



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 737N OF 2009

KENYA BUILDING CONSTRUCTION TIMBER

FURNITURE AND ALLIED INDUSTRIES

EMPLOYEES UNION.....CLAIMANT

-VERSUS-

M/s. MEHTA ELECTRICAL LIMITEDRESPONDENT

M/s. Chege for Claimant.

M/s. Agwenyi for Respondent.

JUDGMENT

The Memorandum of Claim was filed on 25th April, 2009 by the Claimant Union on behalf of the grievants **Mr. Nathan Kasasiri Emitati** and **Mr. Peter Ochola** for alleged wrongful dismissal.

The particulars of the claim are as follows: Nathan Kasasiri Emitati the 1st grievant was employed on 25th February, 2002 at a daily rate of Kshs.250/=. By a contract of service dated 15th June, 2007, the Claimant was employed by the Respondent as an electrician to work at Juba Emergency Power Project in Southern Sudan. He was to receive a monthly gross salary of Kshs.9,000/= and a daily subsistence and transport allowance of Kshs.300/=. He worked continuously for six months and was granted leave between 21st and 27th December, 2007.

On 27th December,2007 the 1st grievant reported to the Kenya office of the Respondent in order to be facilitated to get back to Sudan but was instead paid his outstanding wage of Kshs.8,000/= and was asked to remain in Kenya. He worked at N.H.I.F Building car park in Nairobi until 4th February, 2008 when he received a letter of termination of service with effect from that date. He was to be paid one month salary in lieu of notice and final dues. The letter simply stated that the company no longer required his services.

Mr. Peter Ochola

The 2nd grievant was employed by the Respondent on 2nd February, 2002 at a daily rate of

Kshs.275/= and worked in various sites until when his services were terminated with effect from 5th February, 2008. The letter of termination is dated 6th February, 2008. The 2nd grievant was to receive one month's salary in lieu of notice and other final dues. The letter like that of the 1st grievant stated that Mr. Ochola's services were no longer required.

Payment

Mr. Emitati received Kshs.8,000/= and was asked to sign a voucher. These were dues owed to him at Juba. Mr. Ochola declined to receive Kshs.8,000/=. No other terminal benefits were paid to the grievants.

The grievants were registered with the National Social Security Fund (NSSF) from the time of employment and the Respondent made the necessary contributions.

The Claimant submits that the termination of the services of the grievants were unlawful and unfair as there was no reason given for the termination. That they were also not paid their dues in terms of the Collective Bargaining Agreement and the **Regulation of Wages Building and Construction Industry Legal Notice No. 94 of 2004**.

They claim payment of terminal benefits as follows:

Nathan Kasasiri Emitati

Notice Pay

1. *That the Collective Bargaining Agreement (CBA), entitles him to two months' salary in lieu of notice in the sum of Kshs.23,764/=.*
2. *Two months' salary in lieu of leave in the sum of Kshs.23,764/=.*
3. *Severance pay at the rate of 15 days salary for each completed year of service for 5 years in the sum of Kshs.34,275/=.*
4. *Under payment of wages in that he was paid a daily rate of Kshs.250/= instead of the minimum daily rate of Kshs.457/= in the sum of Kshs.129,168/= and payment for compensation for unlawful termination of services.*

On the other hand, Peter Ochola claims:

1. *Two months' salary in lieu of notice in the sum of Kshs.23,764/=.*
2. *Two months' salary in lieu of leave in the sum of Kshs.23,764/=.*
3. *Payment of service pay at the rate of 15 days salary for each completed year of service for 5 years in the sum of Kshs.34,275/=.*
4. *Underpayment of wages in that he was paid a daily rate of 275 instead of the minimum daily rate of 475 in the sum of Kshs.113,564 and;*
5. *Compensation for unlawful termination of service.*

The Respondent filed a response to the Statement of Claim on 15th January, 2010 wherein it denies the claims by the two grievants stating *inter alia*;

That Nathan Kasasiri Emitati was employed on 2nd February, 2002 as a casual employee but denies

that he was paid a daily rate of Kshs.250/= per day and states that he was paid Kshs.185/= per the letter of employment dated 25th February, 2002 attached to the response as Annex 'A'. He worked as a general labourer in terms of the letter of appointment.

On the other hand, the Respondent denies that Mr. Peter Ochola was employed on 2nd February, 2002 at the rate of Kshs.250/= per day. It states that he was employed on 5th March, 2002 at the rate of Kshs.185/= per day as a general labourer. The letter of appointment dated 4th March, 2002 is attached as Annex 'B' to the response. Mr. Ochola had in fact sent in a letter of application of employment as a general labourer also attached to the response.

The Respondent adds that the two were employed as and when there was work and they did not therefore work continuously. It is also acknowledged that Mr. Nathan Kasasiri Emitati was employed in Juba for a while and was paid all his dues in respect of work done there. A salary voucher dated 20th December, 2007 for Kshs.5,538/46 is attached as Annex 'C' as evidence of such payment prior to taking the Christmas leave. That he was paid one month's salary in lieu of notice and was therefore not owed any further sums.

