



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 605 OF 2015**

**DOMINIC NDAMBUKI MWALIMU.....CLAIMANT**

**VERSUS**

**HUSSEIN BUILDERS KENYA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Wednesday 31<sup>st</sup> July, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 16.04.2015 through Njogu & Associates Advocates. The claimant prays for judgment against the respondent for:

- a) Compensation for unfair termination Kshs.153, 900.00.
- b) Notice pay Kshs.12, 825.00.
- c) Leave pay Kshs.25, 650.00.
- d) Service pay Kshs.12, 825.00.
- e) Total amount claimed Kshs. 205, 200.00
- f) Costs of the suit and interest.
- g) Any other just and equitable relief as the Honourable Court may deem appropriate.

The response to the memorandum of claim was filed on 26.08.2015 through M'limbiine & Mungai Advocates. The respondent prayed that the claimant's suit is dismissed with costs.

There is no dispute that the respondent employed the claimant from 04.07.2013 up to 05.01.2015 as an attendant of glass panes and assigned to polish them. The claimant says that he was paid Kshs. 475.00 per day making Kshs.12, 825.00 per month.

The claimant's case is that the respondent terminated his employment on 05.01.2015 without a notice or a reason. The respondent's case is that the claimant absconded duty without leave or other lawful cause for more than 7 days from 23.12.2014 to 05.01.2015.

The claimant testified that from 23.12.2014 to 05.01.2015 he was on duty. He testified that even on 25.12.2014 he was on duty as well as 26.12.2014. He testified that on 05.01.2015 he was on duty. In re-examination he stated that on 23.12.2014 he was asked to remain on duty till 29.12.2014 when he broke from duty and resumed on 05.01.2015. On 05.01.2014 he resumed duty. He was summoned by his supervisor and was terminated verbally.

The respondent's witness (RW) was Michael Karanja the human resource manager who joined the respondent's employment in June 2017. He relied on the documents on record.

The Court has considered the evidence. The letter alleging that the claimant absconded duty and dated 05.01.2015 was not acknowledged by the claimant and is not clear on the effective date of absconding duty. On the other hand, the claimant while testifying that he was on duty from 23.12.2014 to 05.01.2015, he contradicted himself in re-examination by stating that on 23.12.2014 he was asked to remain on duty till

29.12.2014 when he broke from duty and resumed on 05.01.2015. The Court finds that with such evidence on record, it is established for the claimant that termination was on 05.01.2015, it was abrupt and it is clear that effective 29.12.2014 the claimant was not at work. The Court returns that the claimant must have substantially contributed to his termination. On a balance of probability the termination was not unfair because it was upon a valid reason of being absent without leave or reasonable cause. The claimant was not entitled to notice pay as claimed. The claimant admitted he was a member of NSSF and he was not entitled to service pay as prayed for and in view of section 35 of the Employment Act, 2007. Any NSSF dues not remitted was not pleaded and quantified. The claimant's unchallenged evidence was that he was entitled to leave pay and he is awarded **Kshs.25, 650.00** as prayed for.

The claimant having partially succeeded he is awarded partial costs of the suit fixed at **Kshs.15, 000.00** only.

In conclusion judgment is hereby entered for the claimant against the respondent for payment of **Kshs.40, 650.00** by 15.09.2019 failing interest to be payable thereon at Court rates from the date of filing the suit till the date of full payment.

**Signed, dated and delivered** in court at **Nairobi** this **Wednesday 31<sup>st</sup> July, 2019**.

**BYRAM ONGAYA**

**JUDGE**