



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 132 OF 2016

DAVID GAI THO NDUNGU.....CLAIMANT

VERSUS

TIMAF LOR LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 16th June, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 08.06.2016 through C.M King'ori Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant's dismissal from the employment with the respondents was unfair and unlawful.
- b. General damages for unlawful or unfair dismissal.
- c. Costs of the suit and interest.

Despite service the respondent failed to enter appearance, to file a response and to attend all steps in the suit including the hearing.

The claimant opted to rely on the pleading and other material on record and filed final submissions.

By a contract of employment dated 24.10.2014, the claimant was employed by the respondent from 24.10.2014 to 04.11.2015 as a flower or maintenance attendant. The contract was renewable. The gross pay was Kshs.9, 008.00 per month.

The claimant's case is that the employment was subject to satisfactory medical report by a qualified health practitioner. Further, during the employment the claimant developed health complications diagnosed to be as a result of organophosphate poisoning due to improper working conditions. The claimant's case was that the respondent failed to provide him with protective clothing considering that in his work environment he was exposed to a lot of chemicals and dust.

The claimant was admitted at the Nanyuki Teaching and Referral Hospital from 14.09.2015 to 17.09.2015 due to organophosphate poisoning and by the letter dated 29.09.2015, Dr. Mercy Kamau, a medical officer at the hospital, recommended that the claimant works in an environment where he is not in contact with organophosphate containing chemicals.

The claimant stated that he gave the doctor's recommendation to the respondent but the respondent took no action as the claimant continued working in the same environment. Later, the claimant stated that he was summoned by the respondent's human resource office and he was told to sign documents stating that he was fit to continue working in the same environment. He refused to sign the documents and as a result, he received the dismissal letter on 04.11.2015.

The court finds that the dismissal was unfair because it was due to the claimant's valid complaint that was not irresponsible or without foundation as it was based upon clear medical recommendation. The court finds that the reason for termination was unfair under section 46 (h) of the Employment Act, 2007. The court has considered the aggravating factors that the respondent refused to consider and comply with the medical recommendation, had failed to provide protective clothing for the claimant's use per section 6 of the Occupational Health and Safety Act, 2007 and had dismissed the claimant upon an unlawful ground. As submitted for the claimant the dismissal was grossly unfair and the court awards the claimant maximum 12 months' pay under section 49(1) (c) of the Employment Act, 2007 at the last monthly pay of Kshs. 11, 950.00 making **Kshs.143, 400.00**.

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

1. The declaration that the claimant's dismissal from the employment with the respondent was unfair and unlawful.
2. The respondent to pay the claimant **Kshs.143, 400.00** by 01.08.2017 failing interest to be payable thereon at court rates from the date of the suit till full payment.
3. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 16th June, 2017**.

BYRAM ONGAYA

JUDGE