



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1575 OF 2015

JOHN MUSAVI OKANGA.....CLAIMANT

- VERSUS -

HESBON WASIKE.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 12th July, 2018)

JUDGMENT

The claimant filed the statement of claim on 08.09.2015 through Khalwale & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the dismissal was wrongful and unfair.
- b) Payment of a sum of Kshs. 777, 431.60 being Kshs.8, 846.15 for 23 days worked in February 2015; a month's pay in lieu of notice Kshs.10, 000.00; 2 months pro-rate leave pay Kshs.1, 346.15; severance pay for 10 years' service Kshs.57, 692.30; 12 months' gross salary in compensation Kshs.120, 000.00; off duty days worked Kshs.40, 000.00; house allowance Kshs.181, 000.00; public holidays worked Kshs.67, 647.00; and underpayment Kshs.290, 400.00.
- c) Certificate of service.
- d) 12 months compensation.
- e) The respondent to pay costs of the suit.

The claimant's case is that the respondent employed him verbally as a gardener at the respondent's residential home at a monthly salary of Kshs.10, 000.00. The claimant reported at work at 7.00am and worked to 6.30pm or 7.00pm. He alleges that he served for 121 months until 30.01.2015 when he was granted permission to visit his rural home on a 20 days' leave. On 23.02.2015 he resumed duty and he was shocked to be informed that he had been dismissed verbally without payment of terminal dues or notice. Despite demand, the respondent failed to pay the terminal dues and the claimant filed the present case.

The response to the claim was filed on 01.10.2015 through Sheikh & Company Advocates. The respondent prayed that the claimant's suit should be dismissed with costs. The respondent denied that he had entered a contract of service as alleged for the claimant. The respondent denied the claimant's claims and prayers.

The **1st issue** for determination is whether the parties were in a contract of service. The claimant testified that he was employed by the respondent on 01.01.2005. The agreement was written in some book in the respondent's custody and the claimant embarked to work as appointed. It was his testimony that he took care of the respondent's home including cleaning, caring for the dogs, cleaning the cars and opening and closing the gate.

He further testified that the respondent granted him leave to travel to rural home and the claimant resumed duty on 23.02.2015. On that date the claimant took a child to school and came back after 20 Or 30 minutes and told the claimant that there was no job for the claimant. It was the claimant's evidence that there was no notice or reason for termination. It was the claimant's case that he had served the respondent for 10 years and a month. The claimant testified giving the names of the respondent's family members and other servants.

The respondent opted to rely on the witness statement without any further evidence in Court. It was a mere denial of the employment relationship.

The Court has considered the claimant's coherent testimony and returns that the parties were in employment as per the claimant's account.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The Court returns that the claimant is entitled to a declaration that the dismissal was wrongful and unfair. The verbal dismissal was without notice and no reason was advanced at all as envisaged in section 43 of the Employment Act, 2007. Even if the respondent no longer required the claimant's services it was necessary to prepare the claimant for the looming loss of employment on account of redundancy.
- b) The claimant prays for **Kshs.8, 846.15** for 23 days worked in February 2015 and the claimant having shown that he was on leave till that date, he is awarded accordingly.
- c) The claimant prayed for a month's pay in lieu of notice **Kshs.10, 000.00** and is awarded accordingly per section 35 of the Act.
- d) The claimant prays for 2 months pro-rate leave pay **Kshs.1, 346.15** and is awarded accordingly as per section 28 of the Act.
- e) The claimant testified that he was not a member of the NSSF and is awarded severance pay for 10 years' service Kshs.57, 692.30 as per section 40 of the employment Act, 2007.
- f) The dismissal was unfair. The Court has considered that the dismissal was abrupt, the claimant desired to continue in employment, he had no pension or social security arrangements, he had a clean record of service and he did not contribute to the termination and is therefore awarded 12 months' gross salary in compensation **Kshs.120, 000.00** under section 49 of the Act.
- g) There was no evidence on off duty days worked Kshs.40, 000.00 and the prayer will fail.
- h) The claimant testified that he was housed by the respondent and therefore he is not entitled to house allowance Kshs.181, 000.00 as prayed for.
- i) There was no evidence on public holidays worked Kshs.67, 647.00 and the prayer will fail.
- j) There was no justification for underpayment Kshs.290, 400.00.
- k) 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:

- a) The declaration that the dismissal was wrongful and unfair.
- b) The respondent to pay the claimant a sum of **Kshs. 140, 192.15** by 01.09.2018 failing interest to be payable thereon from the date of this judgment till full payment.
- c) The respondent to deliver a certificate of service by 01.09.2018.
- d) The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday 12th July, 2018.

BYRAM ONGAYA

JUDGE