



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1055 OF 2013

JOHN MBURU MUTURI.....CLAIMANT

- VERSUS -

KAMAHUHA LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 8th March, 2019)

JUDGMENT

The claimant John Mburu Muturi filed the memorandum of claim on 11.07.2013 in person. The claimant subsequently appointed Okemwa & Company Advocates to act in the matter. The claimant prayed for judgment against the respondent for:

- a) An order that the respondent do pay the claimant a sum of Kshs. 1, 222, 041.30 being terminal benefits under the Employment Act, 2007 including 12,600 hours week days overtime Kshs.472, 790.00; 16, 188.00 hours weekly resting days and holidays Kshs.607, 423.55; salary deducted for 5 months at Kshs. 3, 204.55 per month Kshs. 17, 624.75; balance of one month notice due Kshs.3, 204.55; balance of severance not paid Kshs.20, 023.50; and salary equivalent to 12 months for unfair termination Kshs.100, 974.60.
- b) Costs of the action.
- c) Interest from 13.05.2011 when the claimant was terminated until the amount is paid in full.
- d) Any other relief the Court may deem fit to grant.

The respondent Kamahuha Limited filed the response on 28.08.2013 through Mang'erere Bosire & Associates. The respondent prayed that the claimant's claim be dismissed with costs.

The claimant and the respondent's managing director one Wanjiku Kirika (RW) testified to support the parties' respective cases.

There is no dispute that the respondent employed the claimant initially as a loader and later as a cleaner assigned to sweep.

The **1st issue** in dispute is the date of appointment. The claimant testified that he was employed on 01.10.1996 until 13.05.2011 when he was terminated on account that he was told that there was no work to perform. RW testified that the claimant worked from 1996 as a casual employee and was permanently employed in 1998. In view of that evidence and there being no break between the casual service and the permanent service, the Court returns that the claimant's effective date of employment was 01.10.1996 and as testified by RW, he is entitled to withheld severance pay for 2 years at Kshs. 10, 609.00 monthly basic wage per year making **Kshs. 21, 219.30**.

The **2nd issue** for determination is whether the termination was unfair. The claimant's case is that on 13.05.2011 he was told that there was no work to perform. The respondent's evidence is that the respondent outsourced security and cleaning services in 2011. The claimant was given an option to remain a loader but he opted out by declining the offer. The respondent accepted the option as exercised by the claimant and offered to pay him severance pay at one month basic pay for each year served making Kshs. 114, 074.00 from 1998 to separation in 2011 inclusive 60 days in lieu of annual leave and salary as at separation. The claimant admitted in his evidence that he received the payment. The Court returns that the parties separated on account of redundancy and section 40 of the Employment Act, 2007 applied. There was no evidence that the respondent served the due one month notice to the area labour officer and the claimant as provided under the section. There was no evidence that the claimant had also been paid the one month notice in lieu of termination notice as prescribed under the section. To that extent the termination was procedurally unfair. The Court has considered the mitigating factors that the respondent offered alternative employment of a loader but the claimant declined to take up the job. The Court has considered the claimant's otherwise clean service of around 15 years and that he was not prepared for the redundancy as per section 40 of the Act. To balance justice he is awarded 6 months salaries in compensation under section 49 of the Act making **Kshs.63, 657.90** at last salary of Kshs. 10, 609.65 per RW's testimony and the

claimant's pay slip for August, 2009 exhibited by the respondent. The claimant is further awarded **Kshs. 10, 609.65** in lieu of one month notice pay as per the section and which was not shown to have been paid.

The **3rd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court has considered the evidence, the pleadings and the submissions and returns as follows:

a) The claimant's contract of service was terminated on 13.05.2011. The suit was filed on 11.07.2013 long after lapsing of 12 months. The Court returns that the claims for overtime and, weekly resting days and holidays, were in the nature of a continuing injury that ceased on 13.05.2011. Under section 90 of the Act the suit was to be filed within 12 months from the cessation thereof but was filed belatedly on 11.07.2013. Accordingly the claims were time barred and will therefore fail; as the Court, will not delve into the merits of the claims.

b) The withheld severance pay has been found due and already awarded and as admitted by the respondent's witness as falling due.

c) The claimant failed to provide pay slips or other acceptable evidence to establish the salary deduction for 5 months as claimed. His evidence was that he had the relevant pay slips but he had failed to file the same. The Court returns that the prayer will fail,

d) As costs follow event, the respondent will pay the claimant's costs of the suit.

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

1) Payment of **Kshs.95, 486.85** by 01.05.2019 failing interest to be payable thereon at court rates from the date of this judgment till full payment.

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

Signed, dated and delivered in court at Nairobi this Friday 8th March, 2019.

BYRAM ONGAYA

JUDGE