



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 44 OF 2019**

**KENYA UNION OF DOMESTIC, HOTELS,**

**EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS.....CLAIMANT**

**- VERSUS -**

**M/S. NASSOR MBARUK.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 5<sup>th</sup> November, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 08.08.2019 through its Industrial Relations Officer Hezron Onwongá. The claim was on behalf of its member (hereafter the grievant) one David Mutonyi alleging unlawful summary dismissal, refusal by management to pay his terminal dues, and underpayment in view of prevailing minimum wage orders applicable. The claimant pleaded as follows:

1. The grievant was employed by the respondent on 17.03.2010 as a gardener at Kshs.3, 000.00 per month and was provided housing until March 2013 when he was told to look for housing elsewhere. On January 2015 his salary was adjusted to Kshs, 9, 000.00 per month which he earned until termination on 20.04.2016. He served the respondent diligently for 5 years and 10 months.
2. The grievant reported a grievance to the claimant but the respondent failed to co-operate. A trade dispute was reported to the Cabinet Secretary per section 62 of the Labour Relations Act, 2007, and the statutory conciliator Charles I Opalakadi but the respondent refused to attend.
3. The termination was in breach of sections 17, 18, 35, 36, 41, 43, 45, 46 and 49 of the Employment Act, 2007 as well as section 48 of the Labour Relations Act, 2007. The grievant had a clean record of service free from warnings, poor performance or misconduct. The respondent did not pay salary, house allowance for January 2016.
4. The claimant claimed for:
  - a. One-month pay in lieu of termination notice Kshs. 13, 600.00.
  - b. Underpayment of wages 2010 – April 2011 Kshs. 57, 048.00.
  - c. Underpayment of wages May 2011 – May 2012 Kshs. 68, 676.00.
  - d. Underpayment of wages May 2012 to May 2013 Kshs. 82, 392.00.
  - e. Underpayment of wages May 2013 – May 2014 Kshs.98, 964.00.
  - f. Underpayment of wages May 2014 – January 2015 Kshs. 65, 976.00.
  - g. Underpayment of wages January 2015 to April 2016 Kshs. 18, 400.00.
  - h. Service pay for 5 years Kshs. 13, 600 x 5 years Kshs. 65, 000.00.

- i. Annual leave for 5 years 10 months Kshs. 76, 333.00.
- j. 12 months' salary compensation for unlawful termination Kshs. 13, 600.00 x 12 = Kshs. 163, 200.00.
- k. Total claim Kshs. 709, 589.00.

The claimant prayed for judgment against the respondent for:

- a. The declaration the termination of the claimant's employment by the respondent was illegal and unlawful.
- b. The respondent to pay the claimant Kshs. 709, 589.00 as claimed for.
- c. The respondent to issue the certificate of service.

Despite service of the summons, the memorandum of claim, and mention or hearing notices, the respondent failed to enter appearance, to file a statement of response or to attend Court. The grievant testified to support his case and final submissions were filed for him. The Court has considered all the material on record and makes findings as follows:

1. The grievant was employed by the respondent from 17.03.2010 to 20.04.2016.
2. The grievant was a member of the claimant per the membership card dated 13.03.2011.
3. Per the grievant's testimony, the respondent terminated the grievant's employment 20.04.2016 when the respondent told him to leave employment after the claimant had demanded payment of outstanding wages including the extra wage as a reliever guard effective 19.03.2016. The Court finds that the termination was unlawful because it was based upon the claimant's genuine and reasonable grievance about the outstanding wages. In particular, the reason for termination was unfair as per section 46 (h) of the Employment Act, 2007 which provides that it is unfair to punish or dismiss an employee for his initiating or proposing to initiate a complaint or other legal proceedings against the employer except where the complaint is shown to be irresponsible and without foundation. The Court has considered section 49 of the Act on factors to consider in awarding a remedy. The claimant desired to continue in employment, the reason for termination was unfair and unlawful, the claimant had a clean record of service of over 5 years and the aggravating factor that the respondent refused negotiation and statutory conciliation. The further aggravating factor is that the respondent underpaid the claimant as claimed and per prevailing wage orders. The claimant is awarded 12 months' salaries under section 49 of the Act at last statutory monthly pay making Kshs.13, 600.00 x 12 months thus **Kshs. 163, 200.00**. The termination was abrupt without notice and he is awarded Kshs. **13, 600.00** notice pay under section 35 (1) of the Act. There was no evidence that the claimant belonged to alternative pension scheme or NSSF and the claim for service pay is found reasonable per section 35(5) of the Act and is awarded at **Kshs.65, 000.00** as prayed for.
4. The termination was on 20.04.2016 and the suit was filed on 08.08.2019 long after the lapsing of the 12 months' limitation period from cessation of the continuing injury of the claimed underpayment –the cessation being on 20.04.2016. Section 90 of the Act on such limitation period applies accordingly. The claims for the underpayments will be declined as time barred.
5. The claimant is entitled to the certificate of service.

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

1. The declaration that the termination of the claimant's employment by the respondent was unlawful.
2. The respondent to pay the claimant the sum of **Kshs.241, 800.00** by 01.12.2021 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
3. The respondent to deliver the claimant's certificate of service per section 51 of Employment Act by 01.12.2021.
4. The respondent to pay costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 5<sup>TH</sup> NOVEMBER, 2021**

**BYRAM ONGAYA**

**JUDGE**