



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1177 OF 2015

FRANCIS MBURIA NJAGI.....CLAIMANT

-VERSUS-

EAST AFRICA SPECTRE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 9th April, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 07.07.2015 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the respondent's action of summarily dismissing the claimant from employment was unlawful and unfair and the claimant is entitled to payment of his terminal dues and compensatory damages.
- b. The respondent to pay the claimant a sum of Kshs.584, 738.00 being Kshs.6, 288.00 salary for 12 days worked in March 2015; one month salary in lieu of notice Kshs.15, 720.00; pay in lieu of untaken leave for period served Kshs.15, 7120 x 3 years = Kshs.47, 160.00; overtime 3 hours for each day worked Kshs.318, 330.00; service gratuity for 2012as NSSF was not remitted Kshs. 8, 600.00 at 15 days' wage; and Kshs.188, 640.00 12 months' pay compensation for unfair termination..
- c. Interest on b from the date of filing the suit.
- d. Cost of the suit plus interest.

The claimant's case is that the respondent employed him as Assistant Machine Operator from 26.03.2012 in the respondent's Furnace Department and the last wage was Kshs.524.00 per day. His case is that NSSF and NHIF was not fully remitted per statutory provisions. Further no annual leave was given. Further on 12.03.2015 at close of work the claimant and his 4 other workmates from Furnace Department went to the Human Resource Manager one Ms. Grace to present their grievances concerning harsh work environment and unpaid overtime dues – and their supervisors Mwaro and Orina were present when in the process, the claimant and the workmates were ordered to remove company's overall and leave the premises immediately. In that way, it is the claimant's case that he was unfairly and unlawfully terminated for no misconduct but for presenting a grievance.

The respondent entered appearance on 14.12.2015 through Otieno Ragot & Company Advocates. On 20.01.2016 the respondent filed a response to the memorandum of claim and prayed that the claim be dismissed with costs. The respondent's case was that the claimant was hired from time to time as a casual employee and the claimant last worked for the respondent on 14.02.2015 after which he deserted work at his own will and without giving a reason or notice. Further the respondent denied that it failed to remit due NSSF and NHIF as was alleged for the claimant. Further the claimant had a break in service and never earned leave as was claimed. The respondent further denied that the claimant reported on duty on 12.03.2015 and that the claimant and his workmates presented their grievances to Ms. Grace as was alleged for the claimant. Further the claimant deserted duty on 14.02.2015 and stayed away from reporting at work of his own will. Thus, it was the respondent's case that the claimant was not entitled to any of the remedies that were prayed for.

The claimant testified to support his case and the respondent's witness (RW) was Hudson Chitala, the General Manager.

To answer the **1st issue** for determination, there is no dispute that the parties were in a contract of service.

The **2nd issue** for determination is whether the claimant was a casual employee on need basis with a broken service or he was on continuous employment. By his own pleading the claimant states that he was on a daily wage of Kshs.524.00 per day. By that pleading the claimant suggests that he was a casual employee. The claimant testified that accumulated daily wage was paid on 15th of each month then at end month so that the monthly pay was Kshs.15, 720.00. The claimant testified that he was orally employed on 26.03.2012 and he worked

without a break until termination on 12.03.2015. He was promised a formal letter of employment but which was never issued. RW testified that the claimant was employed sometimes in June 2014 per the lists of employees which were filed in Court. The respondent for unexplained reasons failed to exhibit the list of employees for 2012 to show that the claimant was not its employee. The NSSF statement exhibited showed the claimant was employed on 01.04.2012 and he had been registered on 05.04.2012. In absence of any other material and on a balance of probability, the Court returns that the claimant worked for the respondent continuously from 26.03.2012 to 12.03.2015. The agreed payment was Kshs.524.00 per day and Kshs.15, 720.00 per month.

The 3rd issue for determination is whether the claimant is entitled to the prayers made. The Court makes findings as follows:

1. The claimant is entitled to the declaration that the termination was unfair and unlawful. The Court finds that the claimant's evidence on the circumstances of the termination has not been rebutted. The evidence was that the claimant and his workmates had a genuine grievance about overtime. Instead of resolving the grievance, the respondent opted to dismiss the claimant summarily. Under section 46 of the Employment Act, 2007 raising a genuine complaint with an employer like in the instant case does not constitute a fair reason for termination but it amounted to unfair reason. The reason was unlawful as it did not amount to a valid or fair reason under sections 43 and 45 of the Employment Act, 2007. The Court finds that there is no reason to doubt the claimant's evidence that the claimant reported the dispute to the labour officer and personally delivered the summons to the respondent but the respondent failed to attend. Thus the Court further finds that the RW's evidence that the claimant was a casual employee and there was no cause to act after the absence cannot be trusted in view of the finding that the respondent had failed to make such explanation when summoned by the labour officer. Further, in view of the long unbroken service, the purported otherwise casual employment converted to one subject to minimum statutory terms as per section 37 of the Act.

2. The Court has considered the period served of about 3 years with a clean record and that the claimant desired to continue in employment. The aggravating factors were that the claimant was summarily dismissed upon an unlawful ground and the respondent refused to attend to the summons by the labour officer. The claimant did not contribute to the summary dismissal. To balance justice for parties the claimant is awarded 8 months' pay under section 49 of the Act plus one month pay in lieu of the termination notice under sections 35(5) and 36 of the Act making Kshs. 15,720.00 x 9 = **Kshs.141, 480.00**. For the 12 days worked in March 2015 and not paid the claimant is awarded **Kshs.6, 288.00**. The evidence is that for the period served no annual leave was given or paid in lieu thereof and the claimant is awarded **Kshs.47, 160.00** as prayed for and under section 28 of the Act as submitted for the claimant.

3. The claimant prays for overtime of Kshs.318, 330.00. The evidence was that parties agreed upon Kshs.524.00 for a daily wage and which was paid. It is trite law that parties are bound by their own contracts and in view of that undisputed agreement, the Court returns that the claimant has failed to establish a justification for payment of overtime as prayed for.

4. The claimant was a member of NSSF and he is not entitled to service gratuity as prayed for. If NSSF was not remitted for 2012, the legitimate action was to pursue the same under the prevailing statutory provisions.

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

1. The declaration that the summary dismissal of the claimant by the respondent was unfair and illegal.
2. The respondent to pay the claimant a sum of **Kshs.194, 928.00** by 01.08.2020 failing interest at Court rates 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.
4. In view of the prevailing COVID 19 pandemic there be a stay of execution of the decree herein until 01.08.2020.

Signed, dated and delivered in court at **Nairobi** this **Thursday, 9th April, 2020**.

BYRAM ONGAYA

JUDGE