



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.30 OF 2018 Consolidated with CAUSE NO.31 OF 2018**

**SAMSON LESIAMON KIRAMPA.....CLAIMANT**

**NYANGARESI OMOA VINCENT.....CLAIMANT**

**VERSUS**

**CHINA RAILWAY NO.10 ENGINEERING**

**GROUP COMPANY LTD.....RESPONDENT**

**JUDGEMENT**

Suits, Cause No.30 and 31 of 2018 proceeded for hearing separately and each claimant called evidence separately. Upon going through both matters, it became apparent to the court that the cause of action was the same, the claimant were taken through similar termination of employment procedures by the same respondent and thus applied the provisions of Rule 23 with regard to addressing the claims and writing of judgement.

The suits are hereby consolidated for judgement.

**Background**

The claimants filed the Memorandum of Claim on 5<sup>th</sup> February, 2018, served the respondent who did not enter appearance or file any defence. During the hearing, despite being served the respondent did not attend.

The Court Satisfied that the respondent had knowledge of the matter in court based on returns filed by the Process Server Onyango Henry Obonyo confirming that on 8<sup>th</sup> February, 2018 he served the respondent who acknowledged service and he filed the Affidavit of Service. Before the hearing commenced, the respondent was again served on 3<sup>rd</sup> April, 2018 and again on 13<sup>th</sup> July, 2018. Despite these procedures being adopted, the respondent failed to attend as required.

The court, satisfied that the respondent was aware of these proceedings and opted to remain absent heard the claimant's case in terms of Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The matter proceeded by way of formal proof.

**Claim**

The claimants were employed by the respondent in August, 2016 and May, 2016 respectively as a Night Guard and earning Kshs.17,000.00 per month. The work hours were 6pm to 7am and would hand over to the day guard.

On 9<sup>th</sup> May, 2017 when the claimants were on patrol duties, the manager Mr Sung, a Chinese national came about 10pm and called them to the office and in the presence of another officer Mr Yuan attacked and tried to beat them up. The claimants were alleged to have been stealing.

The next day, 10<sup>th</sup> May, 2017 the respondent informed the claimants that their employment had been terminated. The claimants were not paid his terminal dues and were was required to continue working until they repaid the lost property of the respondent and which required working for over three (3) months without pay. The claimants declined such a direction on the basis that they were not the one working in stores from where the respondent lost property. When the claimants reported back to work the next day, they found the respondent had replaced them with new employees.

The claimants reported the matter to trade union, the Kenya Building, Construction and Timber Union and demanded for his terminal dues following the summary dismissal form employment. The respondent refused to pay.

The claimants are seeking for due salary for May, 2017; compensation for unfair termination of employment, overtime pay at Kshs.26, 222.00; and costs of the suit.

The claimants testified in support of the claims.

### **Determination**

The provisions of Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2016 must be read together with the provisions of sections 19 and 20 of the Employment and Labour Relations Court Act, 2011. In its proceedings, the court must ensure each party is given a fair hearing and confirm that all necessary parties are invited to attend. In this regards the Rules of the Court facilities the process of service and the returns filed are to ensure that once the court has confirmed service of all the necessary pleadings but the served party is absent, then the claimant must be given their right to a hearing.

The claim is that while the claimants were at work on 9<sup>th</sup> May, 2017 they were accosted by the respondent officers over matters that there was an alleged theft of respondent's property while guarding at night. The option given was to work for three months to cover the costs and value for the lost property.

Section 41 of the Employment Act, 2007 requires an employer who on good grounds finds an employee has misconducted himself with regard to work performance, capacity or any other matter to bring such facts to the employee and allow for a hearing. Where the employer has good grounds and finding that there is misconduct, then a sanction can issue. The procedures and motions of the law require procedural fairness.

Where the employer finds the employee is in gross misconduct, the motions of section 44 of the Employment Act 2007 must apply. There is the right due to the employer for summary dismissal but such a right must abide the provisions of section 41(2) of the Act where the employer must give the employee the right to be heard before termination of employment.

In this case, by the respondent failing to enter appearance, file defence or attend at the hearing despite service on different occasions, there is no defence as to the reasons leading to the termination of the claimants' employment. Such defence is denied of this court. I take it no defence exists to justify the summary action taken against the claimants.

Section 43 read together with section 45 of the Employment act, 2007 makes it imperative that where employment is terminated without due process, such amounts to unfairness and compensation is due under the provisions of section 49 of the Act.

In this case, where the claimants lost employment and the same is found without justification, compensation is awarded at three (3) months gross salary at Kshs.17, 000.00 x 3 all being Kshs.51, 000.00.

Notice pay is also due in a case of procedural unfairness and he is awarded Kshs.17,000.00.

The claimants had worked for 10 days in May, 2017 when his employment was terminated. The pay due is for the 10 days only. This is awarded at Kshs.5,600.00.

The claimants are also seeking overtime payment of Kshs.26, 222.00 on the grounds that he was at work from 6pm to 7am and was not compensated for his overtime. Without any evidence by the respondent and submission of work records, this evidence is not challenged at all. The overtime pay claim is awarded as claimed.

**Accordingly judgement is hereby entered for each the claimant against the respondent in the following terms;**

- (a) A declaration that termination of the claimant's employment was unfair;**
- (b) Compensation awarded at Kshs.51,000.00; notice pay Kshs.17,000.00;**
- (c) Overtime pay Kshs.26,222.00;**
- (d) Salary due for 10 days Kshs.5,600.00;**
- (e) Costs of the suit.**

Dated and delivered at Nakuru this 4<sup>th</sup> day of October, 2018.

**M. MBARU JUDGE**

In the presence of:.....