



**REPUBLIC OF KENYA**

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

**CAUSE NO.696 OF 2013**

**MOFFAT MWANZI.....CLAIMANT**

**- VERSUS -**

**MUDHER ENGINEERING WORKS LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 23<sup>rd</sup> November, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 15.05.2013 through Gakoi Maina & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the termination was unlawful and unfair.
- b. The claimant be paid dues and benefits of Kshs.516, 692.66 being:
  - Salary for May 2011 Kshs.20, 947.00 (already allowed by consent at the hearing).
  - Payment in lieu of notice Kshs.20, 947.00.
  - 12 months compensation for unfair termination Kshs.251, 364.00.
  - Service pay Kshs.223, 434.66.
  - Costs and interest

The memorandum of response was filed on 07.05.2018 through Firdosh Jamal & Associates.

It is not in dispute that the respondent employed the claimant as a welder effective January 1995. It is alleged for the claimant that the respondent verbally terminated the claimant's contract of employment without a notice, a hearing and justifiable cause.

The claimant testified that in December 2010 he was on leave and he resumed duty on 05.01.2011 when he was given a letter stating that he would no longer be retained in the respondent's employment due to the then prevailing hard economic times for the respondent's enterprise. The letter gave notice that the claimant's employment would end on 05.04.2011. By another letter dated 08.04.2011 the notice was withdrawn and the claimant continued in employment.

Shortly thereafter on 14.05.2011, it was a Saturday and the claimant reported at work. He was paid the monthly advance of Kshs.5, 000.00. He was to leave duty at 1300hrs. The watchman told the claimant not to leave because the manager wanted to see the claimant. The claimant waited and shortly some police officers arrived and he was arrested. It was alleged that he had stolen and the respondent's works officer asked the claimant to resign employment without payment of final dues. That was at the Mlolongo police station and an officer hit the claimant demanding that he accepts that he stole and in lieu thereof his service pay be lost. He refused to sign any discharge statement. He could not have written and signed the statement (as filed for the respondent) because his highest level of education was class 2 and he did not know how to write in any language including English. He therefore denied authoring, writing, and signing a hand-written statement dated 16.05.2011 to discharge the respondent from further liability and filed for the respondent. He denied receiving warning letters filed for the respondent and which stated that he had been drunk while on duty. In re-examination the claimant stated that he was dismissed on account of having stolen and that his employer had the habit of giving him money to buy alcohol for purposes of taking the alcohol prior to embarking on his work.

The respondent's witness (RW) testified that he did not know why the claimant was dismissed and that the claimant's performance of duty was not bad. RW further testified that he had never seen the claimant writing and he did not know if the claimant knew how to write. He also confirmed that he never saw the claimant taking alcohol while on duty but he could report on duty already drunk.

The Court has considered the material on record. The Court finds that the claimant has established that he was not accorded a notice and a hearing prior to termination on account of alleged theft and as envisaged in section 41 of the Employment Act, 2007. Second, the Court returns that the claimant and RW have by testimony established that the claimant did not know how to write and on a balance of probability, the claimant never wrote and signed the alleged statement of 16.05.2011 discharging the respondent from liability on the contract of service. Further, the Court finds that the respondent failed to discharge the burden of proving the reason for termination as per section 43 as read with section 47(5) of the Employment Act, 2007. Accordingly the termination was unfair in procedure and substance.

On the remedies the Court finds as follows:

- The termination was unfair and the claimant is awarded pay in lieu of notice **Kshs.20, 947.00** under section 35 of the Act.
- The Court returns that the claimant is entitled to 12 months compensation for unfair termination **Kshs.251, 364.00** under section 49(1) (c) of the Act. While making that award the Court has considered that the Claimant had served for a long period of 17 years, he desired to continue in employment, and he did not contribute to his predicament. Whereas there was alleged record of being drunk while on duty, the respondent appeared to have, over the years, condoned the behaviour. Further, the attempted termination on feigned redundancy and the arrest prior to unfair termination are aggravating factors that override the claimant's alleged adverse record of service – RW having testified that otherwise, the claimant was a good worker and performer.
- The claimant prayed for service pay **Kshs.223, 434.66**. There was no evidence that parties had alternative pension arrangement or that the claimant was a member of NSSF and the court finds that the award will be made as a reasonable service pay under section 35 of the Act.

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

a. Payment of **Kshs.516, 692.66** by 31.12.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

b. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 23<sup>rd</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**