



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 607 OF 2014

ALPHONCE NZIOKI MULWA.....CLAIMANT

-VERSUS-

JAPA PROTECTION SYSTEMS LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th March, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 10.04.2014 through Namada & Company Advocates. The claimant has pleaded that the respondent employed him as a guard from January 2012 and his last salary was Kshs. 6, 500.00 per month. He alleges that on 09.10.2013 he reported on duty and the respondent's officer one Wekesa ordered the claimant to return the respondent's property and to leave the respondent's premises because he stood dismissed and no reason for dismissal was given. The claimant alleges that his dismissal was unfair and unlawful because no reason was given; he had not engaged in misconduct; and due process was never followed. The claimant prayed for judgment against the respondent for:

- a. One month salary in lieu of notice Kshs. 6, 500.00.
- b. Untaken and unpaid annual leave for 2 years Kshs. 13, 000.00.
- c. Service gratuity at 15 days' payment for 2 years Kshs. 6, 500.00.
- d. 12 months' pay compensation for unfair termination Kshs.78, 000.00.
- e. Underpayment in 2012 Kshs.48,000.00.
- f. Underpayment in 2013 Kshs.38, 700.00.
- g. Total claim Kshs. 190, 700.00.
- h. A declaration the dismissal of the claimant from employment was unlawful and unfair.
- i. Costs of the suit plus interest.

Despite service the respondent did not file appearance, response or attend at the hearing.

The respondent testified that the respondent employed him on in January 2012 and on a date he did not recall. He worked as a guard for 2 years at Kshs. 6, 500.00 per month. On 09.10.2013 he was late in arriving at work due to heavy rains and traffic jam. He informed his supervisor, one Wekesa, on phone about that predicament. He arrived at work at around 8.00am instead of 6.00am. Upon arrival the supervisor told him to hand in uniform and to go away as he had been terminated from employment. He was never recalled and he was not given a termination notice and there was no disciplinary hearing. Further throughout service he was not given annual leave or pay in lieu thereof and no NSSF was deducted and remitted. He was also underpaid as particularised in the memorandum of claim. Final submissions were filed for the claimant.

The court has considered the memorandum of claim, the evidence and submissions and makes findings as follows:

1. The claimant's evidence is not rebutted and the Court returns that the parties were in a contract of service which was terminated per the claimant's account.
2. The termination was unfair for want of a notice and hearing as per section 41 of the Employment Act, 2007.
3. The Court has considered the circumstances of the termination. The claimant admits that he arrived at work at 8.00am instead of 6.00am due to the rains and traffic jam. The court considers that the late arrival was a contributory factor for the claimant's arrival but in absence of a disciplinary hearing, he could not mitigate his circumstances in view of the sudden dismissal that ensued. The Court has considered that the claimant had served for slightly less than 2 years but he desired to continue in employment. The Court has also considered his otherwise good service. The Court returns that under section 49 of the Employment Act, 2007 6 months' payment in compensation will meet the ends of justice making Kshs. 6, 500.00 x 12 thus, **Kshs. 78, 000.00**. The claimant is also entitled to **Kshs. 6,500.00** pay in lieu of one month termination notice in sections 35 and 36 of the Act.
4. The Court finds that the claimant has established prorata leave pay under section 28 of the Act for one year 10 months **making Kshs.11, 916.70**.
5. NSSF was not remitted and there is no evidence of membership in NSSF and the claimant is awarded **Kshs.6,500.00** as reasonable gratuity or service pay under section 35 of the Act.
6. The claimant has particularised under payment in the memorandum of claim and which is not rebutted and is awarded **Kshs. 48,000.00** for 2012 and **Kshs. 38, 7000.00** for 2013 as prayed for.

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 unfair and unlawful.
2. The respondent to pay the claimant as um of **Kshs.189, 616.70** by 01.05.2020 failing interest to be payable thereon from the date of this judgment till full payment.
3. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 6th March, 2020**.

BYRAM ONGAYA

JUDGE