



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 841 of 2009

**KENYA PETROLEUM OIL WORKERS
UNION.....CLAIMANT**

VERSUS

**KENOL- KOBIL PETROLEUM
LIMITED.....RESPONDENT**

JUDGEMENT

The claimant has on behalf of Lucas Mbugua Mithia (grievant) brought this suit claiming compensation of terminal dues totaling to Kshs.3,153,138.00 made up of Kshs.156255 being a month's salary in lieu of notice, Kshs137,513.00 being a balance of travel and entertainment, Kshs. 2,812,500 being claim for forgone years, Kshs.72,120 being severance pay as Kshs.187,500.00 being compensation for unfair delay as paying the terminal dues.

The basis of the claim is that the grievant worked for the Respondent for eight years only to be dismissed without notice. His salary was Kshs.14,447 plus home allowance of Kshs.5,635. The reasons for dismissed was not given.

The respondent has filed a defence denying any indebtedness to the claimant. That she has had employed the claimant for the eight years but only on an annual contract basis. That she has paid all the terminal dues to the claimant and nothing was owing. That the dispute had been heard by the Labour Officer and dismissed.

The case was heard on 26.7.2012 when the claimant called the grievant as the only witness(C.W.1). He testified that he worked for the respondent from September 1997 to March 2005. That the employment was in form of yearly contracts terminable by a one month notice by either party. The last contract was based on Appendix 9 in the claimant's Memorandum of claim. It was for period starting 1st March 2004 for 12 months.

Appendix 1 – 10 for the claimant were the yearly contract between the grievant and the respondent for the period 1997 – 2005. He relied on Appendix 11 to prove his claim for travel and entertainment totaling to Kshs. 275,015 for January 2001- March 2002 which he avers to have been paid only a half of it leaving a balance of Kshs.137,513.

He prayed for compensation for his under payment of salary during his service. He also prayed for service gratuities, certificate of service and any other terminal benefits including compensation for unlawful termination.

On cross examination he confirmed that his contract was for one year but had been renewed at the end of

each year of his service. That Appendix – 9 (contract) provided for termination by a notice of one month. He confirmed that he continued working after the end of the contract until he received the notice on 2.3.2012. That the termination was done before giving the grievant hearing. He confirmed that he was paid Kshs.33,277 including the two days worked in March 2005.

The respondent did not call any witness at the close of the hearing. Both parties filed their written submissions and urged me to find in their favour. The claimant in his submissions asked me to award:-

(a) One month salary in lieu of Notice	-	Kshs. 15,625
(b) Balance of travel and entertainment expenses –		Kshs.137,513
(c) Unremitted NSSF deduction	-	Kshs. 15,120
(d) 12 months compensation for loss	-	Kshs.215,128
(e) Refund at all costs	-	<u>Kshs. 50,000</u>
TOTAL	-	<u>Kshs.496,001</u>

She also prayed for certificate of service be given to the grievant. The Respondent on her side submitted that the contract was only for 12 months from 1.9.1997. Thereafter the contract was renewed annually with a one month termination clause. That the final contract was from 1.3.2004 for 12 months(Appendix 9).

The contract lapsed and by notice dated 1.3.2005 the respondent notified the grievant that he did not intend to renew the contract. That he was not obliged to give 30 days notice because the contract had lapsed automatically. That no travel and entertainment allowance was owing because as per Appendix 11 and 12, the amount had been negotiated and agreed upon and paid in full in June 2002.

Regarding severance pay, the respondent submits that the grievant did not serve for uninterrupted period of 8 years. That the claim was only payable for continuous service after the first year of contract which was not the case herein.

On NSSF, the respondent submits that there was no evidence given by the claimant to the unremitted deductions. That even if the statutory deductions were not remitted, the same were not recoverable in the manner used by the claimant.

Lastly the respondent objected to the claim for loss of job since the same is not provided for under the Employment Act or this court. The issues_for determination are:-

- (1) What was the relationship between the grievant and the respondent as at 2.3.2005 when he notice dates 1.3.05 was served?
- (2) Whether the grievant was employed in a continuous and un-terruted contract of service by the respondent from 1997 – 2005?
- (3) Whether the grievant is entitled to any terminal benefits from the respondent?

