



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT IN NAIROBI**

**CAUSE NO 2304 OF 2014**

**JOHN KAHIGA MENU.....CLAIMANT**

**VERSUS**

**NUCLEAR INVESTMENT.....RESPONDENT**

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

1. The 1<sup>st</sup> Claimant Mr. Benjamine Ndungu Wanyoike pleaded that he was employed by the respondent on 1<sup>st</sup> October, 2003 as a Petrol Station Manager. He worked until 6<sup>th</sup> January, 2013 when he claims his service was unlawfully and wrongfully terminated. His monthly salary at the time of termination was Kshs. 15,000/= of which kshs. 13,250/= was paid into his bank account and the balance of Kshs. 2,750/= was paid in cash.
2. According to him on 4<sup>th</sup> January, 2013 as he was going to his place of work at the respondent's petrol station he was lured by a former employee of the respondent, abducted by a group of about 4 persons including the former employee, driven to an unknown place, drugged and left unconscious. On the morning of 6<sup>th</sup> January, 2013, he regained consciousness, discovered that his office keys had been stolen from him, he immediately proceeded to his place of work whereupon the respondent's directors without according him an opportunity to be heard and without justification accused him of stealing the proceeds of the day he was abducted.
3. On the same day the respondent's directors informed him orally that he had been terminated forthwith and caused his arrest by the police on allegation that he had stolen money. The Claimant was subsequently charged before the SPM-Nyahururu with the offence of stealing.
4. On 14<sup>th</sup> March, 2014 the prosecution withdrew the charges against the Claimant. The respondent did not pay him his terminal dues and further that he had two months of accrued leave at the time of termination.
5. The respondent in its part pleaded that it did not unlawfully, wrongfully and unfairly terminate the Claimant's service without a hearing. The respondent further denied that the Claimant's arrest was without reasonable justification.
6. The respondent further stated that the withdrawal of the criminal charges did not absolve the Claimant from Civil liability and the said withdrawal was without the respondent's consent. The respondent further stated that the Claimant deserted employment after the stealing incident and hence should not complain about unlawful dismissal.
7. The second claimant Mr. John Kahiga Maru pleaded that he was employed by the respondent on 1<sup>st</sup> October, 2003 as a matatu booking clerk and served with diligence until 13<sup>th</sup> June, 2013 when without hearing the respondent unlawfully terminated his service. At the time of termination his monthly salary was Kshs. 8,000/=.
8. On 12<sup>th</sup> March 2012 he visited hospital suffering from recurrent dislocation of his right elbow and was advised by the doctor to rest and take leave for 3 weeks and return for review on 2<sup>nd</sup> April, 2012.
9. On 14<sup>th</sup> March, 2012 he applied for leave and was granted 21 days but was not paid salary for the period he was on leave. On 13<sup>th</sup> June, 2013 the respondent's directors without according him an opportunity to be heard, terminated his service. He was further not given any reason. He was paid an arbitrary sum of Kshs. 38,500/= as his terminal dues.
10. The respondent filed a response to the claim which consisted mainly of bare denials of averments in the statements of claim and putting the Claimant to proof.
11. At the hearing only the Claimant's attended to give evidence. Mr. Menu stated additionally that he was employed in February, 2003 as a clerk at a salary of Kshs. 7,000/= which was later increased to kshs. 8,000/=.

12. On 12<sup>th</sup> March, 2012 in Nyahururu he fractured his hands and was taken to hospital and given 21 days sick leave. He was never paid for the period he was on leave.

13. On 13<sup>th</sup> June, 2013 he was called by the Manager and asked to sign a document because the manager wanted him to stop working. He was thereafter paid Kshs. 38,000/= . He did not know what the payment was for. Mr. Benjamine Wanyoike on his part stated that he was employed by the respondent from October, 2003 to 6<sup>th</sup> January, 2013 as a station filing manager. His salary was 15,000/= per month.

14. On 5<sup>th</sup> January, 2013 he was given a lift by one of his colleagues. They were other occupants. He was thereafter abducted and his safe keys and mobile phone taken from him. He was kept in the vehicle the whole night and released the following day in the evening around 6.00pm. He reported to work and found the security and two pump attendants. They called the police who arrested him. No one wanted to listen to his story. He was told money had been lost and he was responsible. He was taken to Ol Kalau police station and later charged at Nyahururu Law Courts. The case was mentioned severally and later withdrawn for lack of evidence.

15. As observed, the respondent's filed a defence merely denying the Claimant's allegations without more. Further the respondent never attached any statement or evidence to support their assertion that the termination of the Claimant's service was justifiable in law. The respondent also never attended the hearing to cross-examine the Claimant's and tender any evidence in rebuttal. The Claimant's allegations that they were unfairly terminated therefore remained uncontroverted.

16. It is a requirement of the Law that before a termination of employment occurs, the employee must be informed of the allegations against him and given a chance to defend himself and where required call witnesses. There is nothing on record to show the Claimants' were taken through this process.

17. On the allegation that the Claimant's absconded duty, no evidence was put forward to show a notice to resume work or any attempt was made to find out the whereabouts of the Claimant's and that they were called upon to resume work or get dismissed. In the circumstances the Court returns a verdict of unfair termination and awards the Claimant's as follows: -

#### **JOHN KAHIGA MENU**

(a) One-month salary in lieu of notice **8,000**

(b) 13 days' pay for the month of June **3,467**

(c) Seven months' pay as compensation for unfair termination **56,000**

**67,467**

(d) (a) (b) and (c) are subject to taxes and less sums already Paid.

(e) Costs of the suit.

#### **BENJAMINE WANYOIKE**

(a) One month's salary in lieu of notice **1,500**

(b) Unpaid salary for 6 days worked for January,2013. **3,000**

(c) Seven month's salary as compensation for Unfair termination. **105,000**

**123,000**

(d) (a) (b) and (c) subject to taxes and less sums Already paid as terminal dues.\_

(e) Costs of the suit.

18. Claim for 10 months annual leave is rejected for the reason that nothing is on record to show such leave was over requested for and never approved besides the Court ought to be wary of claims for long periods of untaken leave always being raised when employment terminates but was never raised even once during the occurrence of employment.

19. It is so ordered.

Dated at Nairobi this 13<sup>th</sup> day of March, 2020

**Abuodha Jorum Nelson**

**Judge**

Delivered this 13<sup>th</sup> day of March, 2020

**Byram Ongaya**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.