



**REPUBLIC OF KENYA**

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

**CAUSE NO. 216 OF 2016**

**BENSON NTHIWA MUTHAMA.....1ST CLAIMANT**

**DAVID KINYAMASYO.....2ND CLAIMANT**

**VERSUS**

**NAYAN PRODUCTS (K)LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 25<sup>th</sup> October, 2019)

**JUDGMENT**

The claimant filed the statement of claim on 16.02.2016 through Charles Gomba & Company Advocates. The claimants prayed for judgement against the respondent for:

a) Payment of Kshs.656, 590.78 as follows:

**Ist claimant:**

- i. One month in lieu of notice Kshs.14, 336.00.
- ii. Gratuity for 16 years Kshs.137, 626.56.
- iii. 12 months compensation Kshs. 14, 336.00 x 12 = Kshs.172, 032.00
- iv. Sub-total Kshs.323, 994.56.

**2nd claimant:**

- i. One month in lieu of notice Kshs.14, 336.00.
- ii. Gratuity for 17 years Kshs.146, 228.22.
- iii. 12 months compensation Kshs. 14, 336.00 x 12 = Kshs.172, 032.00.
- iv. Sub-total Kshs.332, 596.22

b) Certificate of service.

c) Costs of the suit.

d) Interest at Court rates.

The claimants' case is that the 1st claimant was employed by the respondent as a machine operator in December 1999 and the 2nd claimant in August 1998. Sometimes in January 2016 the claimants requested their Manager one Nayan to advance each of them Kshs.20, 000.00 to enable the claimants to pay school fees for their children in High Schools. Nayan promised to look into the request and on 16.01.2016 the claimants approached him about the progress. It is the claimants' case that Nayan became annoyed and paid each claimant Kshs.5, 000.00 for January 2016 pay and told them to leave the company as their employment had been terminated.

The response and counterclaim was filed on 07.04.2016 through Nyabena & Company Advocates. The respondent stated that the 1st claimant was employed on 01.02.2000 and the 2nd claimant on 20.09.1999. Further in December 2015 each claimant was advanced Kshs.30, 000.00 repayable at Kshs. 5, 000.00 per month for 6 months. In January 2016 each claimant requested for a further Kshs.20, 000.00 as an advance. The respondent advanced each Kshs. 5, 000.00 on 16.01.2016 and thereafter the claimants deserted duty. The respondent's director tried to communicate with the wife of one of the claimants who replied that the claimants had gone to look for school fees. Thus there was no unfair termination. The respondent prayed for:

- a) The declaration that the claimants were not dismissed from work.
- b) Dismiss the claimant's case.
- c) Each claimant to pay back the respondent Kshs.44, 336.00 advanced to each.
- d) The claimants to pay costs of the suit.
- e) The Court to award any other relief that may befit the ends of justice.

The Court has reviewed the evidence in the case and is as follows:

- a) The claimants admitted that the respondent advanced each Kshs.30, 000.00 in December 2015 and each had not repaid that loan.
- b) It was true that on 16.01.2016 the respondent advanced each claimant Kshs.5, 000.00.
- c) The respondent had paid the claimant's service pay for entire service from employment up to 2009.
- d) The claimants were members of NSSF.
- e) The Monday after 16.01.2016 the claimants did not try to report on duty.
- f) The 2nd claimant testified that on 16.01.2016 they were locked out whereas the 1st claimant testified that on 16.01.2016 they were given an advance of Kshs.5, 000.00 and told to go away from employment. The Court finds that the claimants' contradictory evidence in that regard cannot be trusted and the Court upholds the respondent's evidence that on 16.01.2016 each claimant was given an Advance of Kshs.5, 000.00 and thereafter each deserted duty.
- g) The 2nd claimant confirmed that on 18.01.2016 Nayan telephoned his wife to make inquiry why the claimants were absent from duty and thereafter the claimants never reported at work. On that account the Court finds that the claimants deserted duty after receiving the advance of Kshs. 5, 000.00 each and they did not want to resume duty even after the respondent looked for them on telephone. Their claims of unfair termination are found by the Court to be unjustified and baseless. In any event the 2nd claimant confirmed that after 16.01.2016 they went to look for job elsewhere.
- h) The respondent claimed from each claimant a sum of **Kshs. 44, 336.00** being advance of Kshs. 30, 000.00 and Kshs. 14, 336.00 pay in lieu of notice. The Court finds that the counterclaim was justified and is awarded accordingly.

The Court finds that the claimants have acted in the most ungrateful and deceitful manner in filing the suit against their otherwise long-time generous and considerate employer and they will pay the costs of the proceedings.

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

- a) The declaration that each claimant deserted duty after 16.01.2016 and there was no unfair termination of their respective contracts of service.
- b) Each claimant to pay the respondent a sum of **Kshs.44, 336.00** by 01.02.2020 failing interest to run at Court rates from the date of this judgment till full payment,
- c) The claimants to pay the respondent's costs of the suit including the counterclaim.

**Signed, dated and delivered in court at Nairobi this Friday, 25<sup>th</sup> October, 2019.**

**BYRAM ONGAYA**

**JUDGE**