



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1013 OF 2016

TITUS MALOVA.....CLAIMANT

- VERSUS -

ONE WAY CLEANING SERVICES LIMITED....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th July, 2018)

JUDGMENT

The memorandum of claim was filed on 30.05.2016 through Musili Mbiti & Associates. The claimant prayed for judgment against the respondent for:

- a) Payment of Kshs. 247, 787.00 being Kshs.7, 586.00 notice pay; Kshs. 37, 930.00 pay in lieu of annual leave for 2010 to 2015 being 5 years at Kshs.7, 586.00 per year; service pay for 5 years Kshs.18, 965.00 at half monthly salary per year; house allowance Kshs.68, 274.00; 12 months' salaries for compensation Kshs.91, 032.00; and NHIF not remitted for 5 years at Kshs.400.00 per month making Kshs.24, 000.00.
- b) Interest and costs incidental to this suit.
- c) Certificate of service.
- d) Any such other or further relief as the Honourable Court may deem fit and just to grant.

The memorandum of response was filed on 29.07.2016 through Wanyaga & Njaramba Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant's case is that the respondent employed him as a cleaner from January 2010 to 28.08.2015 at a monthly salary of Kshs.7, 586.00. Further, on 28.08.2015 the respondent terminated the claimant's contract of service without a notice and a hearing as per section 41 of the Employment Act, 2007.

The respondent has pleaded that the parties were not in a contract of service and the respondent never employed the claimant.

The **1st issue** for determination is whether the claimant was employed by the respondent. The claimant has testified that he was employed by the respondent in January 2010 as a steward at Kshs.7, 586.00 per month. He served at various stations of deployment including Shauri Moyo Civil Servants quarters, All Saints Cathedral; CITAM Burburu and later at Uniliver where he served around June 2015. Claimant's witness No. 2(CW2) was one Japheth Onwangala. He testified that he was employed by the respondent from April 2012 to 2014 at the claimant was his workmate. The respondents' witnesses were consistent that the respondent employed the claimant. The Court returns that the parties were in a contract of employment.

The **2nd issue** for determination is whether the termination of the claimant's contract of service was unfair. The claimant's evidence was that he had served at Uniliver for about 2 months and his son fell sick one evening at around 7.00pm. He called an officer in charge one Chris and notified that he was unable to report on duty in view of the illness of the son and that he had to stay home because his wife was in hospital nursing the sick daughter who was also unwell. The following day he reported on duty and he worked throughout the night shift as expected. As he checked out from work he was summoned at the respondent's Baba Ndogo office. He met the operations manager one Johnson Obwoga and the zone manager one Ikapel. They told him to go home since he had been unable to work and he would receive his pay at the bank account. He protested demanding to be given a documented termination letter but he was advised to resign but the claimant testified that he declined to resign because he wished to continue in employment. He reported at work at Uniliver that evening but he was locked out.

It all took place around 28. 08.2015. The trade union official unsuccessfully intervened and the respondent failed to attend dispute resolution at the labour office. Thus the claimant filed the suit.

The respondent despite pleading that the claimant was not its employee, its witnesses confirmed that the respondent had employed the claimant. Such contradictory positions by the respondent as an employer rendered the respondent's case incredible. The respondent has not offered coherent circumstances under which the claimant's employment was terminated. The Court finds that the claimant was honest in his account. The termination was unfair for want of due process of a notice and a hearing as per section 41 of the Employment Act, 2007 and for want of a valid reason as per section 43 of the Act.

As submitted for the claimant the Court follows **Nicholas Muasya Kyula –Versus- Farmchem Limited [2012]eKLR** thus, “...it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes for undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

The Court has considered all the decisions cited for the respondent and returns that they all support the position that dismissal must be fair on account of procedure and substance but which the Court has found not to have been the case in the present dispute.

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

- 1) The termination has been found to have been unfair. The claimant desired to continue in employment. He did not contribute to his termination. The Court has considered the abrupt termination after a considerably long service and returns that the claimant is entitled to the 12 months' pay in compensation for the unfair termination under section 49 of the Act. The Court has further considered the alleged investigation report of 09.11.2015 by Hellen Ikapel, the zone manager and returns that the purported report came belatedly long after the claimant's termination. The Court finds that the report served no purpose towards rendering the termination not unfair.
- 2) The claimant is entitled to pay in lieu of annual leave per section 28 of the Act and as prayed for.
- 3) The claimant was not a member of an alternative pension scheme or NSSF and is awarded service pay as prayed for and as per section 35(5) of the Act, the award being found reasonable in the circumstances of the case.
- 4) As termination was without notice he is awarded pay in lieu of annual leave as prayed for.
- 5) The claimant appears to have agreed to serve upon a consolidated monthly pay. The claimant has failed to show, by reference to the Regulation of Wages (General) Order, how the monthly pay can be said not to have included an element for rental pay. The prayer will fail in line with the respondent's submissions.
- 6) The claimant has submitted that he was deducted NHIF but the dues were not remitted. The Court finds that he will recover the deductions as prayed for.

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

- 1) The respondent to pay the claimant a sum of **Kshs.179, 513.00** by 01.09.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 2) The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 6th July, 2018.

BYRAM ONGAYA

JUDGE