



**REPUBLIC OF KENYA**

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

**CAUSE NO. 997 OF 2013**

**BEN SHICHENGA SHICHANA.....CLAIMANT**

**VERSUS**

**KIMFAY E.A LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 7<sup>th</sup> December, 2018)

**JUDGMENT**

The claimant filed a memorandum of claim on 02.07.2013 through Isaac S. Mutoka & Company Advocates. The amended memorandum of claim was filed on 18.05.2015. The claimant prayed for:

- a) An order declaring the undated statement of witness and final payment of dues document dated 03.01.2012 signed on 21<sup>st</sup> and 23<sup>rd</sup> February 2012 null and void.
- b) An order to pay Kshs. 565, 525.20 being salary for February 2012 Kshs. 9, 068.00; one month salary in lieu of notice Kshs. 9, 068.00; annual leave for 4 years worked Kshs.51, 097.20; house allowance at 15% of basic pay for period served Kshs. 65, 289.60; compensation for wrongful termination 12 months' gross pay Kshs.125, 138.40; service pay Kshs.25, 000.00 for each of 4 years served Kshs. 100, 000.00; and WIBA compensation 25 % injury Kshs. 205, 525.20.
- c) Exemplary damages.
- d) Costs of the suit.
- e) Interest.
- f) Any other relief the Honourable Court may deem fit.

The respondent's case was based on the amended statement of defence filed on 15.10.2018 through Agimba & Associates Advocates. The respondent prayed that the amended memorandum of claim be dismissed with costs.

It is not in dispute that parties were in a contract of service. The respondent employed the claimant as a general worker earning Kshs. 9, 068.00 per month and effective 04.10.2007. The claimant alleged that the respondent promised to pay house allowance but the respondent denied that allegation.

The claimant worked as a loader for the respondent's truck KAY 732X and deliveries were made in Nairobi Area. He had a clean record of service. On 08.07.2009 he was involved in an accident on Mombasa Road in Nairobi and he suffered three fractures and other injuries. The

claimant was on sick leave for a long time until 02.02.2012 when he wrote to the respondent requesting to resume work on light duty as was prescribed by the doctor on 27.10.2011. The respondent's human resource officer advised the claimant that the request would be considered. On 21.02.2012 the claimant received a telephone call from the respondent's lawyers. The lawyer asked the claimant to collect some document and the claimant complied. It was the claimant's final dues and the lawyer advised the claimant that he was separating with the respondent. The payment was for January 2012 salary Kshs. 9, 068.00; WIBA compensation Kshs. 51, 466.00; and the claimant confirmed that the payments were full and final payments from Kim-Fay East Africa Limited. He further confirmed that he had no further claims against the respondent. The final payment of dues dated 03.01.2012 shows it was signed by the claimant on 23.02.2012. A certificate of service issued in favour of the claimant showed that he worked for the respondent from 04.10.2007 to 31.01.2012 as a loader at a gross pay of Kshs.9, 068.00.

On 23.02.2012 the claimant received a termination notice. The notice was dated 01.01.2012 and it stated that after careful consideration, it was with regret that the respondent was informing the claimant that the respondent had decided to end the claimant's employment effective 31.01.2012. The other notice dated the same date explained that following the road accident on 08.07.2009 and the resultant injury the respondent had catered for the claimant's medical bills and paid his salary for 2 years and it had become clear to the respondent that the claimant could no longer carry out the job that he had initially been employed to perform. In its testimony the respondent's witness stated that the claimant's employment had been terminated on account of ill health.

The **1<sup>st</sup> issue** for determination is whether the termination of the contract of service was unfair. Section 41 of the Employment Act, 2007 applied to termination of the contract on account of ill health. The claimant was entitled to a notice and a hearing as prescribed in section 41 of the Act. The evidence is that such notice and hearing was not given. The Court returns that the claimant was entitled to lament that the termination was unfair.

The claimant prays for 12 months compensation under section 49 of the Act. The Court has considered the factors as enumerated under section 49 on exercise of discretion to award compensation for unfair termination. The claimant says that he was able to perform light duties and he should have continued in employment unless procedurally removed. The Court has considered the mitigating factor that the respondent had provided due medical attendance throughout the two year period of injury and treatment up to termination and discharged its obligations under section 34 of the Act. The Court has considered the further mitigating factor that throughout the sick leave period of over two years the respondent continued to pay the claimant full salary and beyond the minimum period of sick leave under section 35 of the Act. In that consideration the court will balance justice while being alert that after the injury, the claimant will not be able to suitably continue in employment and the injury or ill-health was acquired in the course of duty. The Claimant is awarded 6 months compensation being Kshs.9, 068 x 6 making **Kshs. 54, 408.00**.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other remedies as prayed for and the Court makes findings as follows:

- a) The claimant received the termination notice on 23.02.2012 and in absence of any other material the Court returns that he is entitled to pay up to 23.02.2012 and is awarded **Kshs. 6, 952.10** prorate payment.
- b) The claimant was not accorded due termination notice and is awarded one month salary in lieu of notice **Kshs. 9, 068.00**.
- c) The claim for annual leave for 4 years worked Kshs.51, 097.20 was in the nature of a continuing injury and the Court returns that the claimant is not entitled as prayed because the 12 months of limitation of action under section 90 of the Employment Act, 2007 had lapsed when the suit was instituted. Further the Court has found that the respondent had fully paid the claimant throughout the period of sick leave and the leave was not fully earned as alleged and claimed. The prayer will fail.
- d) The parties agreed on a consolidated gross monthly pay per section 31 of the Act and there was no dispute throughout the service. The Court returns that the claim for house allowance was also a continuing injury that was time barred under 12 months limitation period under section 90 of the Act. The prayer for house allowance at 15% of basic pay for period served Kshs. 65, 289.60 will therefore fail.
- e) There was no justification for service pay Kshs.25, 000.00 for each of 4 years served Kshs. 100, 000.00. The prayer will therefore

fail.

f) As submitted for the respondent the WIBA compensation 25 % injury Kshs. 205, 525.20 was not justified as the claim should be dealt with in accordance with the provisions of the Work Injury Benefits Act, 2007.

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

- a) The declaration that the termination of the contract of service purportedly on account of ill-health was unfair.
- b) The respondent to pay the claimant **Kshs.70, 428.10** by 31.12.2018 failing interest to be paid thereon at Court rates from the date of the judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 7<sup>th</sup> December, 2018.**

**BYRAM ONGAYA**

**JUDGE**