



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2241 OF 2017**

**WINFRED KASYOKI WILLIS.....CLAIMANT**

**- VERSUS -**

**MAROO POLYMERS LIMITED....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 14<sup>th</sup> December, 2018)

**JUDGMENT**

The claimants filed the memorandum of claim on 13.11.2017 in person. The claimant prayed for judgment against the respondent for:

- a) Payment of all terminal dues plus the days the claimant has been out of employment when she was getting treatment.
- b) One month notice Kshs. 18, 000.00.
- c) 6 days worked not paid for Kshs. 4, 154.00.
- d) Prorate leave 4 months Kshs. 4, 154. 00.
- e) Annual paid leave one month Kshs. 20, 769.00.
- f) Gratuity or the service pay for 19 years Kshs. 197, 305.00.
- g) Maximum compensation for loss of employment Kshs. 216, 000.00.

The respondent filed the statement of defence on 06.12.2017 through Omangi & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs or the claimant be ordered to return at work.

There is no dispute that the respondent employed the claimant effective 16.04.1998 as a messenger. The claimant worked until 06.06.2017. On that day it is her testimony that she was walking from a toilet (about 1530 hours) at the work place and the son to the managing director asked her to explain where she was coming from. Immediately the claimant stated to him that she was coming from the toilet, the director's son started to abuse her, slapped her, and kicked her until she fell on the ground. The boss then told her to remove her protective gear and to leave the Company. The claimant reported the matter at Industrial Area Police Station and the culprit was arrested and charged in a criminal case. At termination she earned Kshs. 15, 650.00 plus house allowance of Kshs. 2, 350.00 making a gross pay of Kshs. 18, 000.00 per month.

The claimant has pleaded that she was not given a notice or a hearing and sections 41, 43 and 45 of the Employment Act, 2007 were all breached and the termination was unfair.

The claimant's evidence was that after the assault, she was treated at Mama Lucy Kibaki Hospital and a medical examination report as exhibited was prepared.

The respondent's witness (RW) was Ashiv Dinesh Kumar. He denied the claimant's account of the events of 06.06.2017 and stated that effective that date the claimant absconded from duty and the respondent was willing to reengage the claimant back at work as per the reply to the demand letter by the claimant's advocates.

The Court finds that if indeed the claimant had absconded from duty, then it was for the respondent to initiate disciplinary process but which was not done. Further the Court finds that the invitation by the respondent that the claimant should resume duty was inconsistent with the alleged absconding from duty. The Court finds that the claimant was coherent in her pleadings and evidence that she was verbally terminated

from employment on 06.06.2017. She reported the assault to police and the culprit was arrested and criminal charges were preferred against him. There was no due process as per section 41 of the Employment Act, 2007 and there was no established valid reason for the termination as per section 43 of the Act. As pleaded for the claimant, sections 41, 43 and 45 were breached and the termination was unfair. She had served for a very long time of 19 years, she did not contribute to her termination, and she desired to continue in employment. The aggravating factor under section 49 of the Act was that the respondent failed to pay for the days already served and the termination was accompanied with the physical attack and abuse or assault. The Court awards the claimant maximum compensation as prayed for making **Kshs.216, 000.00**. The claimant is also entitled to pay in lieu of notice **Kshs. 18, 000.00** and being as prayed for, and, under section 35 of the Act. She is awarded **Kshs. 4, 154.00** for 6 days worked in June 2017 and not paid for. She had been in employment all along and she is entitled to pro rate pay for annual leave as prayed for **Kshs. 4, 846.00**. The claimant was a member of NSSF and the prayer for service pay or gratuity will fail per section 35(6) of the Act.

The claimant is awarded costs of the suit fixed at **Kshs. 30,000.00**.

In conclusion judgment is hereby entered for the claimant against the respondent for payment of **Kshs.273, 000.00** by 31.01.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

**Signed, dated and delivered in court at Nairobi this Friday 14<sup>th</sup> December, 2018.**

**BYRAM ONGAYA**

**JUDGE**