In addition, the Respondent states that Mr. Kasasiri was employed on permanent terms by a letter dated 1st March, 2005 and was paid a monthly salary of Kshs.7,056/=. However he also received a house allowance of Kshs.1,400/= per month.

The Respondent concedes that Mr. Ochola declined to receive his terminal dues but states that it is ready and willing to pay the sum if directed to do so.

Respondent submits that the termination of employment of the two was substantively and procedurally lawful and their respective claims should be dismissed with costs.

Leave

The Respondent states that Mr. Kasasiri took his annual leave in 2005, 2006 and 2007 and has attached signed leave forms as follows: for 2005, he cashed 26 leave days at the rate of Kshs.290/= totaling Kshs.7,540/=; in 2007 he cashed 18 days and took the rest of the days whereas between 22nd July, 2006 to 2nd August, 2006 he took 10 days compassionate leave. No such documents were produced with respect to Mr. Ochola.

Service pay

Furthermore, the Respondent avers that Mr. Kasasiri only served three years as a permanent employee from 2005 to 2008 and he should claim Kshs.10,584/= instead of Kshs.34,275/= as service pay.

Underpayments

The Respondent has submitted that both grievants were not underpaid as alleged or at all.

With regard to Mr. Peter Ochola, the Respondent states that he is only entitled to one month's salary in lieu of notice which he was offered and declined. He was employed on permanent basis on 3rd January, 2007 at a salary of Kshs.7,056/=. Therefore he served only one year in respect of which severance pay may be due. The document referred to is however not attached to the response.

The dispute was referred to the Ministry of Labour and Human Resources Development. Mr. J.N. Gatimu convened conciliation meetings but the matter was not resolved. He declared the dispute unresolved by a letter dated 9th September, 2009.

Remedies

It is conceded by the Respondent that the 1st grievant Mr. Nathan Kasasiri Emitati was permanently employed on 1st March, 2006 whereas the 2nd grievant Mr. Peter Ochola was permanently employed on 3rd January, 2007.

In terms of Clause 19 (2) of the Memorandum of Agreement between the Kenya Association of Building and Civil Engineering Contractors and the Claimant in force at the time of termination of the grievants, they were entitled to payment of two months' salary in lieu of notice. The 1st grievant was paid one month's salary in lieu of notice whereas the 2nd grievant was not. The court awards the 1st grievant one month salary in lieu of notice whereas the 2nd grievant is awarded two months' salary in lieu of notice.

The Respondent also admits that the 1st grievant is entitled to severance pay at the rate of 15 days salary for each completed year of service in the sum of Kshs.10,584/=. This however should be calculated on the basis of the gross salary giving a total of Kshs.12,684/= (7,056 + 1400 x ½ x 3).

With respect to the 2nd grievant, it is apparent that he worked continuously from 5th March, 2002 until the date of termination. The Respondent states that he was earning Kshs.7,056/= at the time of termination. He also received a house allowance of Kshs.1,400/= per month.

In terms of Clause 18 (v) of the CBA, he is entitled to a salary of 15 days for each completed year of service. This works out at Kshs.21,140 (7,056 + 1400 x ½ x 52). The court awards this amount accordingly.

The court finds that the claims for underpayment by both grievants have not been proven and the same are dismissed for want of proof.

Compensation

The two grievants were employed in the same year and their employment was terminated in similar circumstances in 2008. The letters of termination dated 6th February, 2008 did not provide any reason for the termination of their services. The Respondent concedes that both of them were permanent employees at the time of termination.

The Respondent is bound by the **Section 843** of the Employment Act to give reasons for the termination and accord the employees opportunity to explain why their employment should not be terminated in terms of **Section 41** of the Employment Act.

In court, the employer has the onus to prove that the termination was for a valid reason and that the termination was done in accordance with a fair procedure. This is in terms of **Section 43** as read with **Section 45 (2) (a) and (c)** of the Employment Act.

The Respondent has failed in both respects and this court finds that the termination of the two grievants was substantively and procedurally unfair and the two grievants are entitled to compensation.

The two had worked for the Respondent for about five (5) years and had lost their jobs in unfair manner. They lost means of livelihood which is often associated with loss of dignity especially when it is done abruptly and without notice as in this case.

The court finds this an appropriate case to award seven (7) months' salary as compensation for unlawful and unfair dismissal to each of the grievants in the sum of Kshs.60,592/= each.

In the final analysis the Respondent will pay each of the grievants as follows:

Nathan Kasasiri Emitati

0. Notice pay: 1 month salary in the sum of Kshs.8,466/=.

0. Severance pay Kshs.12,684/= (7,056 x 1400 x ½ x 3).

0. Compensation Kshs.60,592/=.

Total Kshs.81,742/=.

Peter Ochola

0. Notice pay: 2 months' salary in the sum of

Ksh.16,932/=.

ii) Severance pay: Kshs.21,140/= (8,466 x ½ x 5).

iii. Leave pay: 22 days salary in lieu of leave in the

sum of Kshs.14,111/=.

iv. Compensation: Kshs.60,592/=.

Total Kshs.112,775/=.

Costs of the suit to follow the outcome.

It is so ordered.

Dated and delivered at Nairobi this 27th day of August, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE