



**REPUBLIC OF KENYA**

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

**CAUSE NO. 139 OF 2015**

**SAMUEL WAMBUGU GITONGA.....CLAIMANT**

**VERSUS**

**NYERI COUNTY GOVERNMENT.....RESPONDENT**

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

**JUDGMENT**

The claimant filed the memorandum of claim on 17.08.2015 through Kebuka Wachira & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Salary for September 2014, salary in lieu of notice and in lieu of annual leave making Kshs. 53, 610.00.
- b) Unpaid off days for one year being Kshs. 31, 104, unpaid for 12 public holidays Kshs. 7, 148.00, unpaid overtime for 240 days Kshs. 48, 000.00, and one year service gratuity Kshs. 42, 888.00 making a sum of Kshs. 129, 140.00.
- c) amages for unfair and unlawful termination of employment.
- d) Costs of the claim.
- e) Interest on a, b, c, and d, above at court rates.
- f) Any other relief as the court may deem fit to grant.

The statement of defence was filed on 09.10.2015 through Ndumia Caroline Advocate. The respondent prayed that the claimant's suit be dismissed with costs.

By the letter dated 04.11.2013 the respondent employed the claimant as a cook in the Governor's residence. The appointment was for 4 years with effect from 01.09.2013. On 06.08.2014 the claimant wrote to the respondent stating that he worked from 6.30am or sometimes earlier as requested and checking out at 9.00pm or even sometimes later than that time. Further he had been asked to be on duty in the residence for 2 weeks overnight and without off duty as there was no other employee to change shifts with the claimant. He requested for payment from 01.09.2013 to 06.08.2014.

By the letter dated 24.09.2014, the claimant's employment was terminated effective 26.08.2014. He was to be paid salary and other allowances up to 25.08.2014.

By the letter dated 15.04.2015 the claimant wrote to the respondent demanding his benefits. The claims were set out in the letter. The claimant's advocates issued the demand letter dated 10.06.2015.

The main issue for determination is whether the claimant is entitled to the remedies as prayed for. The court has considered the pleadings, evidence and submissions on record. The findings are as follows:

a) The respondent has submitted that the claimant is entitled to September pay, salary in lieu of notice and pay in lieu of annual leave. The court returns that pay in lieu of notice and in lieu of annual leave is awarded at basic pay Kshs. 11, 370.00 making Kshs.22, 740.00. September pay is awarded at gross pay of Kshs. 17, 870.00. The sum of the award is therefore **Kshs.40, 610.00** accordingly.

b) As admitted by the respondent in the submissions, gratuity is awarded at **Kshs. 42, 888.00** and as prayed for.

c) As submitted for the respondent the claimant is awarded **Kshs. 4, 765.00** being pay for 8 public holidays worked and not paid for.

d) The claimant was dismissed without notice and no reason was advanced. The respondent's action to terminate without notice and retroactively was clearly unfair for want of due process as envisaged in section 45 (2) (c) of the Employment Act, 2007 and, unfair for want of a valid reason per section 43 and 45(2) (a) and (b) of the Act. The claimant had served only about a year of the fixed term contract and he had about 3 years to go. The claimant did not contribute to the termination of the contract and he desired to continue in employment as per the contract of employment. The court has considered the aggravating factor that the respondent repeatedly failed to address the claimant's reasonable and well founded grievances about overtime and other unpaid dues. The court has considered the factors and returns that the claimant is entitled to the maximum 12 months compensation for unfair termination and is awarded **Kshs.214, 440.00** as prayed for under section 49(1) (c) of the Act at Kshs. 17, 870.00 per month.

e) The court finds that as per evidence there is no reason to doubt that the claimant worked overtime for 240 days being **Kshs. 48,000.00**; and for one year he took no off day and he is awarded **Kshs. 31, 104.00** as prayed for. While making that finding the court has considered that the claimant made claims for the pay while he was in service but the respondent made no effort to reply or act fairly in the circumstances. Further the court holds that it was unfair labour practice in contravention of Article 41 of the Constitution for the claimant to have worked, as per his testimony, without offs or rest days and on overtime, and, to for the respondent to have failed to compensate him accordingly.

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

a) The respondent to pay the claimant **Kshs.381, 807.00** by 01.07.2017 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

b) The respondent to pay the claimant's costs of the suit.

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

**BYRAM ONGAYA**

**JUDGE**