



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT BUNGOMA**

**CAUSE NO. 18 OF 2018**

**BENARD LUMBA.....CLAIMANT**

**VERSUS**

**NZOIA WATER SERVICES CO.LTD.....RESPONDENT**

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

This suit was filed on 28.9.2017 and served on the Respondent who filed a Memorandum of Appearance on 23<sup>rd</sup> October 2017.

Federation of Kenya Employers (FKE) did not file a defence for the Respondent and the matter was on 29.5.2018 set for Formal Proof on 26.9.2018.

On 26.9.2018 the matter proceeded for Formal Proof as scheduled. The Respondent sneaked to file a Memorandum of defence apparently filed on 26.9.2018 without leave of court.

This is the same date the matter proceeded to formal proof and no representative of the Respondent or FKE came before court but instead sneaked the document at the registry.

The court has seen the defence document in the process of writing this judgment and shall ignore its contents and strike it off the record.

The suit is undefended therefore. The Claimant's testimony in chief is not controverted and he was not cross examined on the same. The Claimant prays for compensation for unlawful termination of employment and payment of terminal benefits to wit:

(i) Gratuity calculated at 31% on the gross salary for the 3 years contract period.

(ii) 52 days in lieu of leave days not taken

(iii) Interest and costs.

**Facts:**

The Claimant was employed on 9.9.2010 as assistant Regional Manager, Commercial.

On 27.5.2013 he was appointed as acting Internal Auditor to which position he was interviewed on 30.8.2013 and given a three year contract with effect from 1.9.2013.

The Claimant earned Kshs 95,000 and 20,000 house allowance.

On 4.3.2015, the Claimant was placed on compulsory leave pending investigations following a loss of Kshs 1.6 million at Bungoma Branch and Kshs 3 million at Kitale Branch.

As at March 2015, the Claimant earned a gross salary of Kshs 150,000 but in March 2015 the Claimant received a pay cut of Ksh 20,000 without explanation.

The Claimant filed for a formal leave which expired on 4.6.2015 and he was served with a show cause letter on 4.6.2015 in which he was to answer various allegations contained in the letter.

The Claimant replied to the show cause letter and was called before disciplinary staff committee which he alleges comprised of junior staff without financial background.

The Claimant denied the allegations before the committee and states that his defence was ignored and not well evaluated. He states that the termination of his employment on 24.8.2015 was not for a valid reason and did not follow a fair procedure.

The Claimant stated that regional managers were responsible for the Kshs 4.5 million loss and finance commercial and debtor managers who failed to carry out bank reconciliations.

The Claimant adds that the discovery of the loss was a result of his reports as explained in the reply to the show cause letter.

The Claimant prays to be awarded as prayed.

**Determination:**

The Claimant bears the primary onus of proving on a balance of probabilities that his employment was terminated for no valid reason and that the Respondent did not follow a fair procedure in terms of Section 107 and 108 of the Evidence Act Cap 80 Laws of Kenya as read with Section 47(5) of the Employment Act. 2007

This remains the case even where, as in the present case, no defence was filed and no evidence adduced by the Respondent in rebuttal.

The court is satisfied that the Respondent had a valid reason to ask the Claimant to show cause why his employment ought not to be terminated.

The Respondent had suffered a loss of Kshs 4.5 million Kshs under the watch of the Claimant who was the Internal Auditor of the organization. The Claimant gave a written explanation and was given opportunity to present his case before a staff disciplinary committee.

The committee found the explanation by the Claimant to be unsatisfactory and recommended the Claimant's employment to be terminated.

The court is satisfied that the Respondent had a valid reason in terms of Section 43(1) and (2) of the Employment Act 2007 to terminate the employment of the Claimant. From the testimony by the Claimant, the Respondent followed a fair procedure in terminating the employment of the Claimant. The Claimant could not choose which member of staff to be selected to the disciplinary panel. This complaint by the Claimant lacks merit.

The court finds that the Respondent followed a fair procedure in terms of Sections 41 and 45 of the Employment Act in terminating the employment of the Claimant.

In terms of Clause 3.1 of the Letter of appointment signed on 1.9.20013, the Claimant was entitled to gratuity calculated at 17.5% of

the consolidated salary received for each completed year of service for both years when leaving in the second year.

The contract started on 1.9.2013 and termination was on 24.8.2015 almost at the tail end of the 2<sup>nd</sup> year.

The Claimant is therefore entitled to payment of gratuity calculated as follows

$(150,000 \times 17.5\% \times 2)$  Kshs 52,500.

The Claimant is also entitled to Kshs 95,000 in lieu of 52 days untaken leave days.

It is not apparent from the letter of termination that the Claimant was paid in lieu of three (3) months notice in terms of Clause 7 of the Letter of appointment.

If it was not done, the Respondent is obliged to pay the Claimant Kshs 450,000 in lieu of three months termination notice.

Accordingly the Claimant is awarded as against the Respondent as follows:-

- a) Kshs 52,500 gratuity
- b) Kshs 95,000 in lieu of leave
- c) Kshs 450,000 in lieu of notice

Total amount Kshs 597,000

- d) Interest at court rates from date of filing suit till payment in full.
- e) Costs.

**DATED, SIGNED and DELIVERED at BUNGOMA this 29<sup>TH</sup> day of MARCH, 2019.**

**HON. M. N. NDUMA, JUDGE**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**BUNGOMA**

**Appearances:**

Mr. Kassim for Claimant

FICE for Respondent

Chrispo: Court Assistant.



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