



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO.6 OF 2012

(FORMERLY CAUSE NO.454 OF 2011 AT NAIROBI)

PETER WACHIRA NGUNGA.....CLAIMANT

-VERSUS-

KIRINYAGA DISTRICT FARMERS SACCO SOCIETY LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th December, 2014)

JUDGMENT

The claimant filed the statement of claim on 24.03.2014 through Igati Mwai & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Special damages of Kshs.1, 213,020.00 being salary in lieu of the termination notice; pay in lieu of 2 years' annual leave; and gratuity for 11.5years of service.
- b. General damages for illegal termination of employment.
- c. Costs of the suit.
- d. Interest at court rates.
- e. Any other relief as the honourable court may deem fit and just to grant
- f. Alternatively, payment of the claimant's terminal dues and benefits by the respondent.

The respondent filed the memorandum of defence on 05.05.2011 through Waweru Gatonye & Company Advocates. The respondent stated that the claimant was not entitled to any of the reliefs sought and prayed that the claimant's case be dismissed with costs. The claimant's reply to the memorandum of defence was filed on 28.06.2012.

The claimant testified to support his case. The respondent's witnesses included Amos Kimotho Njeru, the respondent's chief executive officer (RW1) and Timothy Kinyua Muthike (RW2).

The respondent employed the claimant with effect from 1.01.1998 and the claimant served for over 11 complete years without a break in the service.

On 12.10.2009 the claimant received the respondent's letter terminating the claimant's employment. The letter conveyed that the respondent's board of directors sitting on 6.10.2009 had decided to terminate the claimant's services with the respondent with effect from 6.10.2009 under clause 15(a) of the terms and conditions of service in force. The letter asked the claimant to liaise with the manager so

as to facilitate payment of the claimant's terminal benefits and one month salary in lieu of notice. The cited clause 15(a) provides that in the case of termination for reasons other than summary dismissal and after completion of the probation period, one month termination notice or pay in lieu of the notice will apply.

The 1st issue for determination is whether the termination of the claimant's employment was unfair. The evidence is clear. The respondent did not assign reason for termination at the time of the termination. Thus the termination was unfair under section 43 of the Employment Act, 2007 for want of a genuine reason for termination. It is also obvious from the evidence before the court that the respondent did not serve the claimant a notice and afford him a hearing as envisaged in section 41 of the Act. The court finds that the termination was unfair both substantively and procedurally.

The respondent at paragraph 5 of the defence particularized the alleged misconduct or poor performance on the part of the claimant. The respondent further sought to establish the alleged misconduct or poor performance in its evidence before the court. The court holds that the respondent as an employer was required to establish the misconduct or poor performance before or at the time of the dismissal during the administrative disciplinary process. The court upholds its opinion in **Joseph Otieno Nyolo –Versus- Rift Valley Railways Kenya Limited [2014]eKLR** thus,

“The court has carefully evaluated the circumstances of this case and the manner in which the parties engaged themselves in urging their respective cases. The claimant elaborately sought to show that the reason for the dismissal was invalid and the respondent meticulously sought to establish that the reason existed as valid. In the opinion of this court, the parties to employment disputes shall not convert the court into the employer's administrative disciplinary tribunal or disciplinary committee. If the employer fails to exercise the administrative disciplinary power or authority as conferred under the Employment Act and the parties' agreement, it is the opinion of the court that the termination would be unfair *ab initio* and the court need not inquire into the evidential evaluation of the validity or otherwise of the validity or otherwise authenticity of the reasons for termination in such cases. The court holds that it is for the employer to be satisfied of the validity or authenticity of the reason at the time of the termination as envisaged in section 43 of the Act failing which, the termination is unfair *ab initio*.

It is the opinion of the court that the court's investigation into the validity or genuineness of the reasons for termination accrues only where it is shown that the employer invoked due process as per section 41 of the Act and the parties' agreement to establish the reason and if that precondition test is not passed, the termination is unfair. If the precondition is satisfied, in the opinion of the court, the court's investigation at the hearing then takes the direction that the employer established a reason but which the employee disputes and the court has to resolve the dispute one way or the other. That was not the case in the present dispute and the court finds that the termination was unfair *ab initio* as it has been established that the respondent did not invoke due process to establish the reason for the termination.”

Accordingly, the termination in the present case was unfair. The claimant did not contribute to his unfair termination in any manner. He had served the respondent for a long period of time spanning over 11years. The court awards the claimant maximum compensation of 12 months' salaries at Kshs. 17, 580.00 making **Kshs.210, 000.00**.

The 2nd issue for determination is whether the claimant is entitled to the gratuity. Clause 29 of the collective agreement filed as exhibit KD1 on the defence bundle provides that an employee who retires or resigns or dies will be paid gratuity at the rate of 2 months of current salary for every completed year

of and for any part of uncompleted year on prorata basis. It is not disputed that the claimant served for 11.5 years and his due gratuity is 11.5 times Kshs.17, 580.00 times 2 making **Kshs.404, 340.00**. While making that finding, the court holds that the parties were entitled to agree in terms of the said clause 29 because section 35(5) of the Employment Act, 2007 particularly entitled the parties to agree upon and to fix the rates of the service pay.

The respondent pleaded that the claimant was paid terminal dues of Kshs.386, 760.00 but the respondent failed to establish by evidence that such money was indeed delivered to the claimant. The claimant testified that he sold his land to pay the loan in issue. RW2 confirmed that at the time of the hearing of the case, the claimant did not owe the respondent any money by way of loan because the loans had been liquidated by offsetting using the terminal dues and further payments by the guarantors. The court has evaluated the evidence and finds that the Kshs. 386, 760.00 was indeed applied to settle the loans the claimant owed the respondent at termination and the claimant is entitled to the monies found due in this judgment less the **Kshs.386, 760.00**. The court further finds that the claim for the due leave and pay in lieu of notice were covered in the computation of that sum of money. Thus the claimant is entitled to Kshs.614, 340.00 found due less Kshs.386, 760.00 making **Kshs.227, 580.00**.

In conclusion, judgment is entered for the claimant against the respondent for:

1. **The respondent to pay the claimant Kshs.227, 580.00 by 1.02.2015 failing interest to be payable at court rates from the date of this judgment till full payment.**
2. **The respondent to pay costs of the suit.**

Signed, dated and delivered in court at Nyeri this Friday, 19th December, 2014.

BYRAM ONGAYA

JUDGE



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