



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 78 of 2011

PAUL MWAURA MBUGUA.....CLAIMANT

VS

KAGWE TEA FACTORY LTD.....1ST RESPONDENT

KENYA TEA DEVELOPMENT AUTHORITY.....2ND RESPONDENT

AWARD

The Claimant's claim in this case is for unlawful suspension and unfair termination of employment by the Respondents. At the hearing, Mr. Muchemi appeared for the claimant while Mr. Ogutu appeared for the 1st and 2nd Respondents. The Claimant and the Respondents' two witnesses gave sworn evidence and the parties' Advocates filed written submissions.

The Claimant told the Court that he was employed by the 2nd Respondent's successor in law at the 1st Respondent's Factory in the position of Senior Mechanic effective 1st March 1998. His duties were to service and carry out repairs of the 1st Respondent's fleet of motor vehicles.

On 24th February 2008, the Claimant was served with a letter by the 1st Respondent's Factory Unit Manager seeking an explanation as to why the Claimant had not been on duty on 22nd February 2008 (Letter marked Appendix 2 in the Respondents' documents.) The letter also made reference to some missing spare parts for which the Claimant was being blamed. The Claimant replied the Factory Unit Manager's letter on 20th March 2008 (Reply marked Appendix 3 in the Respondents' documents) explaining that he had gone to his place of work at 7.15 am to pick his phone which he had forgotten to carry with him the previous day. He had then left to attend to his wife who was unwell and in the absence of his supervisor, he had notified his colleagues that he would check in late. He had subsequently asked for an off duty which had been granted. He denied any knowledge of or involvement with the missing spare parts.

On 24th March 2008, the Respondent was suspected from duty (Suspension letter marked Appendix 4 in the Respondents' documents.) The Claimant stayed on suspension from March 2008 to end of October 2008 during which time there was no communication from the Respondents and the Claimant therefore decided to offer himself for Voluntary Early Retirement (Application for retirement marked "PMM3" in the Claimant's documents.)

On 4th December 2008, the 2nd Respondent wrote to the Claimant (Letter marked Appendix 6 in the Respondents' documents) ostensibly accepting the Claimant's resignation. The Claimant was subsequently paid the sum of Kshs. 252,423.75 as terminal benefits.

The Claimant's claim was itemised as follows:

- a) Unpaid salary for the for March 2008-July 2009.....Kshs. 421,090
- b) Gratuity for the year 2009.....24,770
- c) Punitive damages for unlawful suspension and termination
- d) Formal letter of termination and testimonial
- e) General damages
- g) Costs and interest
- h) Any other relief the Court may deem fit to grant

The Respondents called 2 witnesses. Simon Peter Munyiro, Factory Unit Manager (RW1) told the Court that the 1st Respondent had suspended the Claimant in March 2008 after some spare parts had been reported missing. He added that on the day the spare parts went missing, it had been reported to him that the Claimant had reported to work very early and then left. In October 2008, the Claimant opted to retire and was paid all his benefits. The Respondents did not pursue the case of the missing spare parts.

On cross examination RW 1 stated that the Claimant was in charge of the workshop, kept the keys and controlled entry into the workshop. The witness further stated that the Claimant had been suspended to pave way for investigations and that there were plans to constitute a disciplinary panel to hear the Claimant's case which did not materialize.

Stephen Murage Nguni, the 2nd Respondent's Human Resource Manager, (RW2) told the Court that the Claimant had been charged and suspended on account of pilferage. He also stated that at the time the Claimant applied for Voluntary Early Retirement, there was no such an offer. Consequently, the Claimant's letter was treated as a normal resignation. In spite of this, the Claimant was paid severance pay which is normally applicable to cases of Voluntary Early Retirement. The decision to make this enhanced payment was made at the Factory level. The witness further told the Court that in his experience as a Human Resource Manager, investigations on employees would normally take 3 months.

The twin issues for determination in this case are whether the Claimant's suspension and subsequent termination of employment were lawful. The Claimant was suspended vide the 1st Respondent's letter dated 24th March 2008. The letter stated in part:

“Therefore you have been suspended from duty effective date of this letter until further instructions are given to you from this office.”

From this date, there was no further communication from the Respondents to the Claimant until the Claimant provoked communication by his letter dated 29th October 2008 in which he applied for Voluntary Early Retirement. The Respondents construed the Claimant's letter as a resignation vide the 2nd Respondent's letter dated 4th December 2008. The letter stated in part:

“We acknowledge receipt of your letter dated 29th October 2008, in which you tendered your resignation from the services of Kagwe Tea Factory Co. Ltd and hereby accept the same.

You will be paid your salary plus any other benefits that may be due to you up to and including 29th December 2008, your last working day, subject to your compliance with the formal clearance procedure.”

On 19th July 2009 the 1st Respondent computed the Claimant's terminal benefits as follows:

Pay in lieu of notice	Kshs. 40,220.00
Outstanding leave	46,407.90
Severance pay.....	148,758.90
Gratuity.....	178,510.70
Subtotal.....	<u>413,897.50</u>
Less PAYE	(91,188.99)
Less Chai Loan.....	(70,284.76)
Net Pay.....	<u>252,423.75</u>

These benefits were released to the Claimant in July 2009.

In the case of **Bartholomew Wanyama Vs Moses Gitari and 2 Others (Industrial Court Cause No. 973 of 2011)** this Court held that:

The main reason why an employee may be suspended from duty is to allow for independent investigation, out of which further action may be taken. Suspension is an interim measure and is not an end in itself. Suspension by itself is not a form of termination of employment. It follows therefore that upon completion of investigation, further action needs to be taken. During the time of suspension, the suspended employee remains an employee of the employer, with or without pay, until the time a termination letter is issued.

An employee on suspension has a legitimate expectation that at the very least, they will be afforded an opportunity to defend themselves against any adverse findings that may arise from investigations carried out during their suspension.

In the present case, the Claimant having been kept on suspension for 7 months seems to have grown weary of the waiting leading him to apply for Voluntary Early Retirement on 29th October 2008. On 4th December 2008, the 2nd Respondent wrote to the Claimant accepting what they construed as the Claimant's resignation. The investigations against the Claimant seem to have been abandoned at this stage.

RW 2 told the Court that the normal period taken to investigate employees is 3 months. This is as it should be. To keep an employee on suspension, without pay for over 7 months, waiting for them to blink first is not only unlawful but also inhumane. I therefore find the Claimant's suspension unlawful and award him full salary from March 2008 up to October 2008 when he applied for Voluntary Early Retirement. I also order the Respondents to issue the Claimant with a Certificate of Service

I find that by writing the letter requesting for Voluntary Early Retirement, the Claimant effectively terminated his employment with the Respondents and therefore decline to award any salary beyond October 2008. As a result, the claim for gratuity for the year 2009 also fails.

The Respondent will pay the costs of this case.

DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF DECEMBER 2012

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....Respondent