



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 164 OF 2015**

**JOASH NYAKUNDI.....CLAIMANT**

**-VERSUS-**

**WARIDI LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 11.02.2015 through Nchogu, Omwanza & Nyasimi Advocates. The claimant prayed for judgment against the respondent for:

- a. General damages for pain and suffering.
- b. Outstanding salary for March 2013 of Kshs.9, 865.85.
- c. Annual leave Kshs.9, 865.00.
- d. Damages for wrongful and unfair termination of employment contract as per section 49 and 50 of the Employment Act, Kshs.118, 390.20.
- e. Underpayments Kshs.49,365.35.
- f. A declaration that the termination of the contract between the claimant and the respondent is and remains unlawful, therefore null and void.
- g. Certificate of service.
- h. Costs of the cause.
- i. Interest on (a) to (f) above.
- j. Any other relief the Honourable Court may deem fit and just to award.

The claimant's case is that he was employed by the respondent on 07.12.2011 on a seasonal contract as a grader. The contract of employment dated 12.01.2012 is exhibited. The agreed basic monthly pay was Kshs.4, 665.00 and a house allowance of Kshs 1,800.00 per month. The contract provides that it was for 6 months from 12.01.2012 to 12.07.2012. The claimant has pleaded as follows:

- a. The seasonal contract lapsed by effluxion of the agreed time and the respondent employed him on permanent and pensionable terms as a grader at a monthly wage of Kshs. 6,537.00.
- b. The claimant worked diligently until 03.04.2013 when the respondent unfairly and unlawfully terminated the contract of employment without giving reasons.
- c. On 05.10.2012 the claimant injured his leg while trying to load garbage on a trailer truck when some suspended iron sheets cut his

leg. The claimant was taken to the respondent's first aid office but it was locked. He tied the bleeding area with some piece of cloth and later with bandage on his way home. The following day he was attended to by the respondent's nurse at the first aid office and given medication. On 23.10.2012 the pain worsened and the claimant was referred to Kitengela Medical Centre where he was admitted and discharged on 20.10.2012.

d. The claimant thereafter reported on duty and the respondent's nurse gave him three days sick off. He resumed work but he had not recovered and was again admitted at hospital on 09.12.2012.

e. The claimant resumed work on 11.12.2012 with the doctor's letter recommending work which would engage his legs less often but which advisory was not complied with so that he was not deployed accordingly but was given a 21 days' sick leave and advised by the Production Manager that transfer forms would be made available when he resumed work.

f. On 12.02.2013 he reported to the Human Resource Manager for appropriate deployment but the Manager shouted at him and told him to wait outside until he would be called but he was not called at all.

g. On 23.03.2013 the claimant was telephoned and summoned to collect the termination letter and when he reported the same day and a day after, the letter was not ready. On 03.04.2013 he went back and was given a notice pay of Kshs.6, 537.00 but no termination letter and told that his services were no longer required. The claimant concluded that he had been wrongfully, unfairly and unlawfully terminated by the respondent. It was abrupt and without a notice or a hearing and due process. The salary for March 2013 was not paid.

The respondent filed on 12.05.2015 the reply to the memorandum of claim and counterclaim through Sichangi Partners Advocates.

The respondent has pleaded as follows:

a. The employment was on 12.01.2012 and upon the lapsing of the seasonal employment as a grader the contract was extended by letter. The extension letter did not appoint the claimant to permanent and pensionable terms. The extension was for the term of 7 months from 01.08.2012 to March 2013.

b. The claimant fell sick and was given a sick leave from 18.12.2012 to 07.01.2013 and the illness was not work related. He was to resume duty on 08.01.2013 but failed to do so and was absent from duty for 1.5 months.

c. The claimant by contract was entitled to sick leave upon production of a certified letter of sickness signed by a medical practitioner but the claimant failed to provide such evidence.

d. The claimant never reported about his injured leg at the respondent's first aid office and the respondent's nurse never referred the claimant to go to hospital as alleged for the claimant. Further the respondent admitted that the claimant was admitted at Kitengela Medical Centre on 23.11.2012 and discharged on 09.11.2012.

e. The right to be heard was not given because it was not provided for in the contract of service. The claimant's employment was lawfully terminated and he was duly compensated.

f. The respondent prayed that the suit be dismissed with costs and for any other or further relief the Honourable Court may deem fit and just to grant.

g. The Court observes that the respondent did not in fact make a counterclaim as was purported.

The hearing notice dated 24.06.2019 was served upon the respondent's counsel on 24.06.2019 but the respondent and its advocate failed to attend the hearing of the suit on 18.11.2019. The claimant testified to support his case by relying on his witness statement filed on 11.05.2018.

The respondent failed to file and serve the final submissions. The claimant filed and served the final submissions. The Court has considered the material on record and makes findings as follows.

1. The claim for alleged injuries was to be pursued in accordance with the Work Injury Benefits Act, 2007. In that regard and in view of section 16 of that Act, the jurisdiction of the Court for the alleged injury claim has not accrued.

2. The claimant was employed by the contract dated 12.01.2012 which lapsed on 12.07.2012. The respondent has exhibited the letter dated 31.07.2012 which states that due to unsatisfactory performance, the probationary period had been extended for 7 months effective 01.08.2012 and the other terms of service remained in place. The Court returns that the claimant has not disputed the validity of that letter and after the initial contract lapsed on 12.07.2012, the claimant continued to serve on probationary terms until March 2013.

3. On 23.03.2013 the claimant was summoned to pick the termination letter but it was not ready. The letter was subsequently delivered to him on 03.04.2013. The Court returns that the termination was on 03.04.2013 and in absence of any other evidence, the claimant is entitled to pay for March 2013 as prayed for making **Kshs.6, 537.00**. He is also awarded **Kshs.6, 537.00** pay in lieu of accrued annual leave per section 28 of the Employment Act, 2007. The Court further returns that the notice pay was given and in the circumstances of the case, the Court returns that the notice pay was sufficient. The court has considered that the claimant had been on sick leave for many days and on full payment and in view of the prolonged sick leave, the respondent was entitled to terminate

the relationship consequential to the lapsing of the probationary service. The Court finds that the claimant has therefore failed to establish a case for unfair termination and compensation under section 49 of the Employment Act, 2007. The claimant has **cited Zadarack Oyaro Achoki –Versus- Kenya Railways Corporation [2018]eKLR**, where the Court held that parties to a contract of service need to agree upon the extension of the probationary term as per section 42(2) of the Employment Act, 2007. The Court finds that the holding is the position but in the instant case the claimant pleaded and moved the misleading case that he had been emplaced on permanent and pensionable service upon expiry of the initial 6 months service and further in his pleadings he did not set out therefore to dispute the validity of the extension of the probationary service.

4. The suit was filed on 11.02.2015. The termination was on 03.04.2013. The Court finds that the prayers for underpayment and house allowance were continuing injuries which ceased on the date of termination. The suit was filed long after the lapsing of the 12 months of limitation for such cause of action under section 90 of the Act. The claims and the prayers will therefore fail accordingly.

5. The Court returns that the claimant is entitled to the certificate of service per section 51 of the Act and to costs of the suit.

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

- a. Payment of **Kshs.13, 074.00** by 15.01.2020 failing interest to be payable there on at Court rates from the date of filing the suit till full payment.
- b. The respondent to deliver the certificate of service by 15.01.2020.
- c. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Thursday, 19th December, 2019**.

**BYRAM ONGAYA**

**JUDGE**