



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO 15 OF 2013

JUMA HASSAN MWAMBISICLAIMANT

VERSUS

ANWARALI & BROTHERS LIMITEDRESPONDENT

J U D G M E N T

The claimant has sued the respondent claiming terminal benefits amounting to Ksh.192,166/ plus costs and interest. The brief facts of his case are that he sought early retirement after doctors recommendations following an industrial accident while on duty.

The respondent had in her defence alleged that the claimant is the one who terminated the services by deserting work from 17/9/2008 after returning the respondent property. She blames the claimant for not applying for to the medical board for assessment towards retirement on medical grounds.

The suit was heard on 5/6/2013 when the claimant testified as CW1 and Mr. Duncan Kiaye testified for the defence as RW1. The summary of the claimant's evidence is that he was employed by the respondent as mechanic on 1/11/1998 and served in the same capacity until September 2008. His last salary was ksh.11,140 plus house allowance of Ksh.2500/- totaling to Ksh.13,640 per month. That he went for one month annual leave each year except in 2008.

That on 2/9/2008, he was given a letter from the doctor to take it to the respondent recommending early retirement on medical grounds, namely injuries sustained in an industrial accident while at work in the year 2000. That the respondent declined the request and gave him an off for one week pending investigations on his health.

That upon return from his off, the RW1 demanded that he (claimant) writes a resignation letter because no retirement was to be granted. That when refused to resign the RW1 chased him from the office and refused to give him audience for the following five months the claimant kept on visiting his office.

He concluded by saying that the RW1 gave him difficult work including road patrols as far as Eldoret while still ill a fact which made his health to deteriorate. He prayed for unpaid salary, notice pay, service pay, accrued leave days and damages plus any other relief which the court may deem fit.

On cross examination he denied writing any resignation letter and clarified that the letter marked Appendix 2 for the defence was not in any way a resignation letter. That the accident in respect of which he sought early retirement was in the year 2000 but he had worked for 8 years thereafter until 2008.

On further cross examination by the court he admitted that the letter recommending retirement was revoked by a subsequent letter from the same Coast General Hospital marked Appendix 3 for the defence. That thereafter the respondent did not request for an assessment report from a Medical Board on whether or not the claimant should be retired on medical ground.

In response, RW1 the Human Resource Manager for the respondent confirmed that the claimant served the respondent between 1/11/1998 and 2/9/2008 when he returned his uniform to the office. That on the said date he came from home where he was on his sick off until 17/9/2008.

That on 13/9/2008 while still on sick off, the claimant wrote the letter marked Appendix 2 for the defence seeking termination of employment on medical grounds. RW1 confirmed that the claimant had suffered industrial accident in the year 2000 and was fully compensated. That thereafter he continued working for 8 years until he went for sick off on account of Malaria and Typhoid.

That the issues of injuries to him appeared suspicious as it had not been raised before. That he decided to pay terminal dues as follows;

- 1. Service pay for 9 years at the rate of 15 days per yea of service.**
- 2. Leave due at the rate of 2 days per month for the 11 months worked**

The total worked to a gross pay Ksh.47,472.50 out of which PAYE and one month salary in lieu of notice was to be deducted. That the claimant declined the proposed settlement and hence the present case.

After the close of the hearing, the parties did not wish to file closing submissions but instead asked me to write the final judgment.

I have carefully perused the pleadings and considered the evidence adduced on behalf of the parties. It is not in dispute that the court has the necessary jurisdiction to entertain the suit by dint of Section 12 of the Industrial Court Act and Article 162(2) (a) of the Constitution. It is also not in dispute that the claimant worked for the respondent between 1/11/1998 and 17/9/2008. It is also an agreed issue that in the year 2000, the claimant suffered serious injuries when he was involved in an industrial accident while on duty.

It is also agreed that the claimant is entitled to employment terminal dues in respect of service pay and accrued leave days not utilized.

The issues for determination in my view are

- (a) who terminated the claimants employment?**
- (b) whether the termination was wrongful or unfair**
- (C) whether the relief sought ought to issue.**

To answer the first issue, I have considered the medical reports by Dr. Omar dated 2/9/2008 and Dr. Mwangi dated 6/10/2008. The two letters were from the same institution and were in agreement that the claimant had suffered serious fracture of the left hip which required a total hip replacement but he could not afford the cost. The doctors also agreed that the claimant could no longer do heavy work due to pain.

When the claimant brought the letter dated 2/9/2008 he was only given a week off, not to attend hospital, but to be investigated. Instead of receiving sympathy or medical assistance he was ordered to write a resignation letter and when he refused he was chased from the office on 17/9/2008! That evidence was not rebutted. The RW1 did not also challenge the claimant's allegation that he persistently sought audience with the RW1 for five months thereafter without any success. That the respondent also never

caused a Medical Board to be constituted to assess the medical status for purposes of retirement on medical grounds. Instead RW1 blames the claimant for not dealing with the Medical Board.

