



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1593 OF 2015

MBUKU MULONZYA.....CLAIMANT

-VERSUS-

N.K. BROTHERS GARAGE LIMITED.....RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 09.09.2015 in person. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination was unfair.
- b) Payment of Kshs. 583, 402.50 being:
 - i. One month pay in lieu of termination notice Kshs.20, 250.00.
 - ii. Service pay Kshs.53, 662.50.
 - iii. Leave pay Kshs.75, 127.50.
 - iv. House allowance Kshs.191, 362.00.
 - v. Compensation for unfair termination $Kshs.20, 250.00 \times 12 = Kshs.243, 000.00$.
- c) Certificate of service.
- d) Costs of the suit plus interest thereon.

The respondent filed the reply to the memorandum of claim on 01.02.2016. The respondent prayed that the suit be dismissed with costs.

The claimant subsequently appointed Nduku Janet Advocate who filed final submissions on 04.11.2015. The respondent also filed the final submissions on 07.11.2019. Parties gave evidence to support their respective cases. The Court has considered the pleadings, the evidence and the submissions. The court makes findings on the matters in dispute as follows:

- 1) There is no dispute that the claimant was employed by the respondent from February 2010 as a mechanic then as a storekeeper until 07.04.2015.
- 2) The claimant's case and evidence is that he requested and obtained permission from the Manager in charge of the mechanics department (one Tejjal Wilkhu) to attend the sister's wedding on Saturday 04.04.2015 and to resume work on Tuesday 07.04.2015. On Saturday 04.04.2015 at 09.38, the claimant received a text message on his phone from the said manager asking him not to report back at work on the agreed Tuesday. The claimant called the manager to find out the reasons but the manager failed to answer the telephone calls. Despite that, the claimant testified that he reported on duty on Tuesday 07.04.2015 and his supervisor informed him that his services were no longer required and he should look for a job elsewhere. The respondent did not call the said manager to testify because he had left the respondent's employment. The respondent's witness (RW) was Harrison Malonzi Musyoki. He confirmed that the claimant worked for the respondent for 5 years as a casual employee and the claimant's supervisor was the said manager, Tejjal Wilkhu and only Tijjal could confirm if the claimant had asked for permission to attend the sister's wedding. For the 5 years, RW confirmed that the claimant worked continuously without a break. He could not confirm if in 2015 the claimant was

locked out after resuming duty from the leave to attend the sister's wedding.

3) The Court has considered the evidence and returns that on a balance of probability the claimant has established that he was given permission by Tejpal Wilkhu to attend the sister's wedding, he received a text message from Tejpal Wilkhu not to report back and when he reported back on the agreed Tuesday, his employment was terminated. The respondent's alleged desertion is inconsistent with the alleged casual service and the respondent's account cannot be trusted especially that no disciplinary action issued after the alleged desertion. The Court finds that the termination was unfair for want of a valid and fair reason as envisaged in sections 43 and 45 of the Employment Act, 2007.

4) The Court has considered the factors in section 49 of the Act. The claimant had a 5 years' service that was clean and without a break. For all that period the respondent treated him as a casual employee contrary to the minimum terms and conditions of service he was entitled to under the Act and as envisaged in section 37 of the Act. His service obviously converted to one subject to provisions of the Act. Such along service as a casual employee is found to be an aggravating factor under section 49 of the Act that disentitled the claimant the minimum terms of service. The claimant desired to continue in service and he did not contribute to his termination. The mitigating factor is that the payment vouchers show the respondent's endeavour to pay all minimum dues and entitlements including service pay, house allowance and leave. The Court has considered the claimant had served for 5 years. He is awarded 6 months' pay in compensation making Kshs.20, 250.00 x 6=**Kshs.121, 500.00**. The termination was abrupt and he is awarded **Kshs.20, 250.00** in lieu of the termination notice under section 35 of the Act. He is not awarded service pay because the exhibited payment vouchers show the same was paid on annual basis.

5) The payment vouchers exhibited show the claimant was paid leave and house allowance on monthly basis. The prayers on house allowance and pay in lieu of annual leave will fail.

6) The claimant is entitled to the certificate of service.

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

- 1) The declaration that the termination of the contract of service by the respondent was unfair.
- 2) The respondent to pay the claimant a sum of **Kshs.141, 750.00** by 15.12.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 3) The respondent to deliver the certificate of service by 15.12.2019.
- 4) The respondent to pay costs of the suit.

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

BYRAM ONGAYA

JUDGE