



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE 108 OF 2013

KENEDDY MWAKHA MUNYETICLAIMANT

VERSUS

WILSON RADING OTIENO.....RESPONDENT

J U D G M E N T

BACKGROUND

On 13/5/2013 the claimant filed this suit alleging that he was unfairly terminated from service and demanding terminal dues. In addition he alleged that during his service he was underpaid in terms of salary and prayed for compensation. The respondent denied that claim and contended that he only employed the claimant as a casual, as and when work arose.

When the case came up for hearing on 15/7 2013, the parties recorded consent in terms of accrued leave days and service for 2 years plus one month notice. The said consent was based on a salary of ksh.5500 and the severance pay was at the rate of 15 days per year of service. The above consent was however subject to the claimants right to continue with the remaining part of the claim.

CLAIMANT'S CASE

The matter was heard on 23/9/2013 when the claimant testified as CW1 and the respondent opted to file written submissions. CW1 stated that he was employed as a domestic servant on 1/10/2009 on a monthly salary of ksh.4500. On 1/8/2011 the salary was increased to ksh.5500 until 8/6/2012 when he was summarily terminated without any reason. He reported to his union but the demands for terminal dues by the union were never replied by the respondent.

He prayed the court to order payment of terminal benefits including underpayment, public holidays, severance pay, NSSF and NHIF, 12 months salary compensation, house allowance and certificate of service. On cross examination he confirmed receipt of ksh.22000/ in respect of the consent order of 2/9/2013 relating to notice pay, Leave and severance pay. He also confirmed that he did not pay for 12 months salary compensation in his claim.

RESPONDENTS CASE

The respondent in his submissions demonstrated that the claimant was paid ksh.22000/ following the consent order of 2/9/2013 in respect of notice, leave and severance. He maintained that no further pay was owing.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings, evidence and submissions are:

- a. **whether termination of services without notice was unfair.**
- b. **Whether after the consent order dated 2/9/2013 there remains any further dues payable to the claimant.**

To answer the first issue, it is important to appreciate that contracts of employment can be terminated otherwise than as provided under Section 41, 44 and 45 of the Employment Act. The foregoing provisions deals with termination on account of incapacity, poor performance and misconduct. The issue of fairness therefore arises when we are dealing with any of the above reason for termination.

The court however is alive to the provisions of Section 35 of the said Act which provides for termination by notice. The notice is depended on the interval of payment of wages or salary or agreement between the employer and the employee. It follows therefore that just as it is with the English common law, Section 35 permits any party to a contract of employment to terminate the contract without notice and pay salary in lieu of notice if the reasons for termination is not in the category contemplated by Section 40 and 41 of the Act. In the defence pleadings and the submissions, there was no mention of any reason for termination either expressly or by inuendo.

consequently, the court finds that the services of the claimant were not terminated unfairly but wrongfully because no notice was served. In view of the consent order recorded in 2/9/2013, it is clear that one month notice was required before termination and the breach of that obligation was therefore admitted.

The next issue to determine is whether after payment of ksh.222,000/ under the said consent order of 2/9/2013 there still remains any further remedy. The said payment represented ksh.5500 being one month salary in lieu of notice, ksh.11,000 in lieu of leave for 2 years and ksh.5500 being severance for 2 years served calculated at the rate of 15 days per year.

It is not denied that services were terminated on 18/6/2012 which was about 9 ½ months into the 3 years of service. This court will award him accrued leave on pro-rata basis which works to ¾ annual leave. Going by the consent order, the pro-rata leave for 2012/2013 is $3/4 \times 5500 = 4125$. The court dismisses the claim for under payment because it has not been proved. No evidence was adduced to show that the claimant had negotiated for a higher pay than what he used to receive at the end of every month. Even if the contract provided for a higher pay why did the claimant wait until he was terminated in order to sue for it? The court will not entertain the claim where the claimant is shown to have acquiesced to a breach by the employer.

DISPOSITION

For the reasons above and in addition to the consent order dated 2/9/2013 where interim judgment was entered in favour of the claimant the court awards the claimant a further ksh.4125 plus costs.

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

ONESMUS MAKAU

JUDGE