



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2194 OF 2017

EMMANUEL NATO WAKHUNGU.....CLAIMANT

- VERSUS -

TOSHA PETROLEUM KENYA LIMITED...RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 20th December, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 03.11.2017 through Nyabena & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant's services was unfair, unlawful and wrongful.
- b) The claimant be paid his terminal benefits and compensation as set out in paragraph 11 herein above totalling to Kshs.772, 458.00 being:
 - i) Salary for 5 days worked in September 2017 Kshs.2, 823.00.
 - ii) One month's salary in lieu of notice Kshs. 14, 680.00.
 - iii) Leave pay for one year 10 months in 2015 and 2016 Kshs. 11, 857.00.
 - iv) House allowance 15% of basic pay for 22 months Kshs. 48, 444.00.
 - v) Overtime 8 hours over all period served of 22 months Kshs. 447, 321.60.
 - vi) Public holidays being 10 days worked and not paid Kshs. 11, 292.00.
 - vii) A certificate of service.
 - viii) 12 months' compensation for wrongful dismissal 14, 680.00 x 12 Kshs. 176, 160.00.
- c) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice in this matter.
- d) The respondent to pay costs of the claim and all attendant costs.
- e) Interest on the above at Court rates.

The reply to the statement of claim was filed on 27.04.2018 through Sagana, Biriq & Company Advocates. The respondent prayed that the claim be dismissed with costs. The claimant filed a reply to the memorandum of response on 24.05.2018.

There is no dispute that the respondent employed the claimant as a pump attendant. The claimant was initially employed to serve at the respondent's Kangemi Service Station and later was transferred to the respondent's Kitengela Service Station.

The **1st issue** for determination is whether the claimant's termination was unfair. The claimant's account was that he was employed by the respondent in November 2015 as a pump attendant at Kshs. 14, 680.00 per month. He was deployed to the Kitengela station in April 2017.

He testified that he left employment on 05.09.2017 whereby on the previous day he had been on night shift and on 05.09.2017 he was on day shift. On 05.09.2017 his manager summoned him and told him to leave because he had been terminated. The manager was called Mohammed Hafif Sheikh. He surrendered the day's revenues in his possession and left. His evidence was that he was not given a reason for his termination. He denied that he absconded from duty when the respondent asked him to provide a guarantor and as urged for the respondent. It was his case that at initial appointment he provided a guarantor and thereafter he was not asked to provide a guarantor so that the respondent's letters exhibited and purporting to ask him to provide a guarantor had never been delivered to him because he had seen them in Court.

The respondent's witness (RW) was Mohammed Hafif Sheikh who at the material time worked at the respondent's Kitengela station but as at hearing he had been deployed to the Rongai Station. RW's evidence was that the claimant was terminated from employment when he failed to provide a guarantor in view of the fact that he was handling revenues and it was policy that the claimant provides the guarantor.

RW had no information that the claimant had previously worked in Kanagemi.

The Court finds that the respondent operated a redeployment policy just like RW confirmed that he had been redeployed from Kitengela to Rongai. The Court returns that on a balance of probability, the claimant was employed in November 2015 and deployed to Kitengela in April 2015. Further the Court returns that the employment was continuing and the claimant had served at Kitengela Station from April 2017 to 05.09.2017 and throughout that period he had been handling the revenues. The respondent offered no reasonable explanation why for all that time the claimant could have handled the revenue without complying with the alleged policy on provision of a guarantor. The Court returns that the two letters of 02.06.2017 and 04.09.2017 were not genuine as they were not shown to have been delivered to the claimant. The Court finds that it was therefore credible evidence that the claimant must have provided a guarantor at the time of his initial appointment at the Wanyiaki Way Kangemi Station in 2015 or, that the guarantor was not needed at all. The Court further returns that the claimant was unfairly terminated on 05.09.2017 when RW told him to leave and without assigning a reason. The termination was unfair for want of a genuine reason as per sections 43, 45, and 47(5) of the Employment Act, 2007.

The claimant had served for about 22 months, he desired to continue in employment and he did not contribute to his termination. The respondent suddenly terminated the employment without a reason. The mitigating factor is that the claimant had been in the respondent's service for a considerably shorter term of less than 2 years. The Court returns that in view of those factors, under section 49 of the Act an award of 8 months' salaries at Kshs. 14, 680.00 making **Kshs. 117, 440.00** will meet the ends of justice in the case.

The **2nd issue** for determination is whether the claimant was entitled to the other remedies as prayed for. The Court makes findings as follows:

- a) The claimant was dismissed effective 05.09.2017 and the Court returns that the claimant is entitled to salary for 5 days worked in September 2017 **Kshs. 2, 823.00**.
- b) The claimant was dismissed abruptly and is entitled to one month's salary in lieu of notice **Kshs. 14, 680.00** under section 35 of the Act.
- c) There was no evidence that the claimant had been given leave per section 28 of the Act and the Court returns that he is entitled to leave pay for one year 10 months in 2015 and 2016 **Kshs. 11, 857.00**.
- d) The claimant did not establish the contractual or statutory basis for house allowance 15% of basic pay for 22 months Kshs. 48, 444.00 and the prayer will fail and the Court considers that the parties agreed upon a consolidated pay inclusive the house allowance.
- e) The claimant prayed for overtime 8 hours over all period served of 22 months Kshs. 447, 321.60. RW was coherent that the claimant served on alternate night and day shifts for 5 days per week being 5.00pm to 7.00am then 8.00am to 4.30am. The claimant on his part was speculative that he worked on night shift only from 4.00pm to 8.00am and that sometimes, he delayed to check out. The claimant further testified that he was denied rest days but there was no claim on rest days. The Court finds that on a balance of probability the claimant worked on alternate night and day shift with 2 days' off after every 5 days of unbroken service. The claims and prayers for overtime and public holidays will fail. The Court has further considered that while making claims for the entire period of service, the claimant gave no evidence on his shifts and working hours at the Kangemi Station. The prayers will fail.
- f) The claimant is entitled to a certificate of service per section 51 of the Act.

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

- 1) The declaration that the termination of the claimant's contract of service on 05.09.2017 by the respondent was unfair.
- 2) The respondent to pay the claimant a sum of **Kshs.146, 800.00** by 31.01.2019 failing interest to be paid thereon at Court rates from the date of this judgment till full payment.
- 3) The respondent to deliver the claimant's certificate of service by 31.12.2018.
- 4) The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday 20th December, 2018.

BYRAM ONGAYA

JUDGE