



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 129 OF 2013

SAMSON MWANGI GAITA .....CLAIMANT

VERSUS

KENSALT LIMITED .....RESPONDENT

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

### **BACKGROUND**

The claimant brings this suit against the respondent alleging wrongful termination of employment and praying for accrued employment benefits plus compensation for unlawful termination. The respondent has denied liability contending that the termination was lawful; and consequently no damages are payable to the claimant. The claim was heard on 5/9/2013 when the claimant testified as CW1 and Caleb Kemote testified for the defence as RW1.

### **CLAIMANT'S CASE**

CW1 confirmed that he was employed by the respondent on 6/2/1995 by letter dated 6/2/1995. He worked upto December 2007 when he requested for a loan form the respondent to enable him rescue his family from a violent locality. The General Manager (GM) for the respondent advised him to resign in order for him to get dues to enable him meet his financial problems. CW1 then wrote a letter requesting early retirement but still to continue working after which he was paid his dues excluding his service pay of 15 days per year of service.

His salary was 29000/-. He was also not paid his accrued overtime dues in 2007. He used to work overtime but despite the promise, the respondent never gave him off day to compensate the overtime worked. He had worked for over 2000 hours before his termination which came before going for the proposed off days. Upto June 2005 CW1 was getting house allowance but it was stopped. CW1 added that from 2009 he used to work for 11 hours.

On cross examination, CW1 confirmed that he was on pension scheme and he was paid pension in 2008. He maintained that the employers records contains the quantity of hours worked as overtime which is over 2000 hours. He demonstrated from the defence exhibits that he was paid ksh.300/- as overtime for working 24 hours per day. He maintained that he is entitled to service because he resigned in 2007 following advice by the respondents GM.

He confirmed that the letter of appointment of 2007 provided for a consolidated salary of ksh.29400/-. The salary never changed after re-appointment. He denied that he deliberately damaged the

respondent's tractor. He contended that the damage was due to accident caused by lack of breaks.

## **DEFENCE CASE**

RW1 is the Human Resources Manager (HRM) for the respondent. He confirmed that CW1 worked for the respondent from 1995 to 2007 when he voluntarily retired. He was paid his benefits by the respondent of ksh.60531 and pension of ksh.630,502/-. Between 1995 and 2007 he was in management and his salary was consolidated and he was entitled to any overtime. In December 2007 he was re-employed by the respondent in the same capacity but never joined the pension scheme. His salary was consolidated and there was no overtime paid to him because he was in management. He was however paid appreciation token for extra work done.

The claimant was terminated on 15/9/2010 after he reversed a tractor and damaged it. The RW1 was not present but was only told by another manager about the incidence. According to RW1, the termination was fair because the claimant was informed the reason, paid his service pay and issued with certificate of service. RW1 maintained that no further dues were owing whether for the period between 1995/2007 or 2007/2010. After the close of the hearing both parties filed written submissions.

## **ANALYSIS AND DETERMINATION**

The issues for determination are:

- 1. Whether the 2007 contract of employment was wrongfully and unlawfully terminated on 15/9/2010 by the respondent.**
- 2. Whether the claimant is entitled to the relief sought.**
- 3. whether after voluntary retirement in December 2007 the claimant was paid all his dues.**

As regards the first issues for determination, the answer is in the affirmative. CW1 was dismissed summarily for misconduct and or poor performance of duty. He was alleged to have deliberately reversed a tractor and damaged it. RW1 was not present when the accident occurred but was informed by the claimant's manager and dismissed the CW1 before hearing him as required under Section 41 and 45 of the Employment Act. Consequently the dismissal amounted to unfair or unlawful termination.

Likewise, the dismissal was for a reason which was not proved at the trial. The duty to prove the reason for dismissal lies on the employer. The burden is to prove that the reason for dismissal was valid and justifiable. Without prove of any justifiable reason for dismissal, the summary dismissal amounted to wrongful termination because no termination notice was served to the CW1 prior to the termination. The dismissal was therefore wrongful for being in breach of contract within the meaning of Section 35 of the Employment Act.

Secondly, the court has considered the issue of the reliefs sought and is agreeable that the claimant is entitled to some accrued employment benefits with respect to the contract of service between December 2007 and 15/9/2010. In assessing the benefits payable, the court has considered that the claimant was acting in person and asked the court to award other reliefs that it considers just. In the period between 2007 - 2010 the claimant was not a member of a pension scheme but was a contributor of NSSF. Under Section 35 of the Employment Act he loses any claim for service pay. He is also not qualified to claim severance pay because he was not declared redundant.

In answer to the third issue, the court is satisfied that the claimant was paid all his lawful terminal dues after his termination of his first contract in December 2007. The resignation was voluntary and cannot be blamed on the respondent. Even is there was any dues outstanding, the claimant is deemed to have waved them by allowing the right thereto to lapse with time. Consequently the answer to the third issue is that all claims respecting the 2007 resignation is time bared and the court has no jurisdiction to entertain it.

The claim for overtime is also disallowed because it was not proved. The uncontested evidence by

the defence is that the claimant as in the management and therefore he was disqualified from payment of overtime. Instead he was entitled to off-days to compensate for the extra hours served. Any payment of ksh.300 per day as a token for extra hours worked is not enforceable because it was paid *exgratia*.

The claim for arrears in house allowances is also dismissed because the salary paid was consolidated. Consequently, the claim for ksh.184,180/ for accrued benefits is dismissed for lack of merits. The claim for 12 months compensation for wrongful termination will be entertained. As earlier observed the court is going to deem that the claimant intended to pray for 12 months salary for unlawful or unfair termination. The court will therefore award the prayer X read with prayer IV being 12 months gross salary for unfair termination. The gross salary per month at the time of CW1's dismissal was ksh.29400 hence  $ksh.29400 \times 12 = Ksh.352,800/$ . The claimant will also have one month's salary in lieu of notice being ksh.29,400. The prayer for certificate of service is granted to cover the period between 6/2/1995 to 15/9/2010.

### **DISPOSITION**

Judgment is entered for the claimant against the respondent as follows;

- a. **one month salary in lieu of notice .....29,400**
- b. **12 month salary for unlawful termination ...352,800**

**382,200**

- c. **certificate of service for 6/2/1995 to 15/9/2010**
- d. **costs and interest.**

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

**ONESMUS MAKAU**

**JUDGE**