



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 885 OF 2014

UMBERTO DANIEL NUNGARI.....CLAIMANT

-VERSUS-

INTIME CAPITAL LIMITED.....RESPONDENT

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

JUDGMENT

The claimant filed the statement of claim on 27.05.2014 through Kuloba Simiyu & Company Advocates. The claimant prayed for judgment against the respondent on for:

- a. Accrued salary Kshs.148, 000.00.
- b. One month salary in lieu of notice Kshs.120, 000.00.
- c. Airtime (Phone & Ipad) Kshs.5, 600.00.
- d. Subtotal Kshs.273, 600.00.
- e. 6 months' salaries for damages for unfair termination.
- f. A declaration that the respondent is in breach of and has violated provisions of the Employment Act, the Common law and Articles 41 and 47 of the Constitution of Kenya.
- g. Any other relief that the Court may think fit to grant.
- h. Costs of the suit.

The respondent filed on 02.07.2014 the reply to the statement of claim and through A.N. Ndambiri & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

To answer the **1st issue** for determination the Court returns that the parties are in agreement that the respondent employed the claimant by the letter of appointment dated 18.02.2014 as the Operations Manager Diani Place. The letter states that the commencement date was 01.03.2014. The claimant alleges that nevertheless, he was asked to commence work on 18.02.2014 but the respondent denies that allegation. The claimant testified that he worked from 18.02.2014 to 31.03.2014. The Court returns that whether the claimant worked from 18.02.2014 or 01.03.2014, the parties have already settled claims that would turn on the date of commencement of employment. The Court considers that the parties are bound by the terms of the written agreement on the date of commencement of the employment.

The **2nd issue** for determination is whether the termination of the claimant's employment was unfair. Counsel for the claimant stated at the hearing that the only issue for determination was whether the termination was unfair. The claimant's employment was terminated by the letter dated 31.03.2014 on account of alleged drunkenness and incompetence on his part. The claimant states that he was not given an opportunity to answer the allegations and was not given a hearing as envisaged in section 41 of the Employment Act, 2007. He denies the allegations. The respondent has pleaded that after 2 weeks of service the claimant started reporting on duty while drunk and he was therefore unable to perform his duties leading to his dismissal.

Clause 3 of the letter of appointment stated that the appointment was on 3 months' probation service. Either party was at liberty to terminate the contract by giving 30 days' notice or 30 days' pay in lieu of notice. The respondent has already paid the claimant a sum of Kshs.205,000.00 being pay for work done, due payments for the term served and one month pay in lieu of notice. The Court finds that the respondent has complied with the clause for termination during the probationary service and the alleged unfair termination is found unjustified. The Court finds that the respondent has complied with section 42 of the Employment Act, 2007 on termination of the probationary service by giving not less than 7 days' notice. Section 42 (1) of the Act is clear that section 41 of the Act (on notice and hearing in event of misconduct, ill health or poor performance) does not apply where a termination of employment terminates a probationary contract. In view of that provision the Court returns that the claimant's alleged unfair termination and compensation in that regard will fail.

To answer the **3rd issue** for determination, the Court has considered the parties' margins of success including the terminal dues paid after commencement of the suit and returns that there will be no orders on costs.

In conclusion judgment is hereby entered for the parties for determination of the suit with no orders on costs.

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

BYRAM ONGAYA

JUDGE