



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Cause 18 of 2013**

**JOSEPH MUEMA KIMEU.....CLAIMANT**

**V**

**JOSEPHINE MUTHEU MAINGI.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 24<sup>th</sup> May, 2013)

**JUDGMENT**

The claimant Joseph Muema Kimeu filed the memorandum of claim on 22.08. 2011 praying for judgment against the respondent for:

- a) General damages for wrongful dismissal.
- b) Salary for 21 days worked in November 2010.
- c) Underpayment.
- d) Gratuity.
- e) Costs of the suit.

- f) Leave.
- g) Overtime worked.
- h) House allowance.
- i) Any other order that the court may deem just.

The amended statement of claim was filed on 22.06.2012 and the claimant prayed for:

- a) General damages for wrongful dismissal.
- b) Salary for 21 days worked in November, 2010, underpayment, leave, overtime worked and allowances as particularized in paragraph 10(a).
- c) Costs of the suit.
- d) Any other order that the court may deem just.

The respondent Josephine Mutheu Maingi filed the amended statement of reply on 15.04.2013 through Mburu Maina & Company Advocates and prayed that the claim be dismissed with costs.

The case came up for hearing on 14.05.2013 and 22.05.2013. The claimant gave evidence to support his case. The respondent also gave evidence to support her case.

The claimant's evidence was as follows:

- a) The respondent employed him as a family driver three years prior to 24.04.1995 when the car he was employed to drive was involved in an accident. He was the driver at the time of the accident at a monthly pay of Kshs.4,500.
- b) The accident was reported at the Eldoret Police Station and the driver of the other motor vehicle was charged for reckless driving. The case took long to conclude and after attending court four times the claimant left Eldoret to seek employment in Nairobi and Machakos because the respondent had suspended him after the accident.
- c) He eventually gave evidence in the traffic criminal case and the letter by Onyinkwa & Company Advocates marked C1 showed that he had given proper evidence. The other motorist was convicted.
- d) The respondent called him and he resumed duty in June, 2010 at a monthly pay of Ksh.6, 000.
- e) On 21.11.2010 was a Sunday and the respondent called him and conveyed to him verbally that his employment had been terminated as she did not want to see him at her premises. The respondent asked him to compute his terminal dues. On 22.11.2010 he went to the respondent's home to ask for his terminal dues. The respondent abused him and he left.
- f) He was a member of KUDHEIHA workers union in Eldoret and who recommended a terminal payment of Ksh.3, 600. He rejected that recommendation as too low and the union favoured the respondent in the dispute.
- g) He reported a dispute at the labour office and the respondent was summoned by the letter of 17.02.2011 marked C3. The respondent did not attend and the labour officer advised the claimant to file the court case.
- h) While in employment he drove the car to enable the respondent to undertake her duties involving supervision of teaching practice. She did not provide his accommodation while on duty and he had to sleep in the car after dropping the respondent at the hotel.
- i) The respondent employed several maids at her house one after the other and the claimant never interfered with them.
- j) He recalled a day the respondent was admitted at Eldoret Referral Hospital where the respondent's daughter Damaris worked and there had been unpleasant exchange between the claimant and the security personnel. He denied abusing the lady who was the security officer at the Hospital's gate. He also denied abusing the respondent's house help or entering her house or abusing the respondent's neighbours.

k) He recalled going to the Chief's Camp near the respondent's home and rejecting Ksh.3, 200 the administration police officer at the Camp had forced him to take. It was too little for his terminal dues.

l) After termination he did not go to the respondent's home and he did not know about the respondent's maid from Pokot.

The respondent testified as follows:

a) The respondent's husband hired the claimant to drive him in the course of his duties as a lecturer and the Director of teaching practice in Baringo and Nakuru. The 1995 accident occurred when the claimant was driving her husband to the Moi University to submit the returns on the teaching practice. The husband went back to work in Baringo and he came back with on and off pains. He subsequently died at the Aga Khan University Hospital. The claimant was to attend court to give evidence in the accident case.

b) He disappeared and she later met him in 2010. She was running a tax business and she requested him to help drive the car from the garage to her home. She then engaged him to drive whenever she went to field work as a lecturer. She paid him on monthly basis.

c) When she was admitted at the Hospital the claimant displayed gross indiscipline by flying unspeakable abuses at the security personnel at the hospital's gate and her daughter Damaris who worked at the hospital was eventually dismissed because the hospital management thought the claimant was a relative.

d) The claimant intruded the respondent's fridge, showered in her house without permission and intimidated her female house helps. On one occasion the maid had screamed following the claimant's unfair advances and misbehavior forcing the respondent to intervene.

e) On another occasion the respondent's neighbour was moving away from his residence and that neighbor gave the security personnel in the neighborhood gifts and the claimant snatched some of the gifts. That, to the respondent, was unbecoming behavior of spreading disrepute as it affected and concerned her household in view of the claimant's link as an employee.

f) The respondent stated that the claimant interfered with her maids and on the occasion he attempted to take her maid away to lodging, she got fade up and decided to fire the claimant summarily. She calculated his final dues and he refused to take them and he shouted drawing the attention of a crowd near her home. The dues were Ksh.6, 000. She took it to the Chief's Camp as the nearest Government authority but the claimant refused to collect the dues.

g) After termination the claimant would go peeping through the hedge at the respondent's home because he had inappropriate interests in the respondent's maid.

The claimant submitted that his dismissal was unfair because he was not heard and he was entitled to the remedies as prayed for. For the respondent, it was submitted that the claimant had failed to establish the unfair dismissal as provided for in section 45(7) of Employment Act. Further, it was submitted that the respondent was entitled to dismiss the claimant summarily in view of the claimant's abusive misconduct. The summary dismissal was permissible as envisaged in section 44 and in particular subsection 44(4) (d) on abusive language and (e) on failure to obey lawful orders.

The court has considered the circumstances of the case and the material on record and makes the following findings:

a) The claimant was employed by the respondent from June 2010 to 21.11.2010 at a monthly salary of Kshs.6, 000.

b) The claimant was dismissed on account of gross misconduct namely abusive language and failure to obey lawful orders by the respondent.

c) It is clear that in dismissing the claimant the respondent was hasty as she was fed up with the claimant's gross and repetitive misbehavior and she did not give the respondent any hearing as envisaged in section 41(2) of the Employment Act, 2007. The section required the respondent to hear the claimant and to consider his representation before summarily terminating him on account of gross misconduct. To that extent, the court finds the termination was unfair and the claimant is entitled to **Kshs.12, 000** being two months' salary at the rate of the undisputed last salary of Kshs.6, 000 per month. In making the award, the court has taken into account the clear unbecoming previous episodes that distorted the claimant's service and the respondent's positive attempts towards amicable resolution of the dispute.

d) The claimant is entitled to **Kshs.4, 200** for the 21 days worked in November 2010.

e) The claimant has not established and justified the claims for underpayment and overtime but is entitled to **Ksh.2, 500** being proportionate pay for due leave but not taken for the five months he had worked in 2010.

f) The claimant is entitled to costs of the case fixed at **Ksh. 20,000**.

In conclusion, judgment is entered for the claimant against the respondent for the respondent to pay the claimant a sum of **Ksh.38, 700** by 15.07.2013 failing which interest to be payable from the date of the judgment till full payment.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 24<sup>th</sup> May, 2013**.

**BYRAM ONGAYA**

**JUDGE**