



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 795 OF 2014

VICTOR MUTIE MAKOBE.....CLAIMANT

- VERSUS -

AUTO SPRINGS MANUFACTURERS LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 31st July, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 14.05.2014 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's action of sending the claimant back home and the refusal or inordinate delay in recalling him back to work amounted to constructive dismissal from employment which dismissal was unlawful, unfair and inhumane.
- b) A declaration that the claimant is entitled to payment of her terminal benefits and compensatory damages totalling Kshs.399, 540 being:
 - i. Unpaid salary from January 2014 to date of demand letter Kshs.42, 300.00.
 - ii. Pay in lieu of notice Kshs.14, 100.00.
 - iii. Leave pay for 10 years Kshs.140, 100.00.
 - iv. Service gratuity for period NSSF was not remitted 2004 to 2008 Kshs.33, 840.00.
 - v. 12 months' pay compensation at Kshs.14, 100.00 per month Kshs.169, 200.00.
- c) Interest on (b) above from the date of filing the suit till payment in full.
- d) Cost of the suit plus interest thereon.

The memorandum of response was filed on 23.09.2014 through the Federation of Kenya Employers through Dickens M. Ouma Advocate. The respondent prayed that the suit be disallowed and the same be dismissed with costs to the respondent.

The claimant's case is that he was employed by the respondent on 01.02.2004 to 06.01.2014 as a general worker. He was paid at Kshs.470.00 per day. His further case was that on 06.01.2004 his supervisor advised him to go back home until the day the supervisor would recall him. He was not given reasons and he was not recalled.

The respondent's case is that the claimant was employed as an on-and- off casual general worker and the last date of such engagement was on 06.01.2014.

First, the respondent has exhibited the payment vouchers for January, May, June, October, November and December 2013 showing that the claimant worked for 18, 12, 10, 11, 3 and 6 days respectively in the stated months. The claimant signed the payment vouchers. The Court returns that taking that evidence into perspective, the claimant's account that he worked without a break was misleading. The Court finds that he was a casual employee paid at a daily rate and received accumulated wage on daily basis. Further his daily rate of payment or wage was

Kshs.413 as per the vouchers on record and not Kshs.470.00 as he had alleged in his case.

Second, the respondent's case that the claimant would report at work on days he wished to do so is therefore credible. The issue of being recalled after 06.01.2014 did not therefore arise and the termination was not unfair or that he was not terminated at all.

Third, for NSSF not remitted for the years 2004 to 2008 the Court returns that the failure to remit was to be dealt with in accordance with the relevant statutory provisions, the amount not remitted was not computed, the cause of action was time barred under section 90 of the Employment Act, 2007 and, in any event the claimant was a member of the NSSF and service pay was not available as per section 35 of the Employment Act, 2007.

Fourth, in the circumstances the claimant's case will collapse as unjustified and is liable to dismissal with no orders as to costs because the respondent failed to file submissions within time as was directed by the Court.

In conclusion the claimant's suit is hereby dismissed with no orders on costs of the suit.

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

BYRAM ONGAYA

JUDGE