



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1325 OF 2016

EDWARD ONYANGO WERE.....CLAIMANT

-VERSUS-

CHINA ROAD AND BRIDGE CORPORATION (K).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2019)

JUDGMENT

The claimant filed a memorandum of claim on 05.07.2016 through Samuel Nyambane & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's action of sacking the claimant was illegal and unlawful and the claimant is entitled to Kshs. 350, 530.78 being:
 - i. Kshs.24, 368.45 in lieu of one month notice.
 - ii. Service pay for each year worked Kshs.19, 682.21.
 - iii. Leave pay for years served Kshs.14, 058.72.
 - iv. General damages for wrongful dismissal Kshs.292, 421.40.
- b) Certificate of service.
- c) General damages for wrongful dismissal as the Court shall assess.
- d) Costs of the suit plus interest.
- e) Any other relief that the Honourable Court may deem fit and just to grant.

The claimant alleges that he was employed by the respondent from July 2015 to 12.06.2016. Further on 12.06.2016 the respondent unilaterally sacked the claimant without any reasonable cause or justification. The claimant alleges that the sacking was unlawful because not given charges or an opportunity to defend him-self; he was not given a notice, hearing or reason prior to the sacking; he was sacked; and the Employment Act and CBA were violated. His further case is that at termination he earned Kshs. 24, 368.45 per month.

The respondent filed appearance on 04.09.2018 through Minishi & Associates Advocates but no defence was filed. By consent of the parties on 25.07.2019 it was ordered that the suit be determined on the basis of the memorandum of claim and documents filed for the claimant. Parties agreed to file final submissions. The claimant filed on 07.10.2019 but the respondent's submissions are not on record at all.

First, on a balance of probability the claimant has established that he was employed by the respondent as per the payslips on record. He worked as a labourer. There is no cause to doubt that he worked from July 2015 to 12.06.2016 when he was dismissed on account of making a claim for injuries he had sustained while on duty.

Second, the termination was illegal because it was based upon an unfair reason namely making a claim for compensation for injuries suffered while on duty. It is in section 46(h) of the Employment Act, 2007 that it is stated that it is unfair reason to dismiss an employee on

account of the employee's initiation or proposed initiation of a complaint or other legal proceedings against the employer, except where the complaint is shown to be irresponsible and without foundation. The Court finds that under section 49 of the Act, the illegal reason for termination aggravated the termination. The claimant is awarded 12 months' compensation making **Kshs.292, 421.40** at Kshs.24, 368.45 per month as prayed for. While making that finding the Court has considered that the claimant desired to continue in employment, he did not contribute to the termination, it was abrupt, he had suffered injury while on duty and the respondent failed to offer any pleading or evidence to establish the reason for termination in terms of sections 43 and 47(5) of the Act. The claimant is awarded **Kshs.24, 368.45** in lieu of notice and **Kshs. 14, 058.72** in lieu of annual leave as prayed for. The pay slip shows that the claimant was a member of the NSSF and the prayer for service pay is declined as is barred under section 35 of the Act.

Third the claimant is entitled to a certificate of service and the costs of the suit.

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

- 1) The declaration that the dismissal of the claimant from employment by the respondent was unlawful.
- 2) The respondent to pay the claimant **Kshs.330, 848.57** by 15.12.2019 failing interest to be payable thereon from the date of this judgment till full payment.
- 3) The respondent to deliver the claimant's certificate of service per section 51 of the Act and by 15.12.2019.
- 4) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday, 1st November, 2019.

BYRAM ONGAYA

JUDGE