



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 190 OF 2016 CONSOLIDATED WITH CAUSE 191 OF 2016

MORRIS MUTUKU MWEI.....1ST CLAIMANT

JOSEPH LOKINYANG ALIAS JOSEPH LOKINYANG'A.....2ND CLAIMANT

VERSUS

THUTA INVESTMENT COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 14th July, 2017)

JUDGMENT

The claimants filed their respective suits against the respondent. Mwaniki Warima & Company Advocates was appointed to act for the claimants.

The 1st claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's termination was unlawful in that it was done without following laid down procedure.
- b) Payment of Kshs.315, 766.80 as set out in the statement of claim being pay for work on public holidays, house allowance, and compensation for loss of employment.
- c) Costs of the claim.

The 2nd claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's termination was governed by section 40 of the Employment Act, 2007.
- b) Payment of Kshs. 315, 766.80 being pay for work on public holidays, underpayment, house allowance, and severance pay.

The respondent filed statements of response in both suits through Kingori Kariuki & Company Advocates. The respondent prayed that the suits as consolidated be dismissed with costs.

There is no dispute that the respondent employed the claimants as guards.

The **main issue** for determination is whether the termination of the claimants' employment was unfair and whether the claimants are entitled to the remedies as prayed for.

The 1st claimant's employment was terminated on 16.01.2016 partly on account of alleged theft of a transformer at a time the 1st claimant was in charge of supervision of the guards deployed at the scene of the alleged theft. The claimant states that the dismissal was unfair because he was not given a notice and a hearing as envisaged in section 41 of the Employment Act, 2007; so that the allegations were not established as at the time of the termination. The claimant testified that he had been informed about the theft and he had been given a hearing. The court has considered the termination letter and the material on record. The evidence is clear that the 1st claimant's fixed term contract of service was not renewed in view of previous adverse reports such as the case about the transformer. The court finds that the main reason for termination was lapsing of the fixed term and the denial of renewal thereof and not the alleged theft of the transformer. Thus, the court returns that the termination of the 1st claimant's contract of service was not unfair.

As for the other claims, the 1st claimant signed acknowledging receipt of terminal dues and that he had no further claims. That binding disclaimer applies and the other claims will therefore fail. However, it has been established that the respondent unfairly deducted **Kshs. 21, 190.00** from the 1st claimant's terminal dues on account of renovations to the house the respondent had allocated him for residential housing while in the employment. The claimant is entitled to that amount as prayed for within prayer for house allowance.

For the 2nd claimant, he was served the termination notice dated 25.04.2015 conveying that the respondent's operations had reduced so that the claimant was given one month termination notice from 28.04.2015 to 02.06.2015. Thus, the 2nd claimant had served the respondent from 01.10.2008 to 02.06.2015 being 6 years of complete service. The court returns that the respondent substantially complied with section 40 of the Employment Act, 2007 by serving the one month redundancy notice. Thus the court returns that the termination was not unfair. As for the other remedies prayed for the 2nd claimant the court returns as follows:

- a) As the claimant confirmed that the respondent provided the housing accommodation and the court returns that the prayer for house allowance will fail.
- b) The wages paid have not been in dispute and the claimant is entitled to underpayment dues of Kshs.196, 652.00.
- c) The 2nd claimant is further entitled to Kshs. 30,348.00 being severance pay as prayed for.
- d) Claim and prayer for pay on public holidays will fail as sufficient evidence was not provided to justify the same. In particular, the 2nd claimant did not enumerate the public holidays in issue and the applicable rate of pay.
- e) The respondent to pay the 2nd claimant a sum of **Kshs.227, 000.00**.

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

- a) The respondent to pay the 1st claimant **Kshs. 21, 190.00** and the 2nd claimant **Kshs.227, 000.00** by 01.09.2017 failing interest to be payable thereon at court rates from the date of the suits 09.09.2016 till full payment.
- b) The respondent to pay the claimants' costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 14th July, 2017**.

BYRAM ONGAYA

JUDGE