



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 276 OF 2013

JOHNSON KAINGU .....CLAIMANT

VERSUS

BREEZE POINT .....RESPONDENT

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

### **BACKGROUND**

The claimant brings this suit against the respondent alleging unfair termination of employment and claiming terminal benefits amounting to ksh.503,914.30. The respondent has denied liability and accused the claimant for deserting work without notice. The respondent further avers that the claim lacked merit and prayed for its dismissal.

The matter was heard on 4/11/2013 when the claimant testified as CW1 and called Michael Kazungu Yaa as CW2. The respondent never called any witness to support her defence. CW1 told the court that he was employed by the respondent on 17/4/2009 to take care of the swimming pool and the laundry. His salary was ksh.12000 per month. On 1-2-2012 he suffered a stroke while on duty. He blamed his sickness on the working environment which required him to take milk but the employer failed to provide. CW1 worked for 3 years without going for leave or public holidays. He attended hospital from 4/2/2012 and called the respondent to inform her of his sickness. The respondent was however not bothered even with CW1's deteriorating health.

CW1 was never paid his salary during his sick off until April 2012 when he was given salary advance for April 2012. In May 2012, he was given a further ksh.10000 thereafter he was served with a termination letter but without payment of his terminal dues.

CW1 prayed for judgment in terms of his accrued leave days for 3 years, public holidays for the 3 years medical express and terminal dues. He contended that although he was a members of NSSF no remittances were made until after his dismissal.

CW2 is the branch secretary of KUDHEIHA of which CW1 was a union member. He told the court that CW1 fell sick and was retired by the respondent. The union then engaged the respondent for payment of dues but the respondent defaulted. He contended that CW1 was entitled to leave, public holidays, salary arrear for January and February 2012.

### **ANALYSIS AND DETERMINATION**

The issues for determination arising from the pleadings and evidence are

1. **whether the termination of claimant's service was unfair.**
2. **Whether the relief sought ought to issue.**

In answer to the first issue, it is not in dispute that the termination was by the respondent's letter dated 5/6/2012 and the reason for the dismissal was absence from work on 1/6/2012 due to ill-health. The employer noted in the said letter that the sickness had continued from 1-2-2012 to 31-5-2012. The respondent had treated the period between 1-2-2012 and 31-5-2012 as the accrued 103 leave days and allegedly paid his salary for the whole period. As at that time the respondent had no medical opinion from any authority certifying that the claimant ought to be discharged from his employment. The termination letter was also made before according the claimant a hearing as contemplated under Section 41 of the Employment Act.

The said Section 41 supra provides that before an employer terminates the services of an employee on ground of incapacity, poor performance or misconduct, the employer shall first explain to the employee the reason upon which the employment is intended to be terminated. The employee is entitled to be accompanied by another employee or shop floor union representative of his choice, the two of whom shall have a right to make their response to the employer's explanation for consideration before a decision to terminate is reached.

The termination and the ground for the termination were unfair and unjustified. The employer already knew that the CW1 was sick and therefore he should not have dismissed him for being absent from work. The respondent should not have terminated the services for the reason of incapacity unless after the due process under Section 41 supra was followed or by serving notice under Section 35 supra. Consequently this court finds that the termination of the claimant's employment vide the letter dated 5/6/2012 was unfair within the meaning of Section 45 of the Employment Act.

The next issue to consider is what remedy is available to the claimant. He prayed for two months salary in lieu of notice. No documentary evidence was adduced to support the prayer. The court will therefore grant one month salary in lieu of notice as provided by Section 35 of the Employment Act.

The CW1 prayed also for salary arrears for January to May 2012 amounting to ksh.60000. He admitted in evidence that he received a salary advance in April 2012 and further ksh.10000 on 2/5/2012 through his wife. The advance for April 2012 was not stated. The wife of CW1 was not called to testify. The court has considered the documents filed in support of defence by the respondent to verify the payment made to the wife of CW1.

She signed as JANE for ksh.2860/ and ksh.8580/ in respect of salary for May 2012. She also signed petty cash vouchers for ksh.10,000, 4000/ and 3100 on 3/7/2012, 13/7/2012 and 18/7/2012 respectively being salary for February and March 2012. The total paid through CW1's wife is kshs.28540 out of ksh.60000/ prayed for. There is no evidence to show that salary for January and April 2012 was paid. There is also no evidence to show that statutory deductions and remittances made to the relevant authorities. The claimant is therefore awarded the balance of ksh.31460 as salary arrears.

The prayer for public holidays was not proved and is therefore dismissed. The prayer for leave is however allowed being  $21 \times 3 \times 12000 / 30 = 25200$ . The claim for medical expenses and transport is dismissed for lack of proper basis. The claimant is however awarded compensation for unfair termination at the rate of 12 months gross salary amounting to ksh.144000.

## **DISPOSITION**

As a result of the aforesaid findings the termination of the claimant's employment is declared unfair and judgment entered in favour of the claimant against the respondent for payment of the following:

- a. one month salary in lieu of notice .....12,000
- b. salary arrears .....31,460
- c. 63 accrued leave days .....25,200
- d. 12 months salary for unfair termination.....144,000

212,660

Signed, dated and delivered this 6th day of December 2013

O.N. MAKAU

JUDGE