In my view the respondent is to blame for the stalemate. The respondent chased away the claimant and did nothing to address the medical condition. He did not rebut the allegation that he was insensitive to the claimant's ill-health because he continued to allocate him hard duties and for long distances away from home.

The question in my mind is whether the doctors letter dated 6/10/2008 after the claimant had been chased away made the case better for the defence. In my view it made it worse by putting the burden of requesting for a Medical Board meeting on the respondent. So why should RW1 blame the claimant for not requesting for an assessment by Medical Board? In my view the whole problem is attributable to the respondent. She cannot be heard insisting that she desperately needed the services of a person whom the doctors have examined and found to be medically unfit to do heavy duties of a mechanic.

The fact that the RW1 did not deny that he chased away the claimant on 17/9/2008 is another reason why I find that the termination was by the respondent. I am not persuaded that the claimant's letter dated 13/9/2008 was a resignation. He clearly referred to the doctors letter dated 2/9/2008 recommending retirement on medical grounds. The letter only requested for clearance in respect of the recommendation by the doctor and did not in any way mean resignation.

The next issue is whether the termination was wrongful or unfair. I have considered the explanation given by RW1 and the appointment letter produced by the claimant. I have also considered Section 41, 43, 45 and 47 of the Employment Act. The letter of appointment provided for a notice period of one month for any of the party wishing to terminate the services. The said legal provisions on the other hand provided for the procedure for termination by the employer in order to avoid unfairness which may result from the unequal bargaining power.

It is not in dispute that all was well until the claimant brought the doctors letter dated 2/9/2008 recommending retirement on medical ground. Instead of complying with the letter or seeking assessment from a Medical Board the employer demanded a resignation letter from the claimant and even send him away when he refused to tender a resignation. I do not agree with the evidence by RW1 that the claimant had not complained of the injuries since the year 2000 that contracts with the medical doctor's opinion in the letter dated 2/9/2008 and 6/10/2008. In my view injuries requiring a complete replacement of the hip cannot have gone unnoticed by a reasonable employer. The evidence by the claimant that he was hospitalized at Salgaa Hospital and later transferred to Mombasa was not contradicted by RW1. He also did not contradict the evidence by the claimant that he chased the claimant away as observed herein above.

I am satisfied by the explanation of the claimant that the respondent terminated his services without a one month notice as required by the letter of employment. To that extent I find that the termination was wrongful for breach of express term of contract. I will not therefore need to consider the unfairness of the dismissal because the claimant did not ask the court for the same.

I will therefore consider the last issue of whether or not the relief sought ought to issue. I have already observed that the respondent admitted her willingness to pay the claimant's terminal dues in respect of service pay and accrued leave less statutory deductions an notice pay.

On the other hand the claimant prays for service pay, leave, notice pay and unpaid salary for October 2008 to February 2009. I will first grant the uncontested items of service pay at the rate of 15 day per year of service and the accrued leave days. The period of service in my view was between 1/11/1998 and 17/9/2008 which was 9 years 11 months and 17 days. Section 35 of the Employment Act talks of 15 days pay for every year of service. I will round off the period to ten years because it is fairer to treat 11.5 months as one year than to treat it as zero years.

As regards the accrued leave, the appointment letter provides for 24 days annual leave which

translates to 2 days per month. The leave for the period ending on 17/9/2008 was 11 months which translated to a leave of 22 days not taken.

I will in view of my earlier findings, award one month salary in lieu of notice in favour of the claimant. I will however dismiss the prayer for 5 months salary for October 2008 to February 2009 because there is enough evidence to prove that during that period the claimant was not officially on duty because as already held above, had been dismissed by the RW1 on 17/9/2008.

The question in my mind is what salary should I apply in respect of the above awards? The claimant testified that his gross salary was ksh.13640 which was not contested by the RW1. I have however noted from the respondent's exhibit 7 that he had applied a gross salary of ksh.12614. She did not however adduce any further evidence to prove that the said figure was the amount which had been agreed even before the termination. He did not give any basis for such figure of ksh.12614/

Without any evidence to disprove the allegation of the amount of salary of ksh.13640, the court will submit to Section 10(7) of the Employment Act. The said provisions puts the burden on the employer to disprove any allegation on a term of unwritten contract by the employees in legal proceedings like in the present case. Even though the initial contract was written, it later became partly oral after the salary review.

Consequently, I enter judgment in favour of the claimant and against the respondent as follows:

- a. **one month salary in lieu of notice13,640**
- b. **22 days accrued leave10,002**
- c. **service pay (15/30X10 yearsX13640)...68,200**

91,842

The above sum shall be subjected to statutory taxes except for the leave pay. In my view leave is a non-taxable right of every employee. If an employee does not lose some days when his leave is approved, in my view he should also not lose anything when the same is compensated in cash.

The claimant will get costs and interests on the dues from 30/9/2008 until payment in full.

Orders accordingly.

Signed dated and delivered this 8th July 2013

ONESMUS MAKAU

JUDGE