On the first issue, it is obvious from Appendix 9 that the contract was for a specific period of time of 12 months beginning 1.3.2004. The contract did not require notice to terminate unless other party wished to end it before the 12 months period. In my view either party wishing to renew the contract at the end of the period was free to request the other. Otherwise the grievant was not bound to attend work on 1st and 2nd March 2005.

My attention, however is drawn to the definition of a contract of service in section 2 of the repealed

Employment Act which was the law applicable in 2005, thus:- “an agreement, whether oral or in writing and whether express or implied, to employ or to serve as an employee for a period of time.....”

From the foregoing and considering the history of the parties relationship of annual renewal I find that there was an implied contract to continue serving until express renewal of the contract. The fact that the respondent who wanted to continue attended job and he was not turned away on 1.3.2005 and instead he was shown work to do for two more days is indication that the parties had implied by intended to renew the contract on similar terms as those of the ended one. Indeed had the respondent never written the notice dated 1/3/2005 the contract would be presumed because the respondent continued to allocate duty to the claimant.

Regarding the second issue, it is not in dispute that from 1st September, 1997 the claimant worked continuously for the respondent till 2/3/2005. That Appendix 1 – 9 shows contracts of 12 months renewed successfully. The respondent who is the custodian of Employment documents has not produced evidence to counter the evidence of continuous service.

In my view continuous service means the aggregate period of service by an employer whether it was contained on monthly or yearly contracts provided there was no unreasonable(interruption) break in between the specific contracts. In the present case I find that there was continuous and un-interrupted contract of service from 1.9.1997 – 2.3.2005.

Consequently I will address the issue of whether terminal benefits are payable to the claimant. The submissions filed have drastically divided from the amount pleaded in the claim. The submissions pray for Kshs.496,001 down from the Kshs.3,153,138 pleaded in the claim.

The Kshs.496,001 is made up of one month’s salary in lieu of notice being Kshs.15,625; balance of travel and Entertainment Expenses of Kshs.137,513; severance pay for 8 years; continuous service at the rate of 15 days per year; Kshs.72,115 refund of NSSF un-remitted deductions; Kshs.5,120, 12 months compensation for cost of job; Kshs.215,628, and refund at costs of Kshs. 50,000.

In view of my earlier holding on the existence of an implied contract of employment as at 2/3/2005 when notice of non renewal of the contract was served, I will award a one month salary in lieu of notice. The respondent was wrong and unfair to engage the claimant for the first two days of the expected new contract and then terminate without notice. As regards the claim for Kshs.137,513 being travel and entertainment expenses, I have perused the grievant’s letter dated 11.6.2002 accepting to receive half pay for what was his right under a Collective Bargaining Agreement between the claimant and the respondent.

The above acceptance is not to the Respondent but to a Mr. E.G Kinyua. The circumstances under which the acceptance was shoddily written are questionable. The person who made the offer to the grievant on the issue of half pay is not known. Even if he was known, what consideration was given to support the agreement? In my view there was none. Probably the respondent that by paying the half amount without any consideration, the balance would be forfeited. I regret to say that there was legal basis for the grievant to forfeit it. There is an old English Case of *Flukes vs Beer and Punnell vs Cole*. I will therefore grant the prayer from Kshs.137,513 for Travel and Entertainment expenses.

I have also been asked to award severance pay at the rate of 15 days per year of service for the period of 8 years. I have also been asked to order refund of Kshs.5,120 being un remitted NSSF deductions. I have perused the reputations of wages and conditions of Employment and did not see any provision for such pay. I will, however grant the same guided by the meaning of severance pay in *Black Law Dictionary* which is ‘a pay given to a dismissed employee in exchange of some claim the employee might have against the employer’. I will award this in exchange of any claims against refund of NSSF deductions which were not remitted and any other claim that may be incidental thereto.

I will also not award any sum for loss of employment because it is not provided for in the law which was in force in 2005.

In summary, I award the following:-

(a) One month's salary in lieu notice.....Kshs.15,625

(b) Balance of Travel and Entertainment expenses.....Kshs.137,513

(c) Severance pay.....Kshs.72,115

TOTAL = Kshs.225,253

The claimant will also get costs and interests.

Order accordingly.

DATED and DELIVERED at Nairobi this 26th day of October, 2012.

**Onesmus Makau
JUDGE**