



**REPUBLIC OF KENYA**

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

**CAUSE NO. 840 OF 2018**

**SIMON WACHIE WAKWABUBI..... CLAIMANT**

**VERSUS**

**ERDEMANN COMPANY (K) LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 04.06.2018 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's dismissal from the respondent's service was unfair and unlawful and totally failed to follow due process.
- b) One month salary in lieu of notice Kshs.21,000.00.
- c) Unpaid and untaken leave throughout service of 1 year 5 months Kshs.29, 750.00.
- d) House allowance throughout service  $15\% \times 21, 000.00 \times 17$  months Kshs.53, 550.00.
- e) Unpaid overtime of 2 hours for each day worked  $Kshs.700 \times 1/8 = Kshs.87.5$  per hour  $\times 2$  hours per day  $\times 30$  days per month  $\times 1$  year 5 months = Kshs.133, 875.00
- f) Service gratuity for period served Kshs. 17, 850.00.
- g) 12 months compensation Kshs.252,000.00.
- h) Costs plus interest.

The claimant has pleaded that the respondent employed him as a carpenter from 04.04.2016 to 11.09.2017. His last salary was Kshs.21, 000.00 per month. He testified that throughout the service he reported at work at 6.30am and left at 5.30pm and he worked 2 hours beyond the statutory 8 hours per day but was not paid the due house allowance.

His case and evidence was that on Sunday 10.09.2017 he fell sick and went to seek medical attention and he resumed duty on Monday 11.09.2017 when the respondent's foreman Mr. Kimanzi told him to go home and that he stood dismissed. The claimant testified that the termination was without due process of a notice and hearing and the ground for termination was invalid because he had been sick. His evidence was that he worked seven days a week without off and including on public holidays. Further it was his evidence that he was not paid house allowance or provided housing accommodation.

Despite service of summons, statement of claim, the mention and hearing notices, the claimant failed to attend Court, to enter appearance or to file a response to the claim.

The Court has considered the pleadings, the evidence and the claimant's submissions on record. The Court makes findings as follows.

- 1) The respondent employed the claimant as a carpenter. It was from 04.04.2016 to 11.09.2017. The contract was oral. He was paid Kshs.21, 000.00 per month.

2) The claimant was sick on 10.09.2017 and did not report at work as was expected. He did not have the respondent's telephone number and he reported his predicament to the foreman on 11.09.2017 when he resumed duty. He was summarily dismissed on 11.09.2017 and on account of absence from duty on 10.09.2017. The claimant testified that on 10.09.2017 he did not attend hospital but he simply bought some medicines from the chemist. He did not exhibit the relevant receipts by the chemist.

3) Section 30(1) of the Employment Act, 2007 entitled the claimant to a paid sick leave. The leave was available and due if the claimant notified the respondent as soon as was reasonably practicable about the ill health. There is no reason to doubt the claimant's evidence that he had not been provided the respondent's telephone number and the earliest he would notify the respondent was on 11.09.2017 when he resumed duty. The Court finds that the claimant acted reasonably and he was not culpable of absence from duty without reasonable cause and the abrupt termination was unjustified. The termination was unfair for want of due process under section 41 of the Employment Act, 2007 and for want of a genuine reason under section 43 of the Act.

4) The Court has considered that the claimant had worked for only 1 year and 5 months and he desired to continue in employment. Taking all the circumstances into account and to balance justice for the parties he is awarded 6 months' gross salaries in lieu of the termination notice making Kshs.21,000.00 x 6= **Kshs.126,000.00**. The termination was abrupt and unfair and he is awarded one month pay in lieu of the contractual termination notice **Kshs.21, 000.00** under section 35 of the Act. Further he is awarded **Kshs.17, 850.00** in service gratuity under the same section 35 being service pay in lieu of membership to the NSSF and in absence of alternative pension arrangements. The claimant is awarded **Kshs.29, 750.00** pay in lieu of annual leave as prayed for and under section 28 of the Act.

5) The claimant testified that the parties agreed on a monthly pay of Kshs.21, 000.00 and as envisaged in section 31 of the Act the Court considers that the pay could not be inclusive of a reasonable provision for housing and the claimant was not housed by the respondent. The Claimant is awarded **Kshs.53, 550.00** as a reasonable provision for housing and as prayed for.

6) The claimant testified that he worked on all public holidays and 7 days per week from 6.30am to 5.30pm but was not paid the extra 2 hours he worked on daily basis. In absence of any other evidence the claimant has not established the agreed or statutory working hours and then the agreed or statutory rate of the pay for overtime as prayed for. The claim is not anchored on off days so that the claimant is unable to invoke section 27 of the Act on rest days. The Court finds that the prayer will therefore fail.

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

- 1) The declaration that the termination of the claimant's employment by the respondent was unfair.
- 2) The respondent to pay the claimant a sum of **Kshs.248, 150.00** by 01.02.2020 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 3) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Thursday, 19th December, 2019**.

**BYRAM ONGAYA**

**JUDGE**