



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 718 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**MOSES MANGUSU.....CLAIMANT**

**VERSUS**

**JONATHAN MWALILI.....RESPONDENT**

**JUDGMENT**

The claimant, MOSES MANGUSU filed a memorandum of claim on 5<sup>th</sup> May 2014. The claimant avers that he was an employee of the respondent JONATHAN MWALILI having been appointed verbally as a watchman/general labour from 26<sup>th</sup> October 2016 until 31<sup>st</sup> September 2013 when the respondent illegally and unlawfully terminated his services without terminal dues. The claimant states that at the time of termination he was earning a gross salary of Kshs.7,500 which was an underpayment contrary to Legal No. 71 of 2012 and 197 of 2013. He maintains that his salary should have been at least Kshs.9,781 per month plus 15% house allowance being Kshs.1,467 making it a total of Kshs.11,248/=.

The claimant prays that the court finds his termination wrongful and gives the following orders:

- 1.The claimant to be paid full compensation of 12 months wage  
as compensation for loss of employment as provided under  
Section 49(10)(c) of the Employment Act  
Kshs.11,248 x 12 months.....Kshs.134,976
  - 2. One month’s pay in lieu of notice.....Kshs.11,248
  - 3. Leave prorate for 2 years 42 days x 375.....Kshs.15,750
  - 4. Salary underpayment for 2 years at 3,748 x 12 x 2....Kshs.89, 952
  - 5. Severance pay for 2 years 60 days..... Kshs.11,248
  - 6. Off duty 4 days per month 4 x 2 x 24 x 375 x 2..... Kshs.288,000
  - 7. Public holidays for 2 years 22 x 2 x 375.....Kshs.16,500
- Total** **Kshs.567,674**

The claimant prays for judgment against the respondent for the total amount as terminal dues plus interest at 12% per annum from the date of filing and any other award the court deems fit. He further prays for costs of the suit.

The respondent filed a reply to memorandum of claim on 8<sup>th</sup> June 2014. On 14<sup>th</sup> February 2016, respondent’s advocate indicated to court that he was not ready to proceed with the matter as he had no instructions and would file a notice to cease acting though hearing notice had been served. The court ordered that the respondent’s counsel files and serves the notice of withdrawal within 7 days and gave hearing date for the main suit on 30<sup>th</sup> January 2017. On 30<sup>th</sup> January 2017, respondents advocate informed court that the parties were in negotiations with

the aim of settling the matter and the same should be mentioned in a month's time. Court ordered that the matter be mentioned on 23<sup>rd</sup> February 2017 with a view to record a settlement. On 23<sup>rd</sup> February 2017, respondents counsel indicated to court that the parties were still negotiating and requested for a further mention date to record consent. The court ordered that the matter be mentioned on 25<sup>th</sup> April 2017 to record consent. The respondent made no appearance during consequent court appearances to fix the matter for hearing. On 19<sup>th</sup> September 2017 there was no appearance by the respondent and the court gave a hearing date for 3<sup>rd</sup> May 2018. On 3<sup>rd</sup> May 2018 the respondent's counsel indicated to court that he was not ready to proceed as he was out of the country on official business. The court ordered the respondent to pay court adjournment fees of Kshs.1,000 and the claimants' advocates costs of Kshs.2,100 and stated that no other adjournment would be granted to the respondent. On 2<sup>nd</sup> October 2018, the respondents advocate informed court that he had no instructions and had in fact filed an application to cease acting. The Court was to hear the application at 2:30 pm but that did not happen as the counsel did not appear. The hearing of the case thus proceeded in the absence of the respondent.

The claimant gave sworn evidence and stated that he was employed on 26<sup>th</sup> October 2010 as a gardener at the respondent's residence in Runda, Nairobi at a salary of Kshs.7,000. He was transferred to the respondents' farm in Loitokitok to tend to his 2 acre farm and take care of the chicken and turkeys at a salary of Kshs.7,500. He was terminated on 31<sup>st</sup> September 2013 at 12 pm. He testified that on this day as he went on with his daily chores he saw two people, one of them an uncle of the respondent and the other a worker. The uncle informed him that the worker would take over the care of the farm from him. The claimant requested to speak to the respondent before he left but the uncle refused and informed him that the respondent wanted him to go back to Runda. He agreed and boarded a vehicle since he was told he was going to Runda. The fare was paid by the uncle who alighted from the vehicle on the way while the claimant proceeded on to Nairobi and arrived at 9 pm. The claimant stated that he reported to Runda on the following Monday and since the gate was locked he went back to Kiambu and tried to call the respondent whose phone was not going through. The respondent received his call on Wednesday and asked him how much money he was owed. The claimant answered he did not know.

