



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2322 OF 2012**

**NZEKA MUSEE.....CLAIMANT**

**- VERSUS -**

**MARPHIE KENYA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22<sup>nd</sup> June, 2018)

**JUDGMENT**

It is not in dispute that the respondent employed the claimant as a guard sometimes in March 2004. On the eve of 17.02.2012 a fire broke out at the respondent's premises at the Kitchen causing damage to the property. By the letter dated 18.02.2012 the respondent suspended the claimant from duty with immediate effect until further notice to enable the police carry out investigations to establish the cause of the fire. The letter directed the claimant not to report on duty or to appear within the vicinity of the respondent's hotel pending the outcome of the investigations. The claimant was subsequently arrested and charged with the offence of arson contrary to section 332(a) of the Penal Code in criminal case No.6245 of 2012 in the Chief Magistrate's Court at Makadara. In a judgment delivered on 06.10.2017 the claimant was acquitted under section 215 of the Criminal Procedure Code.

The claimant filed the suit on 16.11.2012 through Musili Mbiti & Associates. The claimant prayed for judgment against the respondent for:

- a) Payment of Kshs. 134, 665.00 being Kshs.6, 805.00 a month's pay in lieu of termination notice; service pay for 8 years Kshs.27, 216.00; unpaid leave Kshs.18, 984.00; 12 months' pay for unfair termination Kshs. 81, 660.00.
- b) Interest and costs incidental to the suit.
- c) Certificate of service.
- d) Any such other or further relief as the Court may deem fit and just to grant.

The response was filed on 04.06.2013 through Sena & Company Advocates. The respondent sought that the claim is dismissed with costs.

The respondent's case was that the claimant was employed by the respondent. By the letter dated 17.02.2012 the respondent suspended the claimant on account of a criminal activity by which the claimant was prosecuted in criminal case No. 6245 of 2011 at Makadara. In any event, the respondent stated that the suit was time barred.

The **1<sup>st</sup> issue** for determination is whether the claimant's contract of employment was terminated. The claimant was suspended by the letter dated 18.02.2012 pending the investigations to establish the cause of the fire. Thereafter, the respondent did not lift the suspension. The Court returns that the claimant was entitled to consider himself terminated effective 18.02.2012 by reason of the respondent not lifting the suspension. The termination was constructive.

While making that finding the Court has considered the submission made for the respondent that after the suspension and in terms of the reason for suspension, the claimant ought to have come back to the respondent. The respondent has not established a basis for such expectation especially that the suspension letter was to the express provision that the claimant was not to be seen near the hotel premises. The Court finds that the terms of the suspension letter were such that the claimant could not have gone back on his own and the respondent had the sole duty to recall the claimant but that never transpired. The pending investigations as referred to in the suspension letter were in the control of the respondent and not the claimant – so that it was for the respondent to act at the end of the investigations within the terms of the letter of suspension.

The **2<sup>nd</sup> issue** for determination is whether the suit was time barred. The Court has found that the termination was effective 18.02.2012 and the memorandum of claim was filed on 16.11.2012. Obviously the suit was within the three years (or 12 months' for continuing injuries)

time of limitation under section 90 of the Employment Act, 2007.

The **3<sup>rd</sup> issue** for determination is whether the constructive termination was unfair. The court finds that the claimant was otherwise entitled to due process of a notice and hearing as envisaged in section 41 of the Employment Act, 2007 but which was not accorded. The termination was sudden and without due process. The Court returns that it was unfair.

The **4<sup>th</sup> issue** is whether the claimant is entitled to the reliefs as prayed for. The Court makes findings as follows:

- a) The termination was without due notice and the claimant is awarded **Kshs. 6, 805.00** in lieu of the notice as prayed for.
- b) The material on record does not suggest that the claimant was a member of the NSSF. He is awarded **Kshs.27, 216.00** as reasonable service pay for the 8 years' service and under section 35(5) of the Employment Act, 2007 and at rate of half monthly pay for each year served.
- c) The Court has considered the evidence. The claimant was honest, reliable, faithful and responsible throughout the service and as per his testimony. He did not contribute to his predicament in any manner. Indeed, in the criminal proceedings and as per the judgment the Honourable trial Court found thus, "**I have considered the defence and do find that the position the accused was charged so as to defeat the case at the Employment and Labour Court is plausible position. I do find that material doubt is raised on the motive on the charge and culpability of the accused person before the court.**" The claimant had served for a long period of time. The Court returns that in view of those considerations the claimant is entitled to the maximum 12 months' pay in compensation under section 49 of the Act making **Kshs.81, 660.00** at Kshs.6, 805.00 per month.
- d) The claimant provided no evidence on untaken leave and the prayer for pay in lieu of leave is hereby declined.
- e) The claimant is entitled to a certificate of service per section 51 of the Act.

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

- 1) The respondent to pay the claimant a sum of **Kshs.115, 681.00** by 01.08.2018 failing interest to be payable at court rates from the date of the judgment till full payment.
- 2) The respondent to deliver a certificate of service by 01.08.2018.
- 3) The respondent to pay costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 22<sup>nd</sup> June, 2018.**

**BYRAM ONGAYA**

**JUDGE**