



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 492 OF 2014

WAFULA WEKESA EMMANUEL.....CLAIMANT

- VERSUS -

ENDMOR STEEL MILLERS LIMITED.....RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 26.03.2014 through Namada & Company Advocates and prayed for judgment against the respondent for:

- a) A declaration that the respondent's action to dismiss the claimant from work was unfair and unlawful and the claimant is entitled to payment of his terminal and compensatory damages Kshs. 516, 800.00.
- b) Interest
- c) Costs of the suit plus interest thereon.

The respondent filed the memorandum of response on 05.05.2014 through Githinji, Kimamo & company Advocates. The respondent prayed that the suit be dismissed with costs.

The **1st issue** in dispute is whether the claimant worked without break or was a casual employee. A casual employee under section 2 of the Employment Act, 2007 is one whose terms of service provide for payment at the end of each day and not engaged for more than 24 hours per day. The claimant testified that he worked from 7.00am to 7.00pm at a daily wage of Kshs.800.00 per day payable on weekly basis and he worked for 6 days per week. He testified that he was employed in June 2011 to 21.01.2014 when he was verbally terminated without notice and a reason. Respondent's witness testified that the claimant was paid at a daily rate of Kshs. 471.00. He was not sure if the claimant was employed in June 2011. Both parties testified that payment was by M-pesa. The Court finds that the respondent failed to keep the relevant employment records as provided in the Employment Act, 2007. In particular the respondent failed to provide for the statutory statement of payment of wage or evidence on the terms of contract as provided for in section 9 of the Act. On a balance of probability the Court returns that the claimant worked without break as testified, he earned on weekly basis at the daily rate of Kshs.800.00 and the casual employment converted to employment subject to minimum terms of service under section 37 of the Act.

To answer the **2nd issue** for determination the Court returns that the termination was unfair for want of due process and valid reason. RW testified that on 20.01.2014 the claimant's supervisor notified him that there would be no job on 21.01.2014 and on 21.01.2014 there was no production and the claimant being a loader was terminated. He Court finds that if there was no job then the claimant was entitled to redundancy safeguards in section 40 of the Employment Act, 2007 and RW offered no significant evidence that on the material date and the days there after there had been no job. The Court returns that as per the claimant's testimony he was terminated upon no reason and without notice. The termination was unfair under section 45 of the Act for want of a fair reason and due process.

To answer the **3rd issue** for determination the Court finds on remedies as follows:

- a) The claimant testified that he worked on 18th and 20th January and is awarded **Kshs. 1, 600.00** as prayed for.
- b) The termination was without due notice and the claimant is awarded a months' pay in lieu of notice **Kshs. 24, 000.00**.
- c) The claimant is awarded pay in lieu of annual leave for 2 years and 8 months making **Kshs. 48, 000.00** plus **Kshs. 16, 000.00** as prayed for and under section 28 of the Act.

d) The claimant was a member of NSSF and any unremitted dues would be pursued per statutory provisions. The prayer for service pay or gratuity will fail in view of section 35 of the Act on membership to NSSF.

e) The parties agreed on a consolidated pay of Kshs.800.00 per day as envisaged in section 31 of the Act. There was no justification and evidence to support the prayer for house allowance and it will fail.

f) The claimant prayed for 12 months' pay for the unfair termination. The Court has considered the factors in section 49 of the Act. The claimant did not contribute to his termination. He had a clean record of service. He desired to continue in employment but for unknown term. The respondent did not establish mitigating factors but the court considering the term served and undefined term the employment would have persisted, the claimant is awarded 6 months in compensation making **Kshs.144, 000.00**.

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

- 1) The declaration that the termination of the claimant's contract of service was unfair.
- 2) The respondent to pay the claimant **Kshs.233, 600.00** by 01.07.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 3) The respondent to pay the claimant's costs of the suit.

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

BYRAM ONGAYA

JUDGE