



## REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE. NO. 937 OF 2015

GEOFFREY ALUSIOLA MAKAMU.....CLAIMANT

VERSUS

FARMAL GENERAL MERCHANTS LIMITED... RESPONDENT

### JUDGMENT

#### Introduction

1. The claimant brought this suit alleging that he was employed by the respondent from June 2012 and worked continuously until 18.9.2014 when he was terminated without notice. The reason for the termination according to him was the filing of Civil Suit number CMCC 5227 of 2014 arising from an occupational accident at the respondent's workshop. He further contended that during his employment his salary was underpaid and he was never given his annual leave. He therefore prayed for one month salary in lieu of notice, salary under payments in arrears, unpaid house allowance, accrued leave and severance pay totaling to Kshs.234,573.93 plus costs and interest.

2. The respondent never filed any defence despite service of summons and the claim and as such the suit was heard by way of formal proof.

Thereafter the claimant's counsel filed written submissions.

#### Claimant's Case

3. Claimant testified as Cw1 and told the Court that he was employed by the respondent in June 2012 as a Timber Machine Operator stationed at Kenol Kobil near Nairobi Academy along Lang'ata road. On 24.2.2014, he was operating a plane machine while his colleague Mr. Elisha Osieri was holding the timber he was planing. In the process Mr. Elisha pulled the timber so hard that the claimant's right middle figure was pulled into the machine and cut off. He was taken to hospital and thereafter given 21 days sick leave with full pay. After the sick leave he resumed work but on light duties. When he sought compensation for the injury, the employer ignored him and filed Civil Suit. No. 5227 of 2014 and served summons through a process server on 17.9.2014.

4. Cw1 further testified that immediately the process server left the respondents office, the Director called him and told him that because he has sued the company he stood dismissed from his employment and ordered him to surrender his uniform. He contended that the termination was without prior notice or warning and described the termination as wrongful and prayed for compensation

#### Analysis and Determination

5. There is no dispute that the claimant was employed by the respondent as a Machine Operator from June 2012 till 17.9.2014 when he was terminated by respondent's Director for the reason of instituting legal proceedings against employer to recover damages for the injuries suffered while at work. The issues for determination are:

(a) Whether the termination was wrongful and unfair;

(b) Whether the reliefs sought ought to issue.

#### Wrongful termination

6. The claimant's evidence that he was terminated without prior notice and for instituting civil proceedings against his employer has not been disputed. Under section 46 of the Employment Act, it is unfair for the employer to terminated his employee for the reason that he has

instituted civil proceedings against his employer. It is also wrong under section 35 1(c) of the Act for the employer to terminate his employee's contract of service without prior notice. Consequently, I find and hold that the termination of the claimant was wrongful for want of a just cause and prior notice as required by section 45(2) (a) and (b) of the Act.

#### **Reliefs**

7. Under section 35(1) (c) and 49(1) of the Act, I award the claimant Kshs.13,201.55 being one month salary in lieu of notice. He is also entitled to compensation for unfair termination but he did not pray for the same.

8. I award him the claim for salary under payment being kshs.45,976.60 for June to December 2012, Kshs.14,759 for January to April 2013, Kshs.38,557.76 for May to March 2014 and Kshs.10,429.55 for March to September 2014 totaling to Kshs.109,722.91. The said sum is calculated based on the difference between the claimant's daily wage of Kshs.400 and the rightful daily wage published vide the General Wage Order during the period of his service being 2012 and 2013.

9. The claim for unpaid house allowance is dismissed because it has been catered for by the award of underpaid salary based on daily wage because as opposed to the monthly salary, daily wage under the General Wage Order is inclusive of House Allowance. Likewise, the claim for severance pay is dismissed because the termination was not through redundancy.

10. Finally, the claim for accrued leave is granted as prayed at the rate of 21 days per year. The total leave days earned was 47.25 days equaling to Kshs.20,132.82.

#### **Conclusion and Disposition**

11 .For the reasons that the claimant's contract of service was wrongfully terminated, I enter judgment for him in the sum of Kshs.143,052.30 plus costs and interest. The sum herein shall be paid subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018**

**ONESMUS N. MAKAU**

**JUDGE**