



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1545 OF 2015

BENJAMIN NGILA MICHAEL.....CLAIMANT

-VERSUS-

MEHTA ELECTRICALS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd November, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 02.09.2015 through Wilfred K. Babu & Company Advocates. The claimant prayed for terminal dues including:

- a. 8 days unpaid salary for November 2013 Kshs.4, 321.00.
- b. One month pay in lieu of notice Kshs.16, 203.00.
- c. Unpaid one year leave Kshs.16, 2013.
- d. Unpaid leave traveling allowance Kshs.2, 000.00.
- e. Unpaid tools allowance for 2009-2011 Kshs.200 per month.
- f. Service for 5 years Kshs.40, 508.00.
- g. Transport and food from Athi River to Nairobi 16.10.2013 to 08.11.2013 20 days at 500 per day Kshs. 10, 000.00.
- h. To and from Top Tank transport allowance Kshs.200 per day for 2 years Kshs.144,000.00.
- i. Damages for unlawful and unfair termination 12 months' salary Kshs. 194, 436.00.
- j. Costs and interest of the claim.

The memorandum of response was filed on 29.10.2015 through Mohammed Muigai Advocates. The respondent prayed that the claimant's suit should be dismissed with costs.

To answer the **1st issue** for determination the Court returns that there is no dispute that parties were in a contract of service. The respondent employed the claimant by the letter dated 28.08.2009 as Ungraded Artisan effective 31.08.2009. The claimant reported to the site foreman. He was paid Kshs.7, 300.00 basic monthly salary; house allowance of Kshs.2, 160.00 and tools allowance of Kshs.200.00. Overtime was

paid based on basic salary and annual leave was 27 days. He was deployed at the Nairobi Site.

To answer the **2nd issue** for determination the Court returns that there is no dispute that the claimant's employment was terminated by the letter dated 08.11.2013 on account of the claimant deserting duty from 16.10.2013 to 08.11.2013.

The **3rd issue** for determination is whether the termination was unfair. The claimant's evidence is that on 16.10.2013 he was summoned (by the Manager known as Chandu) together with his 2 workmates at a time they had been deployed at the Athi River Apex Cutline Steel Mills Ltd. They were instructed to report at the respondent's Head office in Nairobi on routine deployment. On 17.10.2013 the claimant reported at the Nairobi office as instructed and deployed and he continued to serve in Nairobi until 08.11.2013 when he was terminated by the letter dated 08.11.2013. He denied the alleged desertion or absence from duty without permission. The claimant testified that for 20 days he was not assigned work. His further evidence was that he worked up to 08.11.2013 and actually left on 17.10.2013. He was given the termination letter on 08.11.2013.

The respondent relied on the attendance register at Athi River Apex Cutline Steel Mills Ltd which showed that for the week 14.10.2013 to 20.10.2013 the claimant signed only for Monday and Tuesday. The evidence is consistent with the claimant's testimony that effective 16.10.2013 he had been summoned to work at head office in Nairobi. The respondent was required to establish the reason for termination in terms of sections 43 and 47(5) of the Employment Act but has failed to do so. On a balance of probability, the claimant has established that he was verbally redeployed to Nairobi and the allegations of desertion have not been proved. The termination was unfair for want a valid reason per section 43 and for want of due process as per section 41 of the Employment Act, 2007.

The claimant desired to continue in employment, he had a clean record of service of over 5 years and he did not contribute to his termination. He is awarded 12 months compensation as prayed for making **Kshs.194, 436.00**. While making the award the Court has considered that, the respondent offered no mitigating factors. The termination was abrupt and the claimant is awarded one month pay in lieu of termination notice under section 35 of the Act **Kshs. 16, 203.00** as prayed for. He is awarded **Kshs.4, 321. 00** for 8 days worked in November 2013 and one year unpaid and untaken leave **Kshs.16, 203.00** as per contract of service. The claimant was a member of NSSF and service pay as prayed for will fail under section 35 of the Act.

The Court returns that the claim for unpaid travel allowance was not justified. No evidence or contractual basis was provided. Further, the claimant testified he had no evidence for the claim of Kshs.500.00 per day for 20 days food and transport costs and the same will fail as not justified. The Court finds that the claims for allowances in 2009 and 2011 were time barred under section 90 of the Employment Act, 2007. In any event the contract of service provided that the claimant would make his own arrangements for accommodation and transport from and to the site or office.

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

- a. Payment of a sum of **Kshs.231, 163.00** by 15.12.2019 failing interest at Court rates to be payable thereon from the date of this judgment till full payment.
- b. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 22nd November, 2019.**

BYRAM ONGAYA

JUDGE