



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 266 OF 2013

LOREKAI LOKOSIO.....CLAIMANT

- VERSUS -

SHOMPOLE GROUP RANCH.....RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 27.02.2013 through S.M. Kitonga & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) One month salary in lieu of notice Kshs.15, 000.00.
- b) Annual leave of the year 2010 Kshs. 10, 000.00.
- c) Service charge for 4 years Kshs. 30, 000.00.
- d) Salary arrears for 9 months 135, 000.00.
- e) Unwarranted salary deductions Kshs.72, 000.00.
- f) Costs of the suit.
- g) Interest at Court rates.
- h) Any other relief that the Honourable Court may deem fit to grant.

The statement of defence was filed on 12.03.2014 through Gachanja & Company Advocates. The respondent later changed its advocates to Masika & Koross Advocates. The respondent prayed that the claimant's suit should be dismissed with costs and interest on costs. The respondent subsequently filed a response and Counterclaim on 19.06.2018 and prayed for dismissal of the claimant's suit and prayed for the claimant to pay the respondent a sum of Kshs. 653, 500.00 being the cost of spare-parts and repairs done on motor vehicle assigned to the claimant KAP 184 Z being for alternator Kshs.150,000.00; fun belt Kshs. 3, 500.00; injector pump Kshs. 200, 000.00; and general repairs Kshs. 300,000.00; damages for inconveniences and alternate transport costs as a result of the vehicle being grounded; costs of the suit and interest; and such other or further relief as the Honourable Court may deem just to grant.

The claimant filed on 09.07.2018 the reply to respondent's response and counterclaim. The claimant prayed that the counterclaim be dismissed with costs.

The respondent has submitted that it is not in dispute that it employed the claimant as a driver effective 08.11.2007. The evidence is that the employment ended on 21.08.2012. The claimant's employment was terminated without notice. The evidence by the claimant was that he was told that the respondent was experiencing financial difficulties and he would be recalled later but he was never recalled.

The only issue for determination is whether parties are entitled to the remedies as prayed for.

First, the Court returns that the counterclaim must fail. The respondent had not established that the claimant is liable for the replacement of the spare parts and the repairs as was urged for the claimant. In any event it is evident that the respondent was in a difficult financial time manifested in the admitted salary arrears for 9 months clearly suggesting that the respondent may not have had funds to keep the motor

vehicle maintained as was its obligation to do. There was no evidence that there had been a grievance or dispute or disciplinary action against the claimant about the matters in the counterclaim. Further the claims arise out of the claimant's contract of service with the respondent. The contract of service lapsed on 21.08.2012 and the counterclaim was filed on 19.06.2018. The Court returns that the 3 years for the limitation of the cause of action under section 90 of the Employment Act, 2007 had lapsed on or about 21.08.2015 so that the counterclaims and prayers were time barred. They will fail accordingly.

Second is whether the claimant is entitled to the prayers made. The Court returns as follows:

- a) The termination was abrupt and the Court returns that the claimant is entitled to one month salary in lieu of notice **Kshs.15, 000.00** as per section 35 of the Act.
- b) There was no evidence that the claimant was given annual leave for 2010 and is awarded annual leave of the year 2010 **Kshs. 10, 000.00** under section 28 of the Act.
- c) The claimant prayed for service charge for 4 years **Kshs. 30, 000.00**. It is submitted that the claim is for service pay at 15 days worked for each of the 4 years' service. The evidence was that the claimant was not a member of NSSF and parties had no alternative arrangements for separation benefits or pension. In any event the separation was in the nature of redundancy so that the claimant would be entitled to a similar pay under section 40 of the Act in severance pay. The claim is found reasonable and justified and the Court awards the claimant accordingly.
- d) The respondent admitted the salary arrears for 9 months **Kshs.135, 000.00** and the claimant is awarded accordingly.
- e) The claimant prayed for unwarranted salary deductions **Kshs.72, 000.00**. There is no reason to doubt that the claimant was deducted Kshs. 3, 000.00 per month accumulating to the claim now prayed for. The respondent offered no evidence to show that contrary to the claim the deduction had not been effected. The Court has noted that the claimant handed to the respondent's chairman the letter of 17.11.2010 and on a balance of probability the claimant is entitled as prayed for. In any event the claimant's evidence was that he was paid a monthly salary by signing in a book retained by the respondent. The respondent never disputed that evidence by providing alternative mode of paying the monthly salary. It cannot be said that the claimant failed to prove the claim on a balance of probabilities because in any event there was no reason to doubt the claimant's evidence on the deduction and that he handed to the respondent's chairman, the vice chairman, and the secretary being Joel Karori, Jackson Lelen and Daniel Kirsianto respectively, his letter of 17.11.2010 on the deductions. That was clearly stated in the claimant's witness statement dated 06.07.2018 filed on 09.07.2018 but the respondent failed to call any of the 3 as witnesses to rebut the claimant's clear evidence. Thus the Court returns that the claimant has clearly established the deduction and he is entitled to refund as prayed for.

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

- a) The payment of a sum of **Kshs. 262, 000.00** by 31.01.2019 failing interest to be payable thereon at Court rates from the date of the termination 21.08.2012 till the date of full payment.
- b) The respondent to pay the claimant's costs of the suit.
- c) The dismissal of the counterclaim with costs.

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

BYRAM ONGAYA

JUDGE