



**REPUBLIC OF KENYA**

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

**CAUSE NO. 58 OF 2016**

**YUSUF JIRMO WARIO.....CLAIMANT**

**-VERSUS-**

**JIANXI ZHOGMEI ENGINEERING**

**CONSTRUCTION COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 5<sup>th</sup> May, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 01.04.2016 through Khan & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination or dismissal process carried out by the respondent against the claimant is unlawful and that during his employment the claimant was not remunerated as required by law.
- b) Payment of Kshs. 1, 595, 389.00 being 2 months' pay in lieu of termination notice Kshs. 43, 000.00; service pay 62, 105.00; 12 months compensation for unfair termination Kshs. 230, 676.00 at Kshs. 19, 233.00 per month; underpayment Kshs. 273, 744.00; pay in lieu of annual leave Kshs. 76, 892.00; unpaid house allowance Kshs. 109, 296.00; due overtime pay Kshs. 799, 676.00.
- c) Costs of the suit.
- d) Any other relief the honourable court may deem fit to grant.

The memorandum of response was filed on 14.09.2016 through Iseme, Kamau & Maema Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant was employed by the respondent from May 2011 to 28.06.2015 as a level and total station operator for construction of upgrading of Marsabit – Turbi Road.

The **1<sup>st</sup> issue** for determination is whether the termination of the claimant's employment was unfair and unlawful. The respondent's case is that the contract of service was for a fixed term lapsing automatically upon completion of the works on upgrading of Marsabit - Turbi Road. The respondent's case is that the project ended in 2015 and thereby terminating the employment contract. In cross examination the claimant admitted that he was employed until the project on Marsabit – Turbi Road was to be completed but as at the time of hearing the case and as at the time of termination on 3.07.2015, the project was on as

the upgrading works had not been completed. The respondent's case is that the project ended in April 2015 and parties separated by agreement. The respondent's witness testified that the project ended in April 2015 when it was handed over to the client. The respondent filed a taking over certificate stating that the project was completed on 20.04.2015.

The court finds that there is no dispute that the employment was for a fixed term ending on completion of the project and further finds that in view of the taking over certificate that the project was completed on 20.04.2015, there would be no reason to doubt that position. The court returns that the respondent has established that the reason for termination was valid per section 43 of the Employment Act, 2007 and the court returns that the termination was not unfair.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The claimant prayed for Kshs. 1, 595, 389.00 being 2 months' pay in lieu of termination notice Kshs. 43, 000.00; service pay 62, 105.00; 12 months compensation for unfair termination Kshs. 230, 676.00 at Kshs. 19, 233.00 per month; underpayment Kshs. 273, 744.00; pay in lieu of annual leave Kshs. 76, 892.00; unpaid house allowance Kshs. 109, 296.00; due overtime pay Kshs. 799, 676.00. The court makes findings as follows:

- a) There is no reason to doubt RW's evidence that the project was in a place without housing so that the respondent provided housing. The prayer on house allowance will therefore fail.
- b) As termination notice was not served and as submitted for the respondent, the claimant is awarded one month pay in lieu of termination notice making **Kshs.19, 240.00** at minimum wage of Kshs. 92.5 per hour for 8 hours per day for 26 days per month.
- c) For the service of 4 years one month, the claimant prays for Kshs. 274, 560.00 for underpayment per alleged prevailing rates for assistant surveyor and as computed in the claimant's submissions. The claimant's submissions have not established the Wage Order under which the claimant was underpaid. The respondent's submission has not been refuted that the Labour Institutions (Building and Construction Industry) (Wages) Order, 2012 prevailed and the monthly wage was 19, 233.00 whereas the claimant was paid Kshs. 22, 348.00 per month. Accordingly the claim for underpayment will fail.
- d) RW admitted that the claimant put in overtime. However, the hours the claimant worked overtime have not been established as there were no submissions in that regard and the prayer will fail.
- e) As the claimant was a member of NSSF, the prayer for service pay will fail in view of the provisions of section 35(6) of the Employment Act, 2007 and the respondent's submissions in that regard.

In conclusion judgment is hereby entered for the parties for:

- a) The respondent to pay the claimant **Kshs.19, 240.00** plus costs of the suit fixed at **Kshs. 20, 000.00** and to pay by 01.06.2017 failing interest to be payable thereon at court rates from the date of this judgment till final payment.
- b) The declaration that the termination of the contract of employment between the parties was not unlawful or unfair.

**Signed, dated and delivered** in court at Nyeri this **Friday, 5<sup>th</sup> May, 2017.**

**BYRAM ONGAYA**

**JUDGE**