



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1272 of 2010

JACKSON ODENY OYOO.....CLAIMANT

VS

SINOHYDRO CORPORATION LIMITED..... RESPONDENT

JUDGMENT

The Claimant filed the statement of claim on October 18, 2010 seeking judgement against the Respondent for:

- a) Reinstatement to the previous position without loss of any benefits.
- b) Salary arrears from the date of unlawful termination i.e. September 2010 till end of contract period (i.e. March 22, 2011).
- c) In alternative to (a) and (b) above, damages for wrongful and unlawful termination amounting to Kshs. 302,438 as set out in the statement of claim.
- d) Maximum 12 months compensation for wrongful dismissal.
- e) Costs of this suit with interest thereon.

The Respondent filed the response to claim on November 3, 2010 praying that the Claimant's suit be dismissed with costs.

Both parties filed written submissions as ordered by the court on April 24, 2012 and the court directed that a decision would be made on notice. Parties agreed to a determination based on the filed documents.

The facts of this case are as follows. On March 29, 2009 the parties entered into a contract before converting the same to a yearly contract of service which was due to end on March 22, 2011. On August 26, 2010 the Respondent wrote to the Claimant a letter titled, "NOTICE OF TERMINATION OF EMPLOYMENT." The letter conveyed to the Claimant that the Respondent had decided to terminate the Claimant's services with effect from September 24, 2010. The letter further stated that in accordance with the Employment Act, 2007 and the employment contract, the Claimant was thereby given one month notice, effective August 26, 2010 that his services shall not be required by the Respondent Company from September 24, 2010 and that the Claimant's last day of duty would therefore be September 24, 2010.

By the letter dated August 26, 2010 the Claimant responded to the notice of termination. He stated that

the intended termination would be unfair and that he was willing to separate provided he was paid for the remaining contract period. The letter further pointed out that the reason for termination, according to the Claimant, related to his deduction of salary without cause, any warning letter and without surcharge and that his complaint had been received with insults from the Respondent's Director of Contract Management Department one Jing Lewei.

By a letter dated September 23, 2010, the Claimant wrote to the Respondent demanding his terminal benefits in view of the notice and intended termination. The letter stated that the Respondent considered the termination to be a redundancy and he made a demand for:

- a) Underpaid wage for the month of August being Kshs.1, 461/=.
- b) One month salary for the notice period and worked from August 26 to September 24 2010.
- c) Service pay for 1.5 years already completed with the Respondent at the rate of 15 days for every completed year of service.
- d) Six months salary for the rest of the contract up to expiry date.
- e) Leave entitlement days up to the end of the contract period at the agreed rate of 2.25 days per month, less days already taken.

The Claimant invoked a conciliatory process through the Provincial Labour Officer as conveyed by the Claimant's letter dated September 27, 2010. The Respondent wrote to the Labour office on September 30, 2010 stating that the reasons for terminating the Claimant's employment included:

- a) That the Claimant did not finish his work on time as he always wasted time on other things not related to work even during working hours.
- b) That the Claimant regarded himself as a Senior Officer and refused to carry out duties related to his job despite the fact that he was a junior officer in the Respondent Company.
- c) That once the Claimant made a mistake he never accepted and always refused to sign warning notice issued to him.

In that letter of September 30, 2010, the Respondent enclosed the Claimant's September 2010 pay slip with a request that the Labour office assists the Respondent to settle the dues earliest possible,

The employment contract dated September 29, 2009 between the parties provided for disputes and grievance handling in clause 9 of the contract. The clause stated that it was the policy of the Respondent Company that all disputes and grievances are settled by discussion and not confrontation. The contract also provided for termination in clause 10. The clause states among other things that it was the policy of the Respondent that all disputes and grievances are settled by discussion and not confrontation. It then provides that for the due notice period and payment in lieu of notice that either party must comply with in event of a termination.

The contract also provided for the issue of dismissal in clause 11. The clause provides that the Respondent may dismiss the Claimant summarily when the Claimant has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

By the memorandum dated March 23, 2010 on the extension of contract of employment, the Respondent extended the Claimant's contract of employment with effect from March 23, 2010 to March 22, 2011 with a new monthly remuneration package including:

- a) salary – Kshs. 30,000/=;

- b) house allowance - Kshs.6,000/=;
- c) transport allowance - Kshs. 3,120/=;
- d) official phone communication allowance – Kshs.1,500/=;
- e) extra duty allowance – Kshs. 2,000/=; and
- f) total monthly remuneration package – Kshs.42,620/=.

The issues for determination in this case are as follows:

1. What was the Claimant's monthly salary?
2. Whether the separation between the two parties entailed redundancy, or unlawful termination.
3. Whether the Claimant is entitled to the prayers made.

