



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 162 OF 2018

BETWEEN

CHRISPUS MWACHIMU MWABILI.....CLAIMANT

VERSUS

CHINA ROAD & BRIDGE

CORPORATION [KENYA] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

M/S Nyakoni Ratemo & Company Advocates for the Claimant

No appearance for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 22nd March 2018. He states that he was employed by the Respondent Company as a Cook, on 5th January 2016. His monthly salary was Kshs. 23,000.

2. He states he was summarily dismissed by the Respondent on 16th October 2017, on the allegation that he stole 5 litres of cooking oil from the Respondent. He was not heard, and did not receive notice of termination. He was not paid his terminal dues. He prays the Court to find termination was unfair, and grant him the following orders: -

- a) 1 month salary in lieu of notice at Kshs. 23,000.
- b) Annual leave over a period of 2 years at Kshs. 37,170.
- c) Public holidays over the same period at Kshs. 35,400.
- d) 12 months' salary in compensation for unfair termination at Kshs. 276,000.

Total...Kshs. 371,570

- e) Declaration that termination was unfair.
- f) Costs.
- g) Interest.

h) Any other suitable relief.

3. There is an Affidavit of Service sworn by Process-Server, Andericus Otieno Odera on 6th April 2018, showing the Notice of Summons and Statement of Claim among other processes, were served upon Respondent's Human Resource Manager, Benson Waweru, at Respondent's Office in Valley Arcade, Lavington, Nairobi. There was no Appearance or Statement of Response filed by the Respondent. The Claimant gave evidence by way of formal proof on 5th March 2019, bringing the proceedings to a close.

4. The Claimant restated details of his employment with the Respondent in his oral evidence, as contained in his Statements of Claim and Witness.

The Court Finds:-

5. The Claim is undefended.

6. On the strength of the oral and documentary evidence given by the Claimant, the Court is satisfied that he was employed by the Respondent as a Cook on 5th January 2016; his salary was Kshs. 23,000 monthly; and he was summarily dismissed on 16th October 2017 on the allegation of stealing 5 litres of cooking oil.

7. He states he did not steal the cooking oil. The Respondent has not presented any evidence to contradict the Claimant on this. Termination was not based on valid reason.

8. The letter of summary dismissal exhibited by the Claimant indicates that the Claimant was heard before termination, on 16th October 2017. There are no minutes to support that indeed such a hearing took place. The Court is not in position to tell if hearing took place, it conformed to the minimum statutory standards under Section 41 of the Employment Act.

9. Termination was not based on valid reason or reasons, and did not meet the procedural standards of fairness, envisaged under the Employment Act.

10. ***The prayer for 1 month salary in lieu of notice is allowed at Kshs. 23,000.***

11. The Claimant worked for about 1 year and 10 months. It is not proportionate to grant him 12 months' salary in compensation, for a contract which he had performed for only 22 months. ***He is allowed 5 months' salary in compensation for unfair termination at Kshs. 115,000.***

12. The letter of summary dismissal produced by the Claimant, offered him annual leave pay of 13 days. It was indicated to be his accrued annual leave. The Claimant did not say anything of this offer, but instead claims annual leave over a period of 2 years. His silence on the offer made by the Respondent creates doubt in the mind of the Court on the prayer for annual leave. He ought to have explained why he seeks annual leave over a period of 2 years, and whether the balance of annual leave days as offered by the Respondent was correct. Did he accept that offer or not? The Court does not think it is safe to allow the prayer for annual leave pay.

13. His plea for holiday pay, over the period of 2 years, looks persuasive and in accordance with the law. The Claimant was able to say the particular holidays he worked. He is not contradicted by any evidence on this. The mode of computation is consistent with the standards prescribed under the Wage Orders. ***Public holiday pay is granted at Kshs. 35,400.***

IN SUM, IT IS ORDERED:-

a) It is declared that termination was unfair.

b) The Respondent shall pay to the Claimant: 1 month salary in lieu of notice at Kshs. 23,000; equivalent of 5 months' salary in compensation for unfair termination at Kshs. 115,000; and public holidays' pay at Kshs. 34,500 – total Kshs. 172,500.

c) Certificate of Service to issue.

d) Costs to the Claimant.

e) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 21st day of June 2019.

James Rika

Judge