



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2204 OF 2014

BENSON MUUNDE MULEI.....CLAIMANT

- VERSUS -

ITALBUILD IMPORTERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th May, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 11.12.2014 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the dismissal or termination of the claimant's employment was unlawful and unfair and the claimant is entitled to payment of his terminal dues and compensatory damages.
- b) An order for the respondent to pay the claimant terminal benefits and compensatory damages totalling to Kshs. 217, 500.00 plus interest thereon (being one month in lieu of notice Kshs.15, 000.00; one year untaken leave Kshs.15, 000.00; gratuity at 15 days' salary for one year served Kshs. 7, 500.00; and 12 months compensation for unfair termination Kshs.180, 000.00.)
- c) Cost of the suit plus interest thereon.

The respondent filed on 03.03.2015 the reply to the memorandum of claim through Munyithya, Mutungi, Umara & Muzna Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimant was employed by the respondent from March 2013 as a Turnboy at Kshs.500.00 per day. The claimant sustained injuries while at work and he filed civil suit No. 3112 of 2014 against the respondent for the injury claims. The summons in the suit was served on 16.09.2014. The claimant's case is that upon receipt of the said summons the respondent ordered him to ask his advocate to withdraw the injury claim suit with immediate effect but he declined to do so because he had not been compensated with respect to the injuries he had suffered. The claimant's case is that thereafter, the supervisor called Muthini summarily dismissed him and ordered him to leave the respondent's premises on account of having sued the claimant. The claimant's further case is that the termination was unfair because it was based on unlawful reason under section 46(h) which provides that it shall not be a fair reason to terminate a contract of employment on account of the employee's reasonable and well founded grievance or initiating legal proceedings against the employer. Further the termination was unfair and without due process as it was abrupt.

The respondent's case is that upon service of summons in CMCC No. 3112 of 2014 at Milimani, the claimant failed to report on duty from 17.09.2014 which amounted to desertion from employment.

The claimant testified that Muthini was his supervisor and he dismissed the claimant on a Friday. On the material date he testified that he had reported at work late at 10.00am and he worked until 01.00pm when Muthini was telephoned from the office and told that the claimant had been dismissed due to filing the suit for injury claims against the respondent. He stated that he had a clean record of service, he was not given the termination notice and he had not been given the due annual leave. Further he was not a member of the NSSF and he prayed for gratuity or service pay. The claimant testified that he worked for the respondent for about 2.5 years and did not recall the exact date of termination but it was on a Friday. He stated in cross-examination that his last day at work was on 18.09.2014 as per the wage sheet on record.

The respondent's witness No. 1 (RW1) was the respondent's Chief Executive Officer. He did not recall the date the respondent employed the claimant. He confirmed the claimant suffered injury and was thereafter given light duty but the injury was minor and not deserving any compensation. RW1 testified that the respondent employed the claimant for about 3 years on and off and he did not know if there had been any break in the service. RW1 confirmed that the claimant was paid throughout the sick leave period.

The respondent's witness No. 2 (RW2) was its site agent at the material time one Mary Nyambura Maina. Her evidence was that the

claimant's last day at work was on 02.09.2014 and he had been injured in July 2013 and RW 2 had been employed in August 2013. RW2 confirmed the claimant was employed as a Turnboy. Further on 16.09.2014 the claimant failed to turn up to sign the wage sheet and his last day at work was 02.09.2013. RW2 had no records in break of the claimant's service.

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

1) The parties were in a contract of service and the only dispute is whether the claimant served without break. RW1 testified that the claimant had served for about 3 years and RW2 stated that she had no evidence that there had been a break in service. The Court finds that the claimant was in unbroken service for the period as claimed. In any event the respondent's evidence was that throughout the sick leave the claimant was paid full wages and which position the Court returns would otherwise be inconsistent with casual service.

2) The reason for termination is found to have been the initiation of the civil suit on the injury claims. If the claimant had deserted as urged for the respondent then the legitimate action was to issue notice and a hearing in that regard per section 41 of the Employment Act, 2007 but which was never the case. As submitted, the termination was abrupt and upon the unlawful reason under section 46(h) of the Act namely filing the suit against the respondent. The Court has considered the period served and that the claimant did not contribute to his own termination. To balance justice for the parties he is awarded 5 months compensation under section 49 of the Act plus one month in lieu of notice under section 35 and 36 of the Act. While making that finding the Court considers the aggravating factor that the respondent admitted the injury the claimant had suffered and the reason for termination was expressly unfair and unlawful under section 46 (h) of the Act.

3) Gratuity or service pay as prayed for under section 35(5) of the Act is awarded because there was no NSSF membership or alternative pension arrangement.

4) One month pay in lieu of annual leave is awarded under section 28 of the Act.

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

1) The declaration that the termination of the claimant's employment by the respondent was unfair.

2) The respondent to pay the claimant the sum of **Kshs.112, 500.00** 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 17th May, 2019**.

BYRAM ONGAYA

JUDGE