



**REPUBLIC OF KENYA**

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

**CAUSE NO.2093 OF 2014**

**JOSEPH MUMALI WANGA..... CLAIMANT**

**- VERSUS -**

**BLESSED T.C WORLD-CLASS SPARES LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 2<sup>nd</sup> November, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 21.11.2014 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant's dismissal from employment was unlawful and unfair.
- b. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c. An order for the respondent to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs.399, 166.00 (being one month pay in lieu of notice Kshs.13, 202.00; payment in lieu of annual leave 2013 – 2014 Kshs. 13, 202.00; prorata annual leave for February to September 2014 being 8 months Kshs.8, 801.00; service gratuity for one year completed year of service Kshs. 6, 601.00; pay for untaken public holidays throughout service being 10 days Kshs. 6, 601.00; salary underpayment per minimum statutory wages Kshs. 164, 040.00; house allowance throughout service Kshs. 39, 606.00; and damages for unfair termination Kshs. 158, 424.00.)
- d. Interest on (c) above from the date of filing suit till full payment.
- e. Costs of the suit plus interest thereon.

The memorandum of defence was filed on 14.01.15 through A.G. Opiyo & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. On 05.09.2016 the respondent changed its advocates to Maina Makome & Company Advocates.

The claimant's case is that the respondent employed him as a general worker effective January 2013 at Kshs. 5000.00 per month which was below the minimum statutory wage. The claimant's further case is that on 02.09.2014 some motor vehicle spare parts were reported to have been found hidden near the respondent's shop and were suspected stolen from that shop. The claimant states that the respondent's director asked him to admit that he had stolen the parts but the claimant declined as he says, he had done nothing wrong. On 03.09.2014 the claimant reported at work but found the respondent's director had recruited another person in the claimant's position. Further, in the evening of 03.09.2014 the director summarily dismissed the claimant by asking him not to report at work the following day.

The respondent's case is that the claimant was a casual employee who was dismissed on account of theft.

The **1<sup>st</sup> issue** is whether parties were in employment contract and upon what terms of service. The Court finds that parties are not in dispute that they were in employment contract. Respondent's witness RW testified that the claimant joined the respondent in 2013 and left after 9 months of service; that the claimant left employment on his own after he had stolen the spare parts in issue. RW confirmed that he paid the claimant Kshs.5, 000.00 per month. The Court returns that the claimant was not a casual employee but he was on monthly pay. RW did not mention the exact time the claimant joined in 2013 and did not know the time the claimant's services were terminated. The Court returns that the claimant's evidence was coherent that he joined in January 2013 and left September 2014 upon the termination. The Court returns that there is no reason to doubt the claimant's account.

The **2<sup>nd</sup> issue** for determination is whether the termination was unfair. RW confirmed that the alleged reason was theft and further confirmed that there was no notice and hearing as per section 41 of the Employment Act, 2007. To that extent the Court returns that the termination was

unfair for want of due process. Further the respondent urged that the claimant was dismissed on account of theft but no such conviction was established and the allegation was not reasonable suspicion of theft. To that extent, the Court returns that the respondent failed to establish the valid reason for termination per section 43 of the Act. The Court returns that in absence of a criminal conviction, the respondent could not validly return a finding of theft as the ground for termination. The claimant had served for slightly over a year, he had not contributed to his dismissal and he desired to remain in the employment. To balance justice in the case he is awarded 6 months' salaries in compensation for the unfair termination making Kshs. **Ksh. 30,000.00** under section 49 of the Act.

The **3<sup>rd</sup> issue** is whether the claimant is entitled to other payments as prayed for and the Court makes findings as follows:

- a. The claimant is awarded one month pay in lieu of notice **Kshs.5, 000.00** because as the Court has found he was not given a termination notice.
- b. The claimant is awarded payment in lieu of annual leave 2013 – 2014 **Kshs. 5,000.00**.
- c. The claimant is entitled to prorate annual leave for February to September 2014 being 8 months **Kshs3, 333.30**.
- d. The claimant was not a member of NSSF and is awarded service gratuity for one completed year of service **Kshs. 5,000.00**.
- e. The RW testified the claimant worked for 6 days per week. There is no reason to doubt that position and the claimant is not awarded pay for untaken public holidays throughout service being 10 days Kshs. 6, 601.00. In any event the 10 days of holiday were not established by evidence.
- f. The claimant prays for salary underpayment per minimum statutory wages Kshs. 164, 040.00; and house allowance throughout service Kshs. 39, 606.00. The claimant gave no evidence or submissions to justify the figures as claimed. Further the claimant did not cite the specific minimum wage order under which the claim for underpayment and house allowance were claimed. The claims and prayers are declined as not justified.

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

- a. The declaration that the termination of the claimant's employment by the respondent was unfair.
- b. The respondent to pay the claimant a sum of **Kshs.48, 333.30** by 15.12.2018 failing interest to be payable at Court rates from the date of this judgment till full payment.
- c. The respondent to pay costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 2<sup>nd</sup> November, 2018**.

**BYRAM ONGAYA**

**JUDGE**