



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1333 OF 2015

PIUS JUMA OTIENO.....CLAIMANT

- VERSUS -

D. MANJI CONSTRUCTION LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th May, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 03.08.2015 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's action of summarily dismissing the claimant from employment was unlawful and unfair at the claimant is entitled to payment of her terminal and compensatory damages amounting to Kshs. 3, 631, 078.17 being one month in lieu of notice Kshs. 20, 029.00; gratuity for 7 years service because NSSF not remitted Kshs. 70, 101.00 at half monthly salary per year; overtime for 4 hours worked daily for 18 years 3 months Kshs. 3, 289, 762.90; prorated leave for 3 months between January and March 2015 Kshs. 3, 338.17; salary for days worked in March 2015 Kshs. 7, 500.00; and 12 months' compensation Kshs. 20, 029 x 12 making Kshs. 240, 348.00).
- b) Interest from the date of filing the suit to the date of payment in full.
- c) Costs of the suit plus interest thereon.

The claimant's case is that the respondent employed him in January 1996 as a foreman at Kshs. 20, 029.00 per month. On 15.03.2015 he reported at work and was locked out but later he was summoned to the CCTV room and the Director one Arish Patel asked him to identify the persons who were stealing the spare parts. The CCTV footage per the claimant only showed the employees at work. The Director threatened to terminate the claimant's employment. The claimant's further case is that on 16.03.2015 he reported at work but he was arrested and taken to Industrial Area Police Station and released at 08.30am. He thereafter reported at work the following day but was locked out and told that he had been terminated.

The respondent filed the memorandum of reply on 28.08.2015 through Okao and Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The respondent pleaded as follows:

- a) On 15.03.2015 the claimant was shown a CCTV footage showing persons (including the claimant) involved in the theft of spare parts from the respondent's premises.
- b) The respondent reported the theft at the police station.
- c) The police summoned the claimant to record a statement but never arrested the claimant.
- d) The claimant had not been terminated but was given time off to go and record the statement at the police station.
- e) The claimant was never locked out but after recording the statement at the police station he was asked to return at work but he declined.
- f) Thereafter the respondent agreed at the labour office to pay the claimant's terminal dues of Kshs. 52, 745.00 as per demands by labour office.

- g) A voucher for leave Kshs. 1732.00 was prepared but the claimant declined to take the money.
- h) The claimant had been paid overtime due per vouchers filed.
- i) Being a member of NSSF he was not entitled to gratuity.
- j) Having deserted work he was not entitled to notice pay.
- k) The claimant's monthly salary was Kshs.20, 028.50 per payslips on record.
- l) The claimant owed the respondent a loan of Kshs. 76, 812.00.
- m) After investigations the claimant was given an opportunity to work but he refused the offer to continue in employment.

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

- a) There is no dispute that the claimant worked for the respondent as a foreman. His last monthly pay per payslip exhibited by the respondent was Kshs.20, 028.50.
- b) The claimant testified that sometimes he was paid overtime and at the same time he claimed overtime for all the 18 years of service. the Court returns that in view of that evidence and the payment vouchers filed for the respondent, on a balance of probability, all overtime was paid and the prayer on overtime will fail.
- c) On annual leave the claimant testified he was paid at the end of the year in lieu of annual leave and sometimes every 6 months thereof. The respondent admits leave for December 2014 was due. Under section 28 of the Employment Act 2007, the Court returns that the claimant is entitled to leave prorata as prayed for up to March 2015 and is awarded **Kshs.3, 338.17** as prayed for.
- d) The claimant admitted that he was taken to the police station on account of alleged theft by servant. He was at the police station from 8.00am to 8.00pm and he was let free. The following day he reported at work. The caretaker told him to take his property. The following day he was locked out. The claimant testified, "**I asked boss if I would resume duty. He told me that the police would decide.**" Respondent's witness (RW) testified that after arrest the claimant never came back to resume job. In cross-examination RW stated that the claimant was dismissed on account of theft. The Court returns that the respondent dismissed the claimant on account of alleged theft but which was never established. There was no hearing and a notice per section 41 of the Act. The reason was not genuine as per section 43 of the Act. The aggravating factor was that the claimant's liberty was withheld for a day when he was held at the police station and no charges were preferred. The Court further considers that the respondent unfairly locked out the claimant and did not accord him a chance to come back and work as was alleged. The termination was unfair and considering the factors as per section 49 of the Act, the claimant is awarded 12 months' salaries making Kshs.20, 028.50 x 12 thus **Kshs. 240, 336.00**. He is also awarded a month's pay in lieu of termination notice **Kshs. 20, 028.50**.
- e) The claimant is awarded **Kshs. 7, 500.00** for days worked in March 2015 and not paid for.
- f) The claimant admitted owing the respondent an amount he did not know and in absence of any other evidence the Court finds he owed **Kshs. 76, 812.00** as per the payslip on record and exhibited for the respondent. He will be paid less that amount and PAYE.

The amount due to the claimant is Kshs. 271, 202.67 less Kshs. 76, 812.00 making **Kshs.194, 390.67** payable. The respondent will pay 75% of claimant's costs of the suit.

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

- a) The declaration that the dismissal of the claimant from employment was unfair.
- b) The respondent to pay the claimant **Kshs.194, 390.67** by 01.07.2019 failing interest to run thereon at court rates from the date of this judgment till full payment;
- c) The respondent to pay the claimant 75% costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 24th May, 2019**.

BYRAM ONGAYA

JUDGE