



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1339 OF 2010

GODANA JILO JIRMO.....CLAIMANT

VERSUS

KARTAR SINGH CONSTRUCTION LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th October, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 01.11.2010 in person. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant's employment on 19.06.2010 was unlawful and unfair.
- b) An order that the respondent do issue a certificate of employment to the claimant.
- c) An order that the respondent to pay the claimant Kshs. 768, 892.35 being his dues under section 49 of the Employment Act, 2007; and underpayment under legal notice No.42 of 01.05.2005, legal notice No. 38 of 01.05.2006; legal notice No. 70 of 01.05.2009; and legal notice No.98 of 01.05.2010.
- d) Interest from 19.06.2010 till payment in full.
- e) Costs.

The claimant appointed Herbert Mwendwa Advocate to act in the matter. Subsequently the claimant appointed Kwengu & Company Advocates to act in the suit.

The respondent filed a memorandum of response on 01.07.2011 and a further memorandum of response on 15.09.2011 through Kelvin Mogeni Advocates but latter changed advocates to Koki Mbulu & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimant testified that the respondent employed him as a night guard effective 05.06.2005. He testified that his last day at work was on 19.06.2010 when his boss Kartar Singh told him to leave employment because he did not like the claimant's tribe. His last monthly pay was Kshs. 6,000.00 as at the termination date. It was his testimony that he worked at night from 5.00pm to 8.00am without an off. He prayed for payment of service pay for 5 years' service; leave pay; notice pay; work on public holiday; and offs worked but not paid all making Kshs. 768, 892.32.

The respondent's witness (RW) was one Singh, the respondent's director. His evidence was that he employed the claimant as a day guard in 2006 and worked from 2006 until a few months in 2010; the claimant worked from 8.00am to 4.00pm on Monday to Friday and up to 1.00pm on Saturday; on Sundays he was on rest day; minimum statutory wages were paid; and he was housed at the construction site house and he slept there but was not a night guard. As to the circumstances of termination RW testified that the work on the construction project was completed and there was no other project to employ the claimant. Further, the claimant was orally notified about the looming termination about 2 months prior to the termination. The claimant had been given a loan by the respondent for Kshs.40, 000.00 and which the respondent pleaded that it be set off with the pay in lieu of leave because throughout the service no annual leave was given to the claimant.

The **1st issue** for determination is whether the claimant was a night guard or a day guard. The Court returns that the claimant's evidence that he was a night guard was credible. In any event the respondent submitted thus, "**2. The respondent admits having been the claimant's employer between 2005 and 2010 at a construction site in Embakasi within Nairobi. The terms of employment were oral, although it was generally agreed that the claimant would work as a night guard at this particular construction site only during the pendency of the construction work that the respondent had been contracted to undertake...**" Thus the Court returns that the respondent employed

the claimant as a night guard from 05.06.2005 to 19.06.2010. While making that finding the Court finds that RW offered contradictory evidence that the claimant was a day guard and the Court will later in this judgment revisit the persistent contradictory positions taken by the respondent in this case rendering the defence case incredible.

The 2nd issue for determination is whether the claimant's termination was unfair. The account by RW on the circumstances of the termination cannot be trusted. RW's evidence was that the claimant worked until a few months in 2010 and the employment lapsed when work at the construction site was completed. That evidence was clearly inconsistent with the statement of response and the evidence did not support the respondent's pleadings. In particular at paragraph 1 (c) of the further memorandum in reply the respondent alleged that the claimant left the respondent's site and employment in 2008 without notice and returned after 6 months demanding reinstatement to his duties and accommodation at the respondent's site. Further at paragraph 1(d) the respondent stated that the claimant was not entitled to notice but RW gave contradictory evidence that the claimant was informed of the looming termination 2 months prior to the termination. The Court returns that the claimant was terminated on 19.06.2010 on account of his ethnicity and which amounted to discrimination contrary to section 5(3) (a) of the Employment Act, 2007 which prohibits discrimination by an employer on account of ethnicity. The Court returns that the dismissal was unfair as the reason did not relate to the respondent's operational requirements or the claimant's conduct, capacity or compatibility as per section 45 of the Act.

The 3rd issue 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 has cited the relevant Regulation of Wages (Building and Construction) Industry Order for 2004, 2005, 2006, 2009, and 2010. The claimant has highlighted the payments on the Wages Orders as filed and the Court returns that he is entitled to the prayers on underpayment as computed in the memorandum of claim.
- b) RW confirmed that the claimant was not given annual leave throughout service and the Court finds that the statutory 2 months' termination notice as prescribed under the prevailing wage order was not served. He is awarded as prayed.
- c) There is no reason to doubt that the claimant was denied rest days, he worked on public holidays and worked overtime beyond minimum statutory hours of work and is awarded as claimed in the memorandum of claim.
- d) The Court has considered the aggravating factor that the reason for termination was discriminatory in breach of clear statutory provisions, the claimant had a clean record of service of over 5 years and the claimant never contributed to his termination from employment. He is awarded the maximum 12 months' salaries in compensation and as prayed for.
- e) In conclusion the Court returns that the claimant is entitled to the **Kshs. 768, 892.35** as prayed for together with a certificate of service.

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

- 1) The declaration that the termination of the claimant's employment by the respondent on 19.06.2010 was unfair and unlawful.
- 2) The respondent to pay the claimant a sum of **Kshs. 768, 892.35** by 15.12.2018 failing interest to be payable thereon from the date of the judgment till full payment.
- 3) The respondent to deliver a certificate of service by 15.11.2018.
- 4) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 19th October, 2018**.

BYRAM ONGAYA

JUDGE