



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1844 OF 2015

BERNARD SIMIYU WANYONYI.....CLAIMANT

-VERSUS-

SIKIMA ENGINEERING SERVICES.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 10th July, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 19.10.2015 through Wangira & Company Advocates. The claimant's case is as follows. He was employed by the respondent as a Carpenter from 01.01.2012 to 05.01.2015. In December 2014 the respondent closed for Christmas on 27.12.2014 until 31.12.2014 and the claimant was told to resume job on 05.01.2015. Upon reporting as scheduled the supervisor informed the claimant that work had reduced and the director would not talk to employees about the issue. The supervisor paid the claimant Kshs.6,000.00 for the off duty days the claimant had worked. After a week the claimant was informed that another person had been employed in his place. The claimant made all efforts to meet the director for reinstatement but the director was unavailable. The claimant's further case is that the termination was unfair without notice and valid reason. The claimant claims:

- a. Service pay for 3 years at $Kshs.6,500.00 \times 20/26 \times 3 = Kshs.15,000.00$.
- b. One-month notice pay Kshs.6,500.00.
- c. Unfair termination $Kshs.6,500.00 \times 12 \text{ months} = Kshs.78,000.00$.
- d. Untaken leave days $21 \text{ days} \times 3 = 63/26 \times 6,500 = Kshs.15,750.00$.
- e. Total claim Kshs.115,250.00

The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant's dismissal from his employment was unlawful and unfair.
- b. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c. An order for the respondent to pay the claimant Kshs.115,250.00 as claimed.
- d. An order that the respondent grants the applicant certificate of service.
- e. Costs of this interest therein.

The respondent filed the statement of defense on 16.12.2015. The respondent denied employing the claimant and further that the claimant was a casual worker and was duly paid. Further, on 29.12.2014 he was locked out after he was involved in criminal conduct whereby he stole and employee's property and which was reported at the police station and is pending investigation because the claimant has failed to honour police summons. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness No. 1 was (RW1) one John Mwangi Gitau and respondent witness No. 2 (RW2) one Ephantas Mugoh Nderitu. The Court has considered the pleadings, evidence and submissions on record and makes findings as

follows:

1. While pleading that it did not employ the claimant, the respondent's evidence was that the claimant was a casual employee at Kshs. 250.00 wage per month as a cleaner. The Court finds that the respondent's account that was contradictory between the pleading and evidence cannot be trusted. RW2 testified that on 16.08.2014 the claimant brought unauthorized person at his place of work. He was warned and he continued to work. The Court finds that the claimant was engaged as a carpenter in the respondent's enterprise in which the respondent had been subcontracted by the Kenya Breweries Limited (KBL) to do woodwork repairs. The respondent while alleging it paid Kshs. 250.00 per day and there were records, none was exhibited. In any event taking 4 days of off per month will be Kshs. 6, 500.00 per month as alleged for the claimant. Thus the Court considers that the pay was Kshs.6,500.00 per month (whether the claimant was a cleaner as alleged for respondent or carpenter as alleged for respondent) and the service having been without a break, any casual arrangement converted to service subject to minimum statutory terms as per section 37 of the Employment Act, 2007.

2. The claimant's evidence is that he reported back on 05.01.2015 and the supervisor informed him there would be no job for him. The respondent alleges that the claimant was caught in the process of stealing certain boots and he disappeared. The respondent has not filed the alleged police report in that regard. The report by the security firm G4S which the respondent says investigated the case has not been exhibited. RW2 testified that G4S recorded all incidents but the record of the alleged theft was not exhibited. In such circumstances the respondent's account is found not believable. The Court returns that the claimant's employment was terminated on 05.01.2015 when he was told there was no more job for him and he was not recalled. The Court further returns that the termination was unfair as section 40 of the Act on redundancy was not followed. It was sudden and without due preparation.

3. The Court has considered the term served and the claimant's previous record. There is no reason to doubt that the claimant had been warned for bringing unauthorized person at his work station. The Court considers that to have been an aggravating factor on the part of the claimant leading to the termination. Thus the Court awards the claimant only 3 months for the unfair termination at Kshs.6,500.00 x 3 = **Kshs.19,500.00**. As termination was abrupt, the claimant is awarded **Kshs.6,500.00** in lieu of termination notice.

4. The claimant has prayed for **Kshs.15,000.00** in service pay. The Court returns that the evidence was that the claimant was not a member of NSSF or provided alternative pension arrangement so that the amount is awarded as reasonable under section 35 of the Act. While making the award the Court considers that in any event severance pay under section 40 of the Act would be due but not claimed.

5. The claimant prayed for annual leave for the period served. The respondent provided no evidence to show that the leave had been granted or payment made in lieu of such leave and the claimant is awarded **Kshs.15,750.00** as prayed for.

6. The Court returns that the claimant is entitled to a certificate of service per section 51 of the Act.

7. The claimant has succeeded his claims and is awarded costs of the suit.

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

1. A declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant a sum of **Kshs.56,750.00** by 01.09.2020.
3. The respondent to deliver the claimant's certificate of service in 30 days.
4. The respondent to pay costs of the suit.
5. In view of the prevailing Covid 19 situation there be a stay of execution till 01.09.2020.

Signed, dated and delivered by the court at **Nairobi** this **Friday, 10th July, 2020**.

BYRAM ONGAYA

JUDGE