



**REPUBLIC OF KENYA**

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

**CAUSE NO. 488 OF 2016**

**ISIAH KITUU KIILU.....CLAIMANT**

**-VERSUS-**

**J.D SHARMA & SONS.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 29th November, 2019)**

**JUDGMENT**

The claimant filed the memorandum of claim on 29.03.2018 through Mwaure & Mwaure Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Payment of Kshs.473, 595.94 being contractual and terminal dues comprising:
  - i. One month salary in lieu of notice Kshs.14, 503.00.
  - ii. Salary for days worked in February 2016 Kshs. 8, 912.00.
  - iii. Unpaid leave for 8 years Kshs.147, 401.29.
  - iv. Service charge for 8 years Kshs.66, 937.20.
  - v. Underpayment from 01.02.2013 to 20.04.2015 Kshs.57, 405.92.
  - vi. Unfair termination 12 x Kshs.14, 503.00 Kshs.174, 036.00.
  - vii. NSSF for August, September, November and December 2015 and January and February 2016 at 800 per month Kshs.4,400.00.
- b) Costs of the suit plus interest at Court rates.
- c) A declaration that the termination of the claimant's employment was unfair and unjust.
- d) Any other relief the Court may deem just and fit to grant.

The respondent filed the response by way of submissions on 10.06.2016 through Muchangi Nduati & Company Advocates. The respondent prayed that the claimant's suit be rejected and dismissed with costs.

To answer the **1st issue** for determination there is no dispute that the parties were in a contract of service. The respondent employed the claimant initially as a Sewing Machinist (Mass Production Machinist) on 01.02.2005.

To answer the **2nd issue** for determination the Court returns that the claimant's employment with the respondent was terminated effective 17.02.2016 when the claimants were locked out. The evidence on record is that on the evening of 15.02.2016 the respondent's director also the respondent's witness (RW) one Deepak Bhardwaj paid all his employees an advance salary of Kshs.2,000.00 each. On 16.02.2016 employees left the premises at 4.00pm except the claimant and his co-workers one Julius Kimetu Ngau and David Munuve Mwanzia. The 3 went to RW's office to demand and they insisted that RW pays each an advance salary of Kshs.5, 000.00 and not the Kshs.2, 000.00 he had already paid each of them. They had declined to accept the Kshs.2, 000.00 each that RW could pay at the time. RW told the three that he did not have the money. They started an argument against RW's instructions that they leave to enable RW to close for the day and leave the

premises. RW threatened to call the police and the three told him they did not care at all and he could call the police because they were not going to let him close and leave unless he paid the Kshs.5,000.00. The other workers had left at about 4.00pm and the three had detained RW at the office for about 15 minutes when RW pressed the button for the security team to come and rescue him. When the G4S security team arrived the three refused to leave until they were threatened that they would be forcefully removed. RW reported the matter to Industrial Area Police Station under OB 58/16/02/2016. On 16.02.2016 the claimant had worked full day. On 17.02.2016 the three employees reported on duty and RW was at the gate and he instructed them to go to the District Labour Officer for guidance. They declined to go to the Labour Office and RW called the police and they were arrested on 17.02.2016 and released on 18.02.2016. RW requested the police to release them so they could go to the labour office for guidance. After that the claimants never came back. RW testified that he therefore had no chance to give them a termination letter.

To answer the **3rd issue** for determination the Court returns that the claimant contributed fully to his termination when he demanded the payment of Kshs.5, 000.00 advance salary. There was no notice and a hearing as per section 41 of the Employment Act, 2007 but it is clear that the misconducts were in presence of RW who was the claimant's ultimate boss. There is no reason to doubt the evidence of RW on the events leading to the separation. The claimant has not established a justification, contractual or otherwise, that made him make demands for the payment of Kshs.5, 000.00 as advance salary at the material time. As testified by RW the payment was on humanitarian ground and not contractual and nothing entitled the claimant to make such demands for advance payment. The claimant was employed on monthly basis and the wage was due at the end of the month as per section 18(2) (c) of the Act. In view of that misconduct on the part of the claimant, the Court considers that the claimant contributed 100% to his dismissal and is not entitled to any compensation under section 49 of the Act. Even if the claimant wanted to pay school fees as he testified, there was no basis to demand, insist or force RW to pay. The Court has considered the claimant's evidence and there is no reason to doubt that the events leading to the separation were as narrated in RW's testimony.

To answer the **4th issue** for determination the Court makes the following findings on the remainder of the remedies as prayed for the claimant:

- a) The claimant testified that he signed all leave documents as filed and exhibited for the respondent. There is no evidence of a grievance about leave pay or not taken as now claimed for the claimant. As submitted for the respondent, CW2 confirmed that they signed leave documents and were paid. On the basis of that evidence the claims and prayers on leave will collapsed as not established and justified on a balance of probability.
- b) The claimant testified that NSSF had been paid and he withdrew the claim. The claim and prayer is accordingly surrendered.
- c) In view of the claimant's established gross misconduct, the respondent was entitled to terminate with a lesser notice than the contractual notice and the claim for pay in lieu of the termination notice will fail.
- d) The prayer for service charge is submitted to be one for service pay. The claimant was a member of NSSF and under section 35 of the Act, service pay is not due.
- e) The claims for underpayment were for 01.02.2013 to 30.04.2015. The suit was filed on 29.03.2016. The respondent pleaded that the claimant was employed as a Machinist and the Court returns that the claimant has established the underpayment as based on the Regulations of Wages (General) Order. The definition of Machinist in the order applied to the claimant as he had worked for many years and engaged in making of complete garments of wearing apparel. He is awarded **Kshs.57, 405.92** as prayed for.
- f) The salary for days worked in February 2016 is awarded at **Kshs.8, 912.00** as prayed for as is not disputed.
- g) The Court has considered the parties' margins of success and returns that the respondent will pay 50% of the claimant's costs of the suit.

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

- 1) Payment of a sum of **Kshs.66, 317.92** by 31.12.2019 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
- 2) The respondent to pay 50% of the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday, 29th November, 2019.**

**BYRAM ONGAYA**

**JUDGE**