The claimant further testified that the respondent asked him why he had gone to Runda and he responded that the respondent's uncle had told him to go there. The respondent told the claimant that he did not want him in Runda and the claimant concluded that he had been sacked. He was paid Kshs.5,500 instead of Kshs.7,500. The respondent informed him that he was recovering money for chicken which had died, which chicken the claimant stated that he had informed the respondent were sick.

The claimant denied that he was not diligent. He further denied that he worked on other peoples' farms. He maintained that the respondent had never found him absent from the Loitokitok Farm or working on other peoples' farms. He also states that the respondent never told him anything negative about his work. The claimant testified that he was not a member of NSSF, that he never took leave or off days and worked on all public holidays. The claimant testified that he was living in the servant quarters. He urged the court to grant orders as prayed.

In the reply to memorandum of claim. The respondent admits that he employed the claimant on 26<sup>th</sup> October 2010 as a gardener at a salary of Kshs.7,500 at his home in Runda and relocated the claimant to Loitokitok still as a gardener with housing and food. It is the respondent's submission that the claimant worked without supervision and would carry out farming in the respondents' farm without any objection from the respondent. The respondent claims that the claimant became ungovernable in 2012 as he refused to pick calls. That on 20<sup>th</sup> July 2012 the respondent paid a surprise visit to the farm and had to wait from 6 am to 3 pm when the claimant came back supposedly from doing manual jobs in neighbouring farms at a fee. The respondent avers that he asked the claimant to go back to Runda by 30<sup>th</sup> August 2013 since the farm in Loitokitok had become dilapidated and bushy due to neglect but the claimant went to Githogoro where his family resides instead of reporting to Runda as directed. That up to the time of writing the reply the claimant had not reported to Runda and had instead filed this suit.

The respondent maintains that the claimant was not terminated but rather voluntarily deserted employment and he was therefore not obligated to give any warning letter or communication of termination or give one month's notice. The respondent avers that the claimant was his own boss and would take leave, paid off duties when he desired and did not work on public holidays. The respondent denies ever receiving any demand letter from the union or meeting any union officer. The respondent prays that the claim be dismissed with costs.

This case raises two issues for determination:

- a) Whether termination of the claimant's employment by the respondent was unfair
- b) Whether the claimant is entitled to the reliefs sought.

Section 43(1) of the Employment Act provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair. Subsection (2) provides that the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. The respondent denies terminating the claimants' employment. However, the claimant testified that the respondent sent him Kshs.5,500 and told him that he did not want him in Runda. This was not refuted by the respondent. The claimant is no longer working for the respondent as according to his testimony, he was not allowed to enter the Runda residence. It is clear that the respondent indeed terminated the employment without due process. The court therefore finds that the termination was unlawful as it is contrary to Section 45 of the Employment Act. The respondent has not proved that the claimant in any way acted in a way that warranted termination nor has he shown court that he followed any procedure before terminating the claimant's employment.

The claimant was employed for a monthly salary of Kshs.7,500. The claimant submits that he was not a member of NSSF. Section 35(5) of the Employment Act provides that an employee whose contract of service has been terminated is entitled to service pay for every year worked. This court finds that the claimant is entitled to payment of service pay and accordingly awards him the same.

The Employment Act provides that a party seeking to terminate an employment contract shall give notice in writing. Section 36 provides that the party terminating the contract should pay the other party the equivalent of one month's pay in lieu of notice. The respondent terminated the claimants' employment without notice. This court finds that the claimant is entitled to one month's pay in lieu of notice.

The claimant claimed for leave days but did not prove the same. Therefore this prayer fails. He also sought off duty and public holidays. The same have not been proved and will fail too. There was also a claim for salary underpayment which has not been proved. The claim too fails.

Having found the termination of the claimant's employment unfair, I award him three (3) months' salary as compensation taking into account the length of service and the manner in which his employment was terminated.

In the final analysis I make an award in favour of the Claimant in the following terms:

1. Compensation of three (3) months' salary.....Kshs.22,500
  2. One month's salary in lieu of notice.....Kshs.7,500
  3. Service pay at 15 days for every year worked.....Kshs.7,500
- Total** **Kshs.37,500**

The claimant shall have costs of the suit.

Interest shall accrue at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**