



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

CAUSE NO. 160 OF 2016

JOSEPH WANDERI KAHIGA.....CLAIMANT

VERSUS

NYORO CONSTRUCTION CO. LTD..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 22nd September, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 21.07.2016 through Mwaniki Warima & Company Advocates. The 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 the laid down legal procedure.
- b) Payment of Kshs.242, 800.00 benefits per paragraph 10 being a month's pay in lieu of termination notice Kshs.12, 000.00; 48 rest days Kshs.19, 200.00; 9 public holidays Kshs. 3, 600.00; 12 months' house allowance Kshs.48, 000.00 at Kshs.4, 000.00 per month; underpayment for 26 months at Kshs.6, 500.00 per month Kshs.36, 000.00; and compensation for unfair loss of employment Kshs.124, 000.00.
- c) Costs of the claim.

The claimant's case is that he was employed by the respondent as a night guard sometimes in October 2012. It was alleged that on the night of 12.09.2013 the respondent's diesel was stolen consequence of which the claimant was arrested and charged with the offence of stealing by servant in criminal case no. 299 of 2013 at the Principal Magistrate's Court at Kangema. The claimant was acquitted on 12.09.2014 under section 210 of the Criminal Procedure Code. It is the claimant's case that since his arrest on 12.09.2013 he was not paid his salary or assigned duties and he was therefore constructively dismissed from employment effective 12.09.2013.

The respondent filed the statement of defence on 05.10.2016 through Nderi & Kingati Advocates. The respondents prayed that the claimant's case be dismissed with costs.

The respondent's case is that it employed the claimant in January 2013 and not October 2012. The respondent admits that the claimant was arrested, prosecuted and acquitted as per the claimant's submission. The respondent's further case is as follows:

- a) The claimant was paid all the days worked up to the date of arrest on 12.09.2013.

- b) The claimant's consolidated pay was Kshs.6, 223.60 which was above the minimum statutory wage and therefore claims for house allowance are unfounded.
- c) The claimant worked 8 hours per day and any work on holiday or overtime was compensated with commensurate off days.
- d) After acquittal in the criminal case, the claimant never resumed duty.

To answer the **1st issue** for determination, the court returns that there is no dispute that the claimant's last day at work was on 12.09.2013. The court returns that the claimant was constructively dismissed from employment effective 12.09.2013. The claimant has prayed for payment for rest days, public holidays, house allowance, and underpayment. The court returns that the claims under those headings are in the nature of continuing injuries and the cause of action having accrued on 12.09.2013, under section 90 of the Employment Act, 2007 the 12 months of limitation of actions for suits based on such continuing injuries lapsed on or around 13.09.2014. The suit was filed on 21.07.2016 long after the lapsing of the 12 months of limitation. Accordingly the court returns that the suit based on those claims of continuing injuries was time barred and the related prayers will fail.

To answer the **2nd issue** for determination, the court returns that the claimant was employed by the respondent effective sometimes in October 2012 as per the respondent's letter to the claimant's bank in support of the claimant's application for loan.

To answer the **3rd issue** for determination, the court returns that the respondent did not impose a disciplinary action in view of the alleged claimant's failure to report to work after the acquittal or earlier time after the arrest. To that extent the constructive termination was unfair for want of a valid reason under section 43 of the Employment Act, 2007 and for want of due process under section 41 of the Act. The claimant has established that after the acquittal he reported at work and was thereafter paid Kshs. 6,000.00 for days worked up to 12.09.2013 but was denied resumption of duty. Accordingly the court returns that the claimant did not contribute to his constructive termination.

The court has considered the short period served and the claimant's desire to continue in employment as well as the claimant's predicament associated with the criminal charge for which he was acquitted. The court has also considered that prior to the acquittal but after the arrest the claimant made no effort to resume duty thereby substantially contributing to his termination. The court considers that an award of 2 months' pay for compensation under section 49(1) (c) of the Act for the ensuing and otherwise unfair constructive termination will meet the ends of justice in the present case. The court further awards the claimant a month's pay in lieu of the termination notice. The claimant's last pay was Kshs.9, 000.00 per month per the claimant's and respondent's testimony and he is awarded **Kshs. 27,000.00** accordingly.

Balancing justice in the case, the claimant is awarded partial costs of the suit fixed at **Kshs.20, 000.00**.

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

- a) The declaration that the termination of the claimant's employment was constructive and unfair.
- b) The respondent to pay the claimant **Kshs.47, 000.00** by 01.11.2017 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

Signed, dated and delivered in court at Nyeri this **Friday, 22nd September, 2017**.

BYRAM ONGAYA

JUDGE