



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

**AT NAIROBI**

**CAUSE NO. 2341 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**BERNARD KISILU KIOKO.....CLAIMANT**

**VERSUS**

**RAMBOO COLOURCANE LIMITED.....RESPONDENT**

**JUDGMENT**

By Memorandum of Claim dated 12<sup>th</sup> September 2017 which was amended on 10<sup>th</sup> September 2018, the claimant avers that his employment was unfairly terminated by the respondent. He seeks the following remedies –

a) Declaration that the claimant's termination from employment was unlawful, unprocedural and unfair;

b) The sum of Kshs.144,321.17 as set out below –

(i) One month pay in lieu of notice

Basic salary + House Allowance

7,862 + 1,179 Kshs.9,041

(ii) Compensation for unfair termination 12 months

9,041 x 12 months Kshs.108,492

(iii) Underpayment of wages

From 3<sup>rd</sup> July 2010 – December 2010

(Kshs.6,743 - 6710) x 6 months Kshs.198

(iv) Underpayment House Allowance

From 3<sup>rd</sup> July 2010 – December 2010

Kshs. x 6,743 = 1,011.45

1,011.45 – 1,010 =1.45

1.45 x 6 Months Kshs.8.7

(v) Travel Allowance

From 3<sup>rd</sup> July 2010 - 3<sup>rd</sup> July 2011 Kshs.500

(vi) Leave dues

3<sup>rd</sup> July 2010 - 3<sup>rd</sup> July 2011

x 7,862 Kshs.12448.16

3<sup>rd</sup> July 2011 – December 2011

$1\frac{3}{4} \times 365.95 \times 5$  Kshs.3,193.31

Total unpaid leave dues

12,448.00 + 3193.3 Kshs.15,641.47

(vii) Unpaid NHIF contributions

From July 2009 – July 2010

daily wages x number of days in a month

250 x 30=7,500

6,000 – 7,999 =300

300 x 12 Kshs.3,600

3<sup>rd</sup> July 2010 – December 2010

6000 – 7999 =300

300 x 6 Kshs1,800

(viii) Underpayments for 2011

2011-01 400-240 160.00

2011-02 400-280 120.00

2011-03 400-260 140.00

2011-04 unpaid 400.00

2011-05 400-220 180.00

2011-06 400-280 180.00

2011-07 400-240 160.00

2011-08 400-220 180.00

2011-09 400-200 200.00

2011-10 400-220 180.00

2011-11 400-180 220.00

2011-12 400-280 120.00

**Total Kshs.2,240**

1,800.00+3,600.00

(ix) Unpaid NSSF contributions

July 2009 – July 2010

200.00 x 12 Kshs.2,400.00

December 2010 Kshs.200.00

December 2011 Kshs.200.00

Total Kshs.2,800.00

**Total amount in the claim is Kshs.144,321.17.**

c) Certificate of service

d) Cost of this suit and interests on at court rates from time of

filing suit until payment in full and

e) Any other further and better relief the Court may deem just and fit to grant

The respondent filed a memorandum of response to claimant's amended claim on 6<sup>th</sup> December 2018. In the memorandum of response, the respondent denies ever terminating the employment of the claimant. It further denies that it underpaid the claimant. It further denies that the claimant was owed any leave. The respondent prays that the claim be dismissed with costs.

At the hearing of the claimant testified on his own behalf while the respondent called one witness who testified on its behalf. The parties thereafter filed and exchanged written submissions.

#### **The Claimant's Case**

It is the claimant's case that he started working with the respondent as a casual labourer in July 2009. He worked in the weaving section during which he was paid weekly. He was confirmed to regular employment with effect from 3<sup>rd</sup> July 2001. His last salary was Kshs.7,862 with house allowance of Kshs.1,179 per month.

It is the claimant's case that in December 2011 he took leave of 7 days during the Christmas break. During the leave his grandmother died. Since he did not have his supervisor's number he telephoned his colleague, Mr. Samuel Kithika whose telephone contact he had and asked him to relay the information to the Supervisor Mr. Mutinda.

He was thereafter informed by his immediate supervisor Mr. Muli Kititi that his services had been terminated. He testified that when he reported back, Mr. Kititi informed him that he was not aware about the claimant's absence the previous day. The claimant testified that after he reported to work he was tossed from one department to another until 4<sup>th</sup> January 2012 when his employment was unprocedurally terminated on grounds that he was not clear about.

During the hearing the claimant stated that he was never issued with a letter of termination. He denied having seen the letter dated 9<sup>th</sup> January 2012 in the respondent's bundle of documents. He also denied ever receiving a warning letter dated 22<sup>nd</sup> December 2011 in the respondent's bundle.

Under cross examination he stated he was supposed to report back to work on 2<sup>nd</sup> January 2012 but reported back on 3<sup>rd</sup> January 2012. That he did not sign the register as he was not allowed to work. He said that he sent Kithika by telephone to inform the employer that he had a funeral.

