



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.917 OF 2013

ALFRED MASUDI ZAWADI.....CLAIMANT

- VERSUS -

RAMBOO COLOURCANE LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th October, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 18.06.2013 through Mogusu Miencha & Company Advocates. The claimant prayed for judgment against the respondent for:

- 1) 3 months' salaries in lieu of notice Kshs. 60, 591.00.
- 2) House allowance underpaid.
- 3) Medical allowance unpaid.
- 4) Transport allowance at a rate of Kshs. 150 per day for 7 years worked Kshs.252, 000.00.
- 5) Leave allowance for 2 years.
- 6) A declaration that the purported summary dismissal of the claimant by the respondent under section 44 of the Employment Act 2007 was arbitrary, unfair and unlawful and therefore null and void.
- 7) The sum of Kshs. 6, 825, 600 being lost earnings for 25 years to retirement age.

The claimant's case is that the respondent employed him as a general worker with a basic salary of Kshs. 3, 900.00 and house allowance of Kshs.800.00 per month. The claimant says the employment was effective 10.04.2004. The claimant was promoted to a machine operator at Kshs. 20, 197.00. Prior to permanent employment, the claimant states that he had served as a casual employee for 2 years. The claimant states that by the letter dated 10.04.2013 the respondent summarily dismissed the claimant on grounds of failing to attend work or failing to reach the target as set by the respondent. By the letter dated 10.04.2013 the respondent alleged that the claimant had been absent from duty without permission or good cause on 3 occasions within 2 previous months but the claimant denied that allegation. Further the claimant states that he was absent only one day which was a public holiday on the inauguration of President Uhuru.

The respondent filed the memorandum of response on 23.08.2018 through Ogola, Okello & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The respondent admits that the claimant was employed by the letter dated 10.04.2004 as a general worker. The respondent alleges that in 2013 the claimant had been absconding duty severally. Further that the claimant failed to heed the warnings leading to his termination on account of absence from work without permission or reasonable cause; deliberately neglecting or ignoring to work or carrying out the work improperly; and disobeying orders from persons in authority. Finally upon termination the claimant was paid terminal dues of Kshs.7, 500.00 for 9 days worked in April 2013 and the pending leave days.

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

- 1) The claimant prays for 3 months' salaries in lieu of notice Kshs. 60, 591.00. The claimant has offered no justification for the 3 months as claimed and is awarded one month in lieu of notice under section 35 of the Act making **Kshs. 20, 197.00**.
- 2) The claimant prays for house allowance underpaid. He testified that the monthly salary was inclusive house allowance. The prayer

will therefore fail.

3) The claimant prayed for medical allowance unpaid. This being a prayer in the nature of special damages, the Court finds that it will fail because the quantum was not specifically pleaded and no justification was offered.

4) The claimant prays for transport allowance at a rate of Kshs. 150 per day for 7 years worked Kshs.252, 000.00. The claimant testified that during the day shift the respondent provided a bus for transport and at night shift the arrangement was that he uses his own means. The parties had an agreement on the commuter issue and the basis of the claim is not established so that it will fail. In any event the claimant testified that he had previously been paid for transport but he claimed for period not paid and which was not specified.

5) He prayed for leave allowance for 2 years. The years were not specified and the Court returns that the claim was vague and it will fail.

6) The Court finds that the claimant is entitled to a declaration that the purported summary dismissal of the claimant by the respondent under section 44 of the Employment Act 2007 was arbitrary, unfair and unlawful and therefore null and void. In particular there was no notice and a hearing as provided in section 41 of the Act. The respondent had purported to engage in disciplinary process after the termination and it was clear that no fair procedure had been invoked.

7) The claimant prayed for a sum of Kshs. 6, 825, 600 being lost earnings for 25 years to retirement age. It was not established that due to a reason attributable to the respondent the claimant was thereby unable to obtain alternative gainful employment. Accordingly, the prayer will fail as it was not justified and the computation being unexplained.

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

- 1) Payment of **Kshs. 20, 197.00** by 15.11.2017 failing interest to be payable thereon at Court rates from the date of filing of the suit till full payment.
- 2) The declaration that the purported summary dismissal of the claimant by the respondent under section 44 of the Employment Act 2007 was arbitrary, unfair and unlawful.
- 3) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 26th October, 2018.

BYRAM ONGAYA

JUDGE