



**REPUBLIC OF KENYA**

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

**CAUSE NO. 46 OF 2017**

**SILAS MASIKA OUMA.....CLAIMANT**

**VERSUS**

**TEZO QUARIES LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday, 19<sup>th</sup> October, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 24.02.2017 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) A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c) An order for the respondent to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs.102, 500.00 being salary in lieu of notice Kshs. 12,000.00; pro rate leave for 7 months served Kshs.4, 900.00; pay for work on public holidays Kshs. 4,400.00, pay for work on rest days Kshs.22, 400.00; and pay for 4 hours overtime for 7 months worked Kshs.58, 800.00.
- d) Interest on (c) above from the date of filing suit till payment thereof.
- e) Cost of the suit.
- f) The respondent to pay the claimant's costs with interest.

The statement of response was filed on 19.06.2017 through Ajaa Olubayi & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs as unfounded, baseless and too remote in law.

The **1<sup>st</sup> issue** for determination is whether there was an employer – employee relationship between the parties. The claimant testified that he was employed by the respondent as a night guard effective 16.01.2016. The employment was oral and he was paid Kshs.12, 000.00 per month as per the muster role. He stated that he signed a check-in and check-out register. The claimant further testified that on 26.06.2016 he was attacked by some thugs while on duty and he sustained serious physical injuries. By that reason, the claimant testified that he was not able to work for a period of one month. It was his

evidence that on 01.08.2016 he reported back on duty after recovering from the injuries and the respondent's manager conveyed to the claimant that the respondent had decided that the claimant should not be assigned any duties until further notice. The claimant testified that he thereafter continued to report on duty for a week but was not assigned duty. The claimant testified that on 10.08.2016, the respondent's manager informed him that he had been terminated from employment.

The respondent stated in the response that there had been no employer-employee relationship. At paragraph 5, the respondent stated in the response that the claimant had been employed on *ad hoc* basis as a watchman until 26.06.2016 when the claimant was attacked by thugs and the claimant sustained injuries at Ndarugu Quarry where several companies and individuals undertook quarrying enterprise. The respondent stated that the claimant had voluntarily left employment on 26.06.2016. The respondent further pleaded that the claimant had filed Civil Suit No. 22 of 2016 at the Chief Magistrate's Court at Gatundu against the respondent to claim for compensation in view of the injuries.

The respondent did not attend the hearing and did not call a witness in the present suit. The claimant was directed to file and submissions and upon that effecting that service the respondent filed an application to set aside the *ex- parte* proceedings of the hearing. The application was fixed for hearing but the respondent failed to attend court and the application was dismissed for want of attendance.

The court has considered the material on record and in particular, the claimant's evidence. The court returns that in absence of any other material on record, the claimant has established that he was employed by the respondent as a night guard.

The 2<sup>nd</sup> issue for determination is whether the claimant is entitled to the remedies as prayed for. The court returns as follows:

a) The court returns that the respondent dismissed the claimant without due process as per section 41 of the Employment Act, 2007 and the dismissal was without a valid reason as envisaged in section 43 of the Act. The court has considered the period served being 7 months and returns that the claimant is awarded **Kshs. 36,000.00** at 3 months' salaries of Kshs.12, 000.00 per month.

b) The claimant prayed for salary in lieu of notice being **Kshs. 12,000.00** and the same is hereby allowed. The pro rate leave for 7 months served Kshs.4, 900.00 is declined as leave had not accrued as at termination in view of section 28(1) of the Employment Act, 2007. The court returns that pay for work on public holidays Kshs. 4,400.00, pay for work on rest days Kshs.22, 400.00, and pay for 4 hours overtime for 7 months worked Kshs.58, 800.00 was not proved by way of evidence and the same are declined. In particular the claimant referred to a check-in and check-out register but which was not filed or produced to establish the claims; and even if the register was in the respondent's possession, no notice to produce had been served.

c) The respondent will pay costs of the suit.

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

a) Payment of **Kshs.48, 000.00** by 01.12.2017 failing interest to be paid at court rates from the date of this judgment till full payment.

b) The respondent to pay costs of the suit.

**Signed, dated and delivered** in court at Nyeri this **Thursday, 19<sup>th</sup> October, 2017.**

**BYRAM ONGAYA**

**JUDGE**