



**REPUBLIC OF KENYA**

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

**CAUSE NO.1562 OF 2012**

**NICHOLAS MUSANGA MUDOGO.....CLAIMANT**

**- VERSUS -**

**DHL WORLWIDE EXPRESS (K) LTD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> November, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 05.09.2012 in person. He prayed for judgment against the respondent for:

- a) The sum of Kshs. 820, 460.00 being one month in lieu of notice Kshs. 19, 100.00; annual leave for 12 years served Kshs. 159, 600.00; house allowance Kshs. 412, 560.00; and compensation for unfair termination at Kshs. 19, 100.00 x 12 making Kshs. 229, 200.00.
- b) Costs of the suit.
- c) Interest on (a) above.
- d) Any other relief the Court may deem just.

The claimant subsequently appointed Betty Rashid & Company Advocates to act in the matter.

The claimant's case was that he was initially employed by the respondent in January 2000 as support staff, cleaning and customer parking at Kshs. 10, 500.00 per month. The contract was reviewed on 01.09.2003 with a salary of Kshs. 19, 100.00. The claimant says he worked with a clean record until 01.06.2011 when he was terminated from the employment without notice and payment of terminal dues.

The record shows that the letter of termination was dated 01.06.2011 and the termination was on account of the respondent outsourcing cleaning services from Facilities Management Services (FMS). The letter stated that the contract between the claimant and Staff 4 U Ltd would be terminated on 01.06.2011. The letter stated that the claimant would be contacted by the respondent and FMS regarding his duties under the new management. The letter concluded, **"I would like to thank you for your dedication and commitment while working for the DHL contract through Staff 4 U Ltd and I would like to wish you well for future."**

The letter of appointment dated 01.09.2003 was for appointment to Staff4U Ltd as cleaning staff. Clause 7.2 stated, **"Nothing in this agreement shall prejudice the right of either party to terminate the contract summarily for lawful cause."**

The statement of response was filed on 31.10.2012 through Lumumba Mumma & Kaluma Advocates. The respondent subsequently changed its advocates to K'Bahati & Company Advocates. The respondent prayed that suit be dismissed with costs upon the following grounds:

- a) The claimant stopped being the respondent's employee on 01.09.2003 when he signed a contract of service with Staff4U Ltd.
- b) It is Staff4U that terminated his employment as per the letter dated 01.06.2011.
- c) For the period the claimant served the respondent from 2000 – 2003 the respondent in good faith decided to pay the claimant 15 days for each year served amounting to Kshs.115, 938.00 less tax giving a net of Kshs.86, 766.00. The claimant declined to take the cash saying that it was too little.

On 26.04.2018 Court granted the claimant's application to amend the memorandum of claim, to among other amendments, enjoin Staff4U

Ltd and the Court ordered that the amended memorandum of claim be filed and served by close of 04.05.2018 together with summons. There is no evidence that the claimant complied with the orders and the Court will determine the suit based on the initial memorandum of claim and response (including as amended).

The Court has considered the pleadings, the evidence and the material on record and makes the following findings on the matter in dispute.

**First**, the Court returns that the prayers for annual leave and house allowance are continuing injuries as alleged over the period of service from January 2000 and ceasing at termination on 01.06.2011. The suit was filed on 05.09.2012 long after the lapsing of 12 months of limitation from cessation of the continuing injury as per section 90 of the Employment Act, 2007. The prayers in that regard will fail as they were time barred.

**Second**, the letter of termination thanked the claimant for his dedication and commitment while working for DHL contract through Staff 4 U Ltd. Further the claimant's payslip filed for the respondent for July 2011 is written "**Staff 4 U Ltd – DHL Cleaners Nairobi**". The termination letter advised that respondent and FMS would directly contact the claimant regarding duties under the new management. The Court has considered that evidence and returns that the respondent and Staff 4 U Ltd had been the joint employers of the claimant as at the time of termination. Further while terminating the employment, the letter hinted to such continued joint employers but now being the respondent and FMS. The Court finds that respondent and Staff 4 U Ltd were the joint employers at all material time.

The respondent computed and offered to pay the terminal dues of **Kshs. 115, 938.00** calculated along the provisions of section 40 of the Employment Act, 2007 consequential to redundancy as was the case in the present case. The claimant was entitled and is awarded accordingly.

The Court considers that the claimant was not prepared for the redundancy as per section 40 of the Employment Act, 2007. In particular it was not explained to the labour officer and the claimant by prescribed notice the extent and nature of the redundancy. The Court has considered the claimant's long service, which he never contributed to its termination, he was willing to continue in the service, and further the aggravating factor that the claimant was not prepared at all. The Court awards him maximum compensation for unfair termination **Kshs. 229, 200.00** as prayed for and under section 49 of the Act.

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

- a) Payment of **Kshs.345, 138.00** (less PAYE) payable by 15.12.2018 failing interest to run at Court rates from the date of judgment till full payment.
- b) Payment of costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 16<sup>th</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**