

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 71 OF 2017

STEPHEN KITHUKA KAMENE.....CLAIMANT

VERSUS

LAUREN INTERNATIONAL FLOWERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 8th December, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 14.03.2017 through Mwaura Kamau & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's dismissal from his employment was wrong, unfair and unlawful.
- b) The respondent to pay the claimant Kshs. 461, 614.29 being Kshs.135, 961.200 for 12 months' compensation; underpayment of Kshs.117, 671.45 for May 2013 to April 2015; underpayment of Kshs.21, 720.04 for May 2015 to 24.10.2015; prorated leave for 4 months Kshs.2, 643.69; overtime Kshs.139, 435.02 plus Kshs.27, 187.02; and service gratuity at 15 days' pay per year for 3 years' service Kshs. 16, 995.15.

The response to the memorandum of claim was filed on 16.05.2017 through Murage Juma & Company Advocates. The respondent prayed that the suit be dismissed with costs.

There is no dispute that the respondent employed the claimant as a security guard from June 2012 to September 2015. The claimant's employment was terminated by the letter dated 25.09.2015. The letter conveyed that the claimant's services with the respondent would cease on 24.10.2015 due to prevailing financial constraints entailing low production. The letter stated that it served as the one month notice stipulated in the law.

First, the court returns that the claims for under payment, overtime and work on public holidays were of a continuing nature. The termination was alleged by the claimant to have been on 24.10.2015 and the suit was filed on 14.03.2017; long after the lapsing of 12 months as the prescribed time of limitation under section 90 of the Employment Act, 2007. The prayers in that regard will fail as the cause of action was time barred.

Second, the court returns that the prayer for gratuity will fail in view of section 35(6) of the Act and because the claimant was a member of NSSF. It was alleged that some NSSF remittances had not been made and the court returns that the same be pursued under the relevant legislation. In any event the same were not specifically pleaded.

Third, the court returns that the claimant's employment was terminated on account of redundancy due to the low production and financial constraints. Section 40 of the Employment Act, 2007 applied. The court finds that the claimant was entitled to severance pay being 15 days for each year served as provided under the section making **Kshs. 16, 995.15**. The court has considered the exhibits by the respondent on leave taken by the claimant and returns that the claimant is not entitled to pay in lieu of annual leave. Indeed, the exhibit shows that as at termination the claimant had been granted 21 days of leave from 01.09.2015

to 24.09.2015. As for claims of unfair termination, the court returns that the respondent failed to notify the labour officer as required under section 40 of the Act. The respondent's witness stated that the respondent was removing 7 security guards and retaining 17. The court returns that the criteria in section 40 (1) (c) of the Employment Act, 2007 including regard to seniority, ability and reliability of the affected staff has not been shown to have been invoked in identifying the claimant for redundancy. Accordingly, the court returns that the procedure for terminating the contract of employment was unfair as it contravened cited provisions of section 40 of the Act. The court has considered the claimant's 3 years' unbroken service, that the claimant did not contribute to his termination and that he desired to continue in employment. Thus, he is awarded **Kshs.135, 961.20** being 12 months' compensation as prayed for.

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

- a) The declaration that the termination of the contract of employment by the respondent was unfair or unlawful.
- b) The respondent to pay the claimant **Kshs.152, 956.35** by 15. 01.2018 failing interest to be payable thereon at court rates from the date of the judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 8th December, 2017.**

BYRAM ONGAYA

JUDGE