the respondents herein on 11.7.2005. He annexed Appendix A, a copy of the employment contract agreement executed between the claimant and respondent as evidence. He was engaged as a driver with a remuneration of Kshs 17,000/= as per the contract agreement. This contract was renewed on 18.12.2006 as evidenced from Appendix A2 now with remuneration of Kshs 20,000/=. It was an open ended contract as the period was not stated.

The claimant informed court that on 1st March, 2009 he was issued with a termination notice dated the same day which was also produced in court as evidence. Before the aforesaid one month notice lapsed, it was revoked vide Appendix A4 and the claimant continued serving the respondent under a contract of employment dated 1.8.2009.

On 16.9.2010 the respondent issued the claimant with a notice of termination of services on grounds of redundancy. The claimant contends that this termination was unlawful as no reason was given as to why he was the one picked as compared to the other employees retained. Appendix 5 is the said notice.

The claimant further contends that from 31.3.2009 to 10.9.2010, he was not being paid his rightful dues by the respondents especially the monthly field allowance of US Dollar 150. He was also not paid any other terminal dues. The claimant wrote to the respondents demanding these dues but the respondents failed to honour the request prompting the claimant to seek redress from court. The claimant contends that he was also not paid his 16 days leave and severance pay.

In their submission in court, the claimants opted not to prosecute their prayers (c) and (d) on unpaid leave and work ostensibly done but unpaid for from 31.3.2009 to 16.9.2010 respectively amounting to Kshs Ksh 459,000.

In summary, the claimant admitted that his employer is a construction company and this would have

prompted him moving from one project site to another and upto when the work ended. He admits he could be dismissed if the work ended but he was entitled to one month notice before termination. He says he was not paid his field allowance for 19 months. He indicates that in the new contract he signed on 1.8.2009, there was no indication he could be paid field allowance and overtime. He said he was terminated in 2010 but was not paid field allowance in 2009/2010 from the time notice of termination was withdrawn i.e from 1.3.2009 to September, 2010.

He asks court to order he be paid redundancy for 15 years as he worked from 2005 upto 2010. He reiterates in cross examination that the project he was working on, didn't end but he was just sacked. He also indicated that in the contract of August 2009 there was an indication that the salary was being increased.

The respondents on the other hand filed their memorandum of reply in September, 2012. They admitted that they employed the claimant as a truck driver and his station of duty was Yei in Southern Sudan with a remuneration of Kshs 17,000/=. This contract was signed in Kisumu on 11.7.2005. The contract was renewed on 18.12.2006 with a salary increment to Kshs 20,000/=. The respondent entered a further contract of employment on 1.8.2009 with a salary of Kshs 27,000. They contend that normally the contract was determined by the scope of work done.

The respondents further aver that it was not only the claimant who was terminated but his colleagues were affected too. Further, the respondents aver that field allowance was payable to those on site as a sort of hardship allowance and for one to qualify, one had to be physically present on site. According to the respondents, the claimant could not have been paid this allowance as he was on leave from 16.7.2010 to 1st September, 2010 as per Exhibit HBS-8. They aver that the contract of 1.8.2009 never provided for service pay. Further, the respondents contend that service pay was payable after serving 36 months, however, when they terminated the claimant's contract 36 months had not lapsed. They also contend that the last contract did not provide for field allowance and that the claimant worked on contract and was not on permanent terms.

They aver that during his time they had 5 drivers but currently they have 2 who drive small cars and they no longer need truck drivers.

Having heard and examined evidence of both parties, the issues for determination are as follows:-

1. Whether the claimant was unlawfully terminated.
2. If so what remedies he is entitled to.

A look at the last contract entered into between the claimant and respondents on 1.8.2009 shows that the claimant's salary was Kshs 27,000/=. However there were other terms indicating that notice period will be one week during the first two months or one week's pay in lieu. Payment of overtime was also discontinued and severance pay was payable upon serving 36 months.

On 16/9/2010, the claimant was issued with a termination notice of one month given that notice was issued the respondent complied with the provisions of the law i.e Section 36 of Employment Act which gives the requirement of notice. However the notice given states:-

“Due to the advancement of works on the Juba Munduri road project, activities on site have become minimal and have necessitated the reduction of staffing level.

The situation has affected your Section and therefore we issue the necessary one month notice for the termination of your contract/service from the date of the letter.”

The respondent were indicating that this termination was necessitated on account of redundancy.

The Law relating to termination on account of redundancy is found at S. 40 of the Employment Act 2007 which states that:-

S. 40(1) “An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions;-

a) ----

b) where an employee is not a member of a trade union, the employer notifies the employee in writing and the Labour Officer.

c) the employer has in the selection of employees to be declared redundant had due regard to seniority in time and to the skill ability and reliability of each employee of the particular class of employees affected by the redundancy.

d) ---

e) the employer has where leave is due to an employee who is declared redundant paid off the leave in cash.

f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice and

g) the employer has paid to an employee declared redundant severance pay at the rate of not less than 15 days pay for each completed year of service.”

The respondent herein may have given notice to the claimant on the expiration of the contract but this notice was not given to the labour office. The selection of employees to be declared redundant in relation to the claimant is also not explained as envisaged herein. The claimant had contended that he was the only one whose contract was terminated but respondents aver that other employees were also affected. It is not clear whether only claimant was one chosen or not. However given that this notice was not served on the labour officer, the procedure used in terminating the claimant was unfair and unjustified.

What remedies then is the claimant entitled to? From the provision of S. 40(1) of Employment Act certain condition must be met before an employee is terminated on account of redundancy. It is apparent that in the previous contracts of 11th July, 2005; and 18th February, 2006, at the end of these contracts the claimant was never paid his dues. This was acceded to by the respondents. The previous contracts were for 5 years and it is my finding that the claimant is entitled to payment of service pay for that period as envisaged under S. 35(5) of Employment Act. I calculate this at 15 days salary for each year worked which translates at:-

1. $15/30 \times 17000 \times 1\frac{1}{2}$ yrs for period of 1st contract = 22.5 days.

Salary = Ksh 12,750/=.

2. $15/30 \times 20,000 \times 2\frac{1}{2}$ yrs for period of 2nd contract 37.5 days.

= Ksh 25,000/=

3. For last contract served = $15/30 \times 27,000 \times 1$

= Ksh 13,500/=

TOTAL SERVICE PAY = Ksh 31,250 /=

The claimant is also entitled to payment of severance pay in respect of the last contract served which was for one year and this is equivalent to 15 days salary = Ksh 13,500/=

The claimant had sought to be paid special field allowance which does not form part of the terms of the last contract and therefore he is not entitled to that payment.

The claimant sought payment of damages for unlawful termination. I will award him 6 months pay for unlawful termination which translates to Ksh 120,000/=.

TOTAL AWARDED = KSH 184,750 plus costs of this suit.

HELLEN WASILWA

JUDGE

12/06/2013

Appearances:-

N/A for both claimant & respondents

CC. Sammy Wamache.