#### **Respondent's case.**

The respondent called two witness. RW1, SAMUEL KITHIKA testified that after the Christmas break of December 2011 they were supposed to report back to work on 3<sup>rd</sup> January 2012 and not 2<sup>nd</sup> January 2012 as stated by the claimant. He stated he was never sent by the claimant to seek permission. He only heard that the claimant had been seen at the office but he did not know what happened.

He testified that the Manager at the time was M. Muli and the Supervisor was Cosmas Mutinda.

Under cross examination RW1 stated that the claimant did not report back to work on 3<sup>rd</sup> January 2012 after the Christmas break. He stated that the reason he came to testify in court was to deny that Kisilu spoke to him.

RW2 MAUREEN JUMA testified that she was the Human Resources Officer from the respondent. She stated she did not know the claimant personally but knew about his case from records that had been filed in court. She testified that the claimant had no leave balance. That the

claimant was not entitled to leave travelling allowance for 2011 as he did not report back to work in 2012 when the leave allowance was paid. She testified that the claimant was not issued with a letter of termination.

Under cross examination she stated that she joined the respondent in 27<sup>th</sup> November 2017. That she adopted the witness statement of the Human Resource Officer whom she took over from. She testified that the claimant took leave on 22<sup>nd</sup> December 2011 and was supposed to report back on 3<sup>rd</sup> January 2012.

She testified that there was a disciplinary meeting to discuss the claimant's case between Human Resource Department and Management but the claimant was not present as he did not report to work between 3<sup>rd</sup> and 6<sup>th</sup> January 2012.

She testified that there was no notice to the claimant of the disciplinary hearing. She testified that Human Resources Department communicated to the claimant that his services had been terminated.

### **Determination**

I have considered to pleadings, the evidence on record and the submissions by the parties together with authorities cited. The issues for determination are whether the claimant absconded duty or was unfairly terminated and whether he is entitled to the prayers sought.

#### **Whether the claimant absconded duty or was dismissed.**

The claimant testified that he was not issued with any letter of termination. The respondent confirmed that it did not issue a letter of termination to the claimant as the claimant absconded duty from 3<sup>rd</sup> to 9<sup>th</sup> January 2012. The claimant's averment that he sent RW1 to inform the respondent that he was attending his grandmother's funeral was denied by RW1.

Section 43 of the Employment Act provides that –

#### **43. Proof of reason for termination**

**(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

The claimant having failed to prove that he informed the respondent of his inability to report to work due to the death of his grandmother, the respondent was right in assuming he had absconded duty. This is fortified by the respondent's letter to the claimant dated 9<sup>th</sup> January 2012 warning the claimant about his failure to report to work between 3<sup>rd</sup> and 9<sup>th</sup> January 2012.

The court further notes that the claimant refers to his failure to report to work on 2<sup>nd</sup> January 2012 yet according to RW1 as confirmed by the respondent's warning letter dated 9<sup>th</sup> January, the respondent's workers resumed duty on 3<sup>rd</sup> January 2012.

From the foregoing I find that that claimant has not proved that he sent RW1 to inform his supervisor of inability to report to work on 2<sup>nd</sup> January 2012 or that he reported to work on 3<sup>rd</sup> January 2012 and was not allowed to resume duty.

I further find that the claimant has not disproved the respondent's averment that he absconded duty.

I find that the claimant failed to prove that his employment was unfairly terminated by the respondent.

### **Remedies**

Having failed to prove that his employment was unfairly terminated

by the respondent, the claimant is not entitled to pay in lieu of notice. The prayer is thus dismissed.

The claimant is further not entitled to compensation which is only payable upon a finding of unfair termination.

The prayer for underpayments was not rebutted by the respondent. I thus grant the claimant underpayments of both basic salary and house allowance as prayed in the sum of **Kshs.2,446.70**.

The claimant is also entitled to leave pay for 2011 in the sum of **Kshs.500** which RW2 confirmed he was not paid.

The respondent further failed to prove that the claimant took all his leave days. The days he took for Christmas break of 7 days did not all constitute leave as it included Christmas day, boxing day and 1<sup>st</sup> January 2012 which were not working days. 2<sup>nd</sup> January 2012 was also a public holiday to compensate for 1<sup>st</sup> January 2012 which fell on a Sunday. The same applies to 27 December 2011 the which compensated

for 25<sup>th</sup> December 2011 which fell on a Sunday.

I therefore find that the claimant is entitled to pay in lieu of annual leave as prayed in the sum of **Kshs.15,641.47**.

The prayers for NSSF and NHIF are rejected as these are statutory deductions and both NSSF and NHIF have machinery to recover the same from any defaulting employer. All the claimant needs to do is report to the statutory bodies and let them follow up payments.

**I thus enter judgment for the claimant against the respondent in the sum of Kshs.18,588.17.**

The respondent shall pay claimant's costs and interest shall accrue from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF MARCH 2020**

**MAUREEN ONYANGO**

**JUDGE**