



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 1366 OF 2015**

**KASOLOI MUTIE.....CLAIMANT**

**-VERSUS-**

**BITTER GUARD LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 9<sup>th</sup> April, 2020)

**JUDGMENT**

The claimant filed the memorandum of claim on 06.08.2015 through Namada and Company Advocates. The amended memorandum of claim was filed on 05.08.2016. The claimant prayed for judgment against the respondent for:

- a. A declaration the summary dismissal 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.352, 578.47 being:
  - i. One month [pay in lieu of termination notice per minimum wage for a tailor under Regulation of Wages (General) (Amendment) Order 2013 Kshs.16, 602.85.
  - ii. Payment in lieu of untaken and unpaid leave for the period of service for 2013 to 2015 being 2 years x Kshs.16, 602.85 thus Kshs.3, 2015.00.
  - iii. House allowance for period served of 2 years 15% x 16, 602.85 12 months x 2 years = Kshs.59, 770.26.
  - iv. Underpayments in 2012 to 2013 Kshs.28, 366.80.
  - v. Underpayment in 2013 to 2015 Kshs.70, 445.60.
  - vi. 7 days worked in May 2015 Kshs.3, 320.00.
  - vii. 12 months' compensation Kshs.16, 602.85 x 12 = Kshs.199, 234.20.
- c. Interest on (b) above from the date of filing suit till payment in full.
- d. Costs of the suit plus interest.

The memorandum of response was filed on 17.05.2016 through Onyoni Opini & Gachuba Advocates. The amended response was filed on 20.02.2019. The respondent prayed that the respondent's defence be struck out with costs.

The Court has considered the pleadings, the evidence and the submissions on record. The Court makes findings as follows:

- a. There is no dispute that parties were in a contract of service. The issue in dispute is whether the claimant worked as a skilled operator or he was engaged as unskilled casual worker as alleged for the respondent. The claimant pleaded that he was employed as an operator. In his evidence he stated that he was employed as an operator and his last pay was Kshs.12, 200.00 per month. The

respondent's witness (RW) was the Director called Faith Muthoni Chiuru. She confirmed that the claimant was employed by the respondent and she offered no evidence to rebut the claimant's evidence that he was employed as an operator. The Court returns that the claimant was employed as an operator.

b. To answer the 2<sup>nd</sup> issue the Court returns that as per the claimant's case, the termination was unfair for want of due process of a notice and a hearing per section 41 of the Employment Act, 2007 and for want of a valid reason per section 43 of the Act. RW confirmed in her testimony that the claimant was sent home on 07.05.2015 but investigations revealed that the claimant had not participated in a strike that day. As per the claimant's account, he was dismissed after working on 07.05.2015 and on account of a strike he had not participated in. The Court finds that the termination was unfair and unlawful. The respondent alleged that by the letter dated 11.05.2015 the claimant was reinstated to his job but there was no evidence that the letter was actually delivered to the claimant. In particular despite the demand letter dated 27.05.2015 and which was delivered to the respondent, there was no reply that the claimant had been offered the reinstatement. The Court finds that the reinstatement letter was an afterthought and its genuineness was not therefore established. The termination was unfair for want of due procedure and genuine reason for the termination.

c. The claimant had served with a clean record. He did not participate in the offensive strike in issue. He was willing to continue in employment. The Court has considered the respondent's remorsefulness as per alleged recall or reinstatement letter. The claimant is awarded Kshs.16, 602.85 x 10 months making **Kshs.166, 028.50** as compensation for unfair termination under section 49 of the Act. He is also awarded **Kshs.16, 602.85** pay in lieu of one month notice.

d. The respondent has not disputed the underpayment as per the cited wage orders except that it had been disputed that the claimant was an operator. The Court has found he was an operator and the underpayment is due as prayed for making **Kshs. 28, 366.80** and **Kshs. 70, 000.00** as prayed for.

e. RW confirmed that the claimant worked without a break and was not paid house allowance or given leave. Accordingly the claimant is awarded **Kshs.59, 770.26** for house allowance and **Kshs.3, 205.00** in lieu of annual leave.

f. RW confirmed the 7 days worked in May 2015 had not been paid and the claimant is awarded **Kshs.3, 320.56** as prayed for.

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

a. The declaration that the termination of the contract of service herein by the respondent was unfair and unlawful.

b. The respondent to pay the claimant a sum of **Kshs.347, 293.97** by 01.08.2020 failing interest to be payable thereon at Court rates from the date of this judgment till payment in full.

c. The respondent to pay the claimant's costs of the suit.

d. In view of the prevailing COVID 19 pandemic there be stay of execution of the decree herein until 01.08.2020.

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

**BYRAM ONGAYA**

**JUDGE**