



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 108 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JOSEPH OWINO MBUYA.....CLAIMANT

VERSUS

CHINA JIANGXI INTERNATIONAL (K) LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed vide a statement of claim on 16th March, 2017 in which the claimant seeks compensation for unlawful dismissal and terminal benefits set out under paragraph 8 of the memorandum of claim to wit:

- (a) Two months salary in lieu of notice.
- (b) Kshs. 73,296 underpayments
- (c) Unpaid overtime
- (d) Prorata leave in the sum of Kshs. 15,000 for 8 months in 2014.
- (e) Untaken leave in the sum of Kshs. 17,500.
- (f) Unpaid house allowance in the sum of Kshs. 18,216
- (g) Costs and interest.

2. The suit was defended vide a response to the statement of claim filed on 26th September 2017 in which the claim for unlawful dismissal is denied and the respondent pleads that the claimant absconded work. The respondent further pleads that all terminal benefits of the claimant were paid and denies all particulars of claim set out in the memorandum of claim.

3. The respondent further pleaded that the suit was filed out of time and that the suit is duplicated in E&LRC Cause No. 154 of 2014. That the suit be struck out accordingly.

4. The court is bound to consider the preliminary objections raised in the statement of defence as to the time bar.

5. In this respect the suit was filed on 16th March 2017 and the cause of action arose on 28th April 2014. On the face of the pleadings, the suit was filed within the three years period mandated by *Section 90 of the Employment Act*. The preliminary Objection regarding time bar lacks merit and is dismissed.

6. The claimant testified in support of the claim and relied on his witness statement dated 8th March 2017. The claimant testified that he was employed by the respondent as a plant mechanic in September 2013. That he worked diligently and with dedication until 28th April 2014, when the respondent wrongfully, unprocedurally and without lawful justification dismissed the claimant from employment without notice and without payment of terminal benefits.

7. The claimant had served the respondent for a period of about eight (8) months. That the respondent did not comply with the relevant provisions of the law during the tenure of claimant's employment. The claimant stated that he was paid Kshs. 20,000 per month. That on the day he was dismissed, a manager beat him up, kicked him three times and chased him away from work.

8. The claimant through his advocates wrote a letter of demand for payment of terminal benefits but same was not heeded. The claimant stated that he sought compensation for the wrongful termination; payment in lieu of two months' notice; prorata leave for the 8 months served; house allowance and overtime since he worked 9 hours a day and was not housed. That the respondent paid overtime at times but other times the respondent did not pay.

9. The respondent failed to turn up for the hearing of the case. The respondent filed an application dated 6th September 2018 to strike out the suit for duplicity in that the claimant has filed a similar suit being Kisumu E&LRC No. 157 of 2014. The application was responded to by the claimant and stated that he was not filed any other suit. That Kisumu E&LRC NO. 157 of 2014 was filed without his instructions and he had since withdrawn the suit. The respondent did not attend the interpartes hearing of the application and same was dismissed on 19th September 2018.

Determination

10. The issues for determination are:

- (a) Whether the employment of the claimant was terminated for a valid reason following a fair procedure.
- (b) Whether the claimant is entitled to the reliefs sought.

11. The court has dealt with the two issues simultaneously. The uncontroverted testimony by the claimant is that he worked for the respondent from September 2013 to April 2014 as a mechanic earning Kshs. 20,000 a month. That on 28th April 2014, a manager beat him up by kicking him three times and unceremoniously chased him from employment.

12. The claimant has proved on a balance of probabilities that he was wrongfully and unprocedurally dismissed from employment contrary to the provisions of *Sections 36, 41, 43 and 45 of the Employment Act 2007*.

13. The claimant is entitled to compensation in terms of *Sections 49(1) (C) and (4) of the Act*. In this regard, the claimant had served for less than a year. The claimant was beaten up and humiliated by the respondent. The claimant did not contribute to the dismissal. The claimant lost career advancement with the respondent unfairly. The claimant did not seek to be reinstated. The claimant was not paid terminal benefits and/or compensated for the job loss at the time of dismissal. The dismissal was sudden and without notice. The claimant suffered loss and damage and the court awards him two (2) months salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. 40,000.

Notice pay

14. The claimant is entitled and is awarded one month salary in lieu of notice in the sum of Kshs. 20,000.

Prorata leave

15. The claimant is entitled and is awarded prorata leave for 8 months served in the sum of Kshs. 15,000.

Overtime and house allowance

16. The claims for overtime and house allowance have not been proved and are dismissed.

17. In the final analysis, judgment is entered in favour of the claimant as against the respondent as follows:

- (a) Kshs. 40,000 being equivalent of two (2) months salary in compensation.
- (b) Kshs. 20,000 in lieu of one month notice.
- (c) Kshs. 15,000 being prorata leave not taken for 8 months served.

Total award Kshs. 75,000

- (d) Interest at court rates from date of judgment till payment in full.
- (e) Costs of the suit.

Judgment Dated, Signed and delivered this 19th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Orayo for claimant

Mr. Anyumba for Respondent

Chrispo – Court Clerk