



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1117 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

DANIEL MALABA ADOGA.....CLAIMANT

VERSUS

MOHAMED MUZEUR SHAZAD

T/A SHAZAD ENTERPRISES.....RESPONDENT

JUDGMENT

The claimant filed this suit against the respondent alleging unlawful and unfair dismissal. He prayed for the following remedies –

- (i) A declaration that the Claimant's dismissal from his employment was wrong, unfair and unlawful.
- (ii) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- (iii) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs.342,000.00/= as tabulated below –

1... Salary in lieu of notice.....	Kshs.18,000
2... Service gratuity calculated at 15 days salary for	
every completed year of service being	
Kshs.18,000 x 5.....	Kshs.45,000
3... Payment in lieu of untaken/unpaid leave for 5 years	
x Kshs. 18,000 x 5 years.....	Kshs.63,000
Compensation at 12 months gross salary being	
Kshs.18,000 x 12 Months.....	<u>Kshs.216,000</u>
Total	Kshs.342,000

- (iv) Interest on (iii) above from the date of filing suit till payment thereof.
- (v) Cost of this suit.
- (vi) The respondent to pay the Claimant's costs with interest.

Although served with summons and copy of memorandum of claim, the respondent did not enter appearance, file defence or attend court for hearing of the claim. The case was certified and heard as an undefended claim.

At the hearing the claimant testified that he was employed by the respondent from May 2010. He could not remember the exact date in May 2010 when he started working for the respondent. He testified that he was initially employed on casual basis then confirmed and issued with a letter of confirmation dated 1st November 2012, a copy of which is produced as document 2 in the claimant's bundle of documents.

The claimant testified that his first salary was Kshs.300 per day. After confirmation he was paid Kshs.18,000/= per month which he stated was below the statutory minimum wage.

The claimant worked for 6 days a week. He testified that he did not take annual leave during the period he worked for the respondent.

The claimant testified that he was employed as a Machine Operator, then he was promoted to be a Supervisor from 2012.

He testified that on 22nd December 2015 he reported to work and was summoned by the Human Resource Manager who told him there was no sufficient work for him. That he was not issued with any letter or given a reason for termination. That he had no previous warning or other disciplinary issue.

He testified that he was not a member of NSSF or NHIF, that he was not paid his last salary for December 2015 or pay in lieu of notice.

The claimant prayed for judgment against the respondent for salary for December 2015, pay in lieu of notice, service pay, leave and leave travelling allowance. He further prayed for NSSF, NHIF and certificate of service and compensation for unfair termination.

Determination

I have considered the pleadings, evidence and submissions filed on behalf of the claimant. In a claim that is undefended, the claimant must as a preliminary point prove that there existed an employment relationship between him and the respondent. In the instant claim the claimant produced a copy of his employment card which bears the name of the respondent, his name, national identity card number and passport photo. He further produced a letter of confirmation. I thus find that the claimant has established that there was an employment relationship between the claimant and the respondent.

The next issue for determination is whether the claimant was unfairly terminated. Based on his uncontroverted evidence, I find that he was unfairly terminated, as he was not given a hearing as envisaged under Section 41 of the Employment Act. Section 43 further requires the employer to prove reasons for termination of employment. The claimant testified that he was just called and informed that there was no work for him. This does not constitute a valid reason for termination of employment.

I thus find that the termination of the claimant's employment was both procedurally and substantively flawed making it unfair in terms of Section 45(2) of the Employment Act.

Remedies

The claimant is entitled to salary for the month of December 2015, which I award him at Kshs.18,000. I further award him pay in lieu of notice at Kshs.18,000.

Having not been a member of NSSF the claimant is entitled to service pay which I award him at 15 days' salary per completed year of service. Having completed four years that is from 2012 to 2015, I award him Kshs.36,000. I further award the claimant leave for 4 years at 21 days per year being 84 days at Kshs.58,154/=. I further award him compensation equivalent to four months' salary at Kshs.72,000. This has taken into account the length of service, the manner in which the claimant's employment was terminated, the fact that he was never paid terminal benefits and the amount of his terminal dues in general.

The award is summarised below –

- | | |
|--------------------------------|--------------------|
| 1. Salary for December 2015 | Kshs.18,000 |
| 2. Pay in lieu of notice | Kshs.18,000 |
| 3. Service pay | Kshs.36,000 |
| 4. Pay in lieu of annual leave | Kshs.58,154 |
| 5. Compensation | <u>Kshs.72,000</u> |

Total **Kshs.202,154**

The respondent shall in addition issue a certificate of service to the claimant.

I further award him costs of this suit.

Interest shall accrue on decretal sum from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE