



**REPUBLIC OF KENYA**

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

**CAUSE NO. 797 OF 2014**

*(Before Hon. Justice Mathews N. Nduma)*

**EMMANUEL KASANDI MUJUKANE.....1<sup>ST</sup> CLAIMANT**

**BERNARD NYAGA MBOGO.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**COSMOS LIMITED.....RESPONDENT**

**J U D G M E N T**

1. The suit was filed on 14<sup>th</sup> May, 2014 claiming General Damages for breach of contract and loss of employment and payment of terminal dues in respect of the two Claimants under paragraphs 9 and 10 of the Memorandum of Claim.
2. The suit was served and M/s Owang & Associates filed Notice of Appointment for the Respondent on 4<sup>th</sup> July 2014.
3. The Respondent did not file a statement of defence. No further step was taken by either party, until 29<sup>th</sup> March, 2017 when the Claimant set down the matter for hearing and served the Respondent. The hearing was set for 13<sup>th</sup> July, 2017. On the day the Respondent through Busaidi Advocate made an application for adjournment and sought leave to file a statement of defence. The Application was opposed by Mr. Kadere for the Claimant in that it was being made more than three (3) years from date of service without any justable reason. The court declined the application and the suit proceeded to formal proof exparte.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Claimants testified under oath in support of their respective Claimants. They adopted the pleadings and annexures thereto as their evidence in chief.
5. The Claims were not opposed and the evidence not rebutted. The Respondent did not cross examine the either Claimants. The Claimants filed written submissions later.

**Determination**

6. The issues to determination are:-

- (i) Whether the employment of the Claimants was unlawfully terminated.
- (ii) Whether the Claimants are entitled to the reliefs sought.

**Issue I**

**Facts**

7. The Claimants were employed by the Respondent vide letters of appointment dated 1<sup>st</sup> April, 1998 and 1<sup>st</sup> November 2003 respectively as delivery personnel. The Claimants worked continuously until their employment was terminated on 25<sup>th</sup> September, 2013 and 30<sup>th</sup> September, 2013 respectively and the Respondent did not pay their terminal benefits.

8. The Respondent accused the Claimants wrongly of theft. That the real culprit was arrested and charged but damage and loss had already been done.

9. The Claimants pray for payment of Kshs.720,600 and 650,562 respectively made up of –

**Emmanuel Kasandi Mujukane**

- (a) Two months in lieu of notice Kshs.60,050.
- (b) Gratuity for 15 years worked Kshs.300,250.
- (c) 12 months salary in compensation for wrongful termination.

**Bernard Nyaga Mbogo**

- (a) Two months salary in lieu of notice Kshs.59,378.
- (b) Gratuity for 9 years worked Kshs.169,227.
- (c) Unpaid leave Kshs.29,689.
- (d) Leave travelling allowance Kshs.6,000 and
- (e) Compensation for wrongful termination.

10. The Claimants were given letters of termination produced as exhibit 3. They were both suspended on 22<sup>nd</sup> August, 2013, served with show cause letters to explain the allegations of theft made against them and disciplinary meeting held on 10<sup>th</sup> September, 2013.

11. They both were found guilty of gross misconduct by the arbitration committee that heard their cases in relation to unauthorized medicine sale transactions on diverse dates as outlined in the letters of termination.

12. The contract of employment provide for termination of contract upon giving two (2) months notice or payment of two months salary in lieu of notice.

13. The employees who had served for more than five (5) years like the Claimants are entitled to 28 working days leave annually.

14. Under clause 17 of the contract, an employee who had served for less than 10 years is entitled to a gratuity calculated at 19 days salary for each completed year of service. Whereas employees who had served for over ten years are entitled to twenty days salary for each completed year of service.

15. Travelling allowance is only payable upon actual taking of leave.

16. The Claims on terminal benefits are not controverted by the Respondent. The Claimants have proved the same on a balance of probabilities and are awarded as prayed.

**Compensation**

17. In terms of section 43 as read with section 45 and 47(5) of the Employment Act, 2007, an employee need only make credible allegations of wrongful termination or dismissal. Once that is done, the employer has the burden of justifying the reason for the termination.

18. In the present case, the Claimants testified under oath that their employment was terminated for no valid reason but the Respondent did not rebut the said evidence having failed to file a response or attend the hearing.

19. Accordingly, the Claimants have established on a balance of probabilities that their employment was wrongfully and unfairly terminated in violation of section 45 of the Act. The court finds this to be the case and the Claimants are entitled to compensation in terms of section 49(1)(c) as read with sub-section 49(4) of the Act.

20. In this regard, the 1<sup>st</sup> Claimant had served the Respondent for 15 years diligently and with good record. The employment was wrongfully terminated and he was not paid any terminal benefits upon termination. The 1<sup>st</sup> Claimant suffered loss and damage. His name was disparaged by false accusations of theft. This is an aggravating circumstance.

21. I find this as appropriate case to award the Claimant the maximum 12 months salary in compensation for the wrongful termination in the sum of Kshs.360,300.

22. With regard to the 2<sup>nd</sup> Claimant he had served the Respondent for nine years without blemish. His employment was wrongfully terminated without payment of terminal benefits. He was maligned by false accusations of theft which were not proved. This is an aggravating circumstance. The Claimant lost prospects of continued employment and has suffered loss and damage.

23. The court awards the Claimant the equivalent of nine (9) months salary in compensation for wrongful termination of employment in the sum of Kshs.267,201.

24. In the final analysis, judgment is entered in favour of the Claimants as follows:-

**(I) 1<sup>st</sup> Claimant – Emmanuel Kasandi Mujukane**

(a) Two months salary in lieu of notice Kshs. 60,050.

(b) Gratuity for 15 years worked (20 days salary for each completed year of service) Kshs.300,250.

(c) 12 months salary in compensation for wrongful termination Kshs.360,300.

**Total award Kshs.720,600.**

**2<sup>nd</sup> Claimant Bernard Nyaga Mbogo**

(a) Two months salary in lieu of notice Kshs. 59,378.

(b) Gratuity calculated at 19 days salary for nine (9) years completed in service Kshs.169,227

(c) Unpaid leave Kshs. 29,689

(d) Nine (9) months salary in compensation for wrongful termination of employment Kshs.267,201

**Total award Kshs.525,495**

(II) (a) The awards are payable with interest at court rates from date of filing suit except the award of compensation which is payable with interest at court rates from date of judgment.

(b) Costs to follow the outcome.

**Dated and Signed in Kisumu this 7th day of May, 2018**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 30th day of May, 2018**

**Maureen Onyango**

**Judge**

**Appearances**

Mr. Kadere & Co. Advocates for Claimant

Mr. Owang for Respondent

Anne Njung'e – Court Clerk