On the first issue, the court finds that the Claimant's monthly salary was thirty thousand shillings (30,000) as stated in the extension of contract of employment dated March 23, 2010. The rest of the payments which when added made up the monthly remuneration package of Kshs.42, 620/= are allowances and not part of the salary.

On the second issue, the Claimant's counsel submitted that the Claimant was not given any prior notice of the termination. In addition, the Respondent did not give the Claimant any reasons why they intended to terminate his services. That the Respondent's action, it was submitted, breached section 45 (1) of the Employment Act, 2007. It was further submitted for the Claimant that the Claimant was an exemplary employee as shown by the extension of contract of employment for a further period of twelve months. That the Respondent had not served the Claimant with any warning letter or questioned his performance. It was submitted that in terminating the Claimant's services there was no due regard to the skills and abilities of the Claimant. It was stated, the Claimant's termination by the Respondent was unlawful and irregular for want of reasons and justification.

For the Respondent, it was submitted that the terms of the contract of employment were express that either party was entitled to terminate the contract of employment by giving one month's notice or paying a one month's salary in lieu of the notice. The Respondent having given the one month's notice, the termination was in accordance with the contract and therefore lawful.

In determining the legality of termination of a contract of employment the court will look at the validity of the grounds for termination and whether the parties have complied with the procedure for termination. The grounds are valid if they are true and shown to exist. Usually the employer must have undertaken an investigation in a process that upholds due process in which rules of natural justice are observed. The employer must be clear from the outset on the particulars of the facts under investigation and subsequently leading to a finding that results into the termination of the employee. In the instant case, to base the termination on the contractual clause, the Respondent was required to comply with its policy that all disputes and grievances are settled by discussion and not confrontation. Under that contractual clause, by inference, termination would follow if the discussions failed to reach an amicable settlement. The Respondent has not shown that there was any attempt in this case to invoke the disputes and grievances procedure. Accordingly, the termination cannot have been under clause 10 of the contract and if desired so, the same clause was breached by the employer for want of discussion and not confrontation in dispute resolution as a precondition to termination under the clause. In the letter dated August 26, 2010 the Claimant has shown that on his part he attempted an amicable settlement of his complaint but the Respondent failed to undertake the prescribed discussions and was confrontational, contrary to the Respondent's own policy. The court believes the Claimant because the Respondent has in the letter to the labour office alleged misconducts against the Claimant. If such misconducts did exist, then they would have invoked the dismissal clause in the contract. In the circumstances, the court finds that the

Respondent's actions and procedure applied to terminate the Respondent's services were in breach of the contract of employment and malicious.

The court further finds that the termination of the contract of employment in this case did not amount to redundancy as the Claimant suggested in his demand to the Respondent. Redundancy as defined in section 2 of the Employment Act, 2007 means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer in circumstances whereby the services of an employee are superfluous and the practices known as abolition of office, job or occupation and loss of employment. Redundancy recognises that there cannot be employment without a vacancy necessitating work to be done by the employee. Where it becomes necessary that an existing office should be abolished, the employer is entitled to terminate the contract of employment in compliance with the provision of section 40 of the Act and any specific agreement on redundancy as may exist between the parties. Abolition of office may be necessitated by change in technology, change in core objectives for which the employer is established and generally circumstances arising out of restructuring and reorganization. Any valid circumstance that may cause an employer to close business altogether is also a good justification for abolition of office. None of these things have been shown to have existed in the instant case. The court therefore finds that the termination in this case was not governed by the law of redundancy but was purely based on the contract of employment between the parties.

On the issue of the remedies the Claimant is entitled to, counsel for the Claimant submitted that the Claimant having demonstrated that the Respondent unlawfully terminated his services the court should grant all the prayers in the statement of claim. The Respondent's counsel submitted that in event the court finds that the termination was unlawful, the only sums payable to the Claimant is one month's salary. Further that it was not just for the Claimant to pray for reinstatement, salary arrears and compensation all at the same time. On this point, the court finds that the Claimant was entitled to make prayers for reinstatement in alternative to damages. However, the court finds that the prayer for reinstatement has been overtaken by the running of time since the contract period ended on March 22, 2011.

The court finds that the Claimant is not entitled to service pay for one year since this was not a case for redundancy. However, in view of the unfair termination and breach of contract by the Respondent, the court enters judgment for the Claimant to be paid damages as follows:

- a) Six months salary for the remainder of the contract at Kshs.30,000/= per month making a total of Kshs.180,000/=.
- b) Payment in lieu of leave entitlement days up to the end of the contract period making Kshs. 22,130/=.

Accordingly the Respondent shall pay the Claimant a sum of Kshs.202,130/= with interest at court rates from the date of this Judgment till payment in full. Further the Respondent shall pay costs of the cause.

Delivered in court at Nairobi this 5th day of October, 2012, in the absence of both parties.

BYRAM ONGAYA
JUDGE