



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 637 OF 2015**

**LINUS TAMBITI BALA.....CLAIMANT**

**VERSUS**

**SAMBA BRAZILIA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 31<sup>st</sup> May, 2019)

**JUDGMENT**

The claimant filed on 20.04.2015 the memorandum of claim through Namada & Company Advocates. The claimant alleged unlawful and unfair dismissal from employment and non payment of terminal dues and compensatory damages including:

- a) One month salary in lieu of notice Kshs.17, 000.00.
- b) Unpaid salary for February 2014 Kshs. 17, 000.00.
- c) Pay in lieu of untaken leave for entire period served of 2 years Kshs. 34, 000.00.
- d) Overtime of 4.5 hours over the 2 years of service (01.06.2011 to 31.05. 2013) Kshs.344, 250.00.
- e) Overtime for 4.5 hours daily for 9 months from 01.06.2013 to 06.03.2014 Kshs. 86, 265.00.
- f) 12 months' gross monthly salaries Kshs. 17, 000.00 x 12 making Kshs. 204, 000.00.
- g) Total Kshs. 702, 515.00.

Thus the claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's aforesaid actions amounted to summary dismissal from employment which dismissal was unlawful and unfair.
- b) The respondent to pay the claimant terminal dues and compensatory damages as pleaded amounting to Kshs. 702, 515.00.
- c) Interest on (c) above from the date of filing suit till payment in full.
- d) Cost of the suit plus interest.

The respondent was served summons and the memorandum of claim on 28.04.2015 but did not enter appearance or file a defence. Despite service of mention notices, hearing notices and the submissions, the respondent failed to attend Court as was expected. The claimant testified to support his case. The only issue for determination is whether the claimant is entitled to remedies as prayed for.

The Court has considered all the material on record and makes findings as follows:

- 1) The claimant testified that the respondent employed him as Head of Security effective sometimes in June 2011 and the Court returns that parties were in a contract of service.

2) The claimant's evidence was that on 03.03.2014 while on night duty he noticed that the door to the store was wide open and he promptly reported the incident to the respondent's manager one Mike Ndirangu. An inventory at the store was carried out and it was established that a speaker was missing. The claimant went for his monthly pay on 06.03.2014 and the respondent's cashier informed him that the manager had instructed that the claimant would not be paid until the claimant returned the missing speaker. The claimant reported the grievance to the respondent's director who ordered him to go home and wait to be recalled to take pending salary and to resume work. The claimant testified that he had not been recalled and he had not received the salary. He earned Kshs.17, 000.00 per month. The Court finds that the claimant's evidence was not opposed in any material respect. The Court further returns that the claimant was dismissed by the respondent on 06.03.2014 when the respondent's director ordered him to go home and the claimant was not recalled thereafter. The termination was without due notice and a hearing as per section 41 of the Employment Act, 2007. The Court further finds that the reason for termination was not genuine as per section 43 of the Act and did not relate to the respondent's operational requirements and the claimant's conduct as per section 45 of the Act. In particular, as at the time of termination, the respondent did not establish that the claimant was in any manner responsible for the open store's door and the missing speaker. The Court has considered the factors in section 49 of the Act. The claimant desired to continue in employment, he did not contribute to the termination, he had served with due loyalty, diligence and had a clean record of service. The aggravating factor against the respondent is the failure to pay for the days worked as per the contract of service. The Court returns that as prayed for, the claimant will be awarded **Kshs. 204, 000.00** in compensation for the unfair and unjustified termination. The termination was abrupt and he is awarded **Kshs. 17, 000.00** in lieu of the termination notice as prayed for. He is awarded **Kshs. 17, 000.00** pay for February 2014 as prayed for.

The claimant was dismissed on 06.03.2014 and he filed the suit on 20.04.2015. The Court has considered the prayers for overtime and untaken leave and returns that they were continuing injuries and the claims were time barred under section 90 of the Employment Act, 2007 because as at the time of filing the suit, the 12 months of limitation from the date of cessation of the continuing injuries had lapsed. In any event there was no evidence of a reported grievance by the claimant to the respondent about the continuing injuries and while the contract of service was subsisting. The prayers will fail.

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

- a) The declaration that the respondent's aforesaid actions amounted to summary dismissal from employment which dismissal was unlawful and unfair.
- b) The respondent to pay the claimant a sum of **Kshs. 238, 000.00** by 01.07.2019 failing interest at Court rates to be payable thereon from the date of this judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 31<sup>st</sup> May, 2019.**

**BYRAM ONGAYA**

**JUDGE**