



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 42 OF 2017

HESBON MAINA.....CLAIMANT

VERSUS

BENDOR ESTATES LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 24th November, 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 employment was wrong, unfair and unlawful.
- b) A declaration and order that the claimant is entitled to payment of his terminal dues and compensatory damages totalling to Kshs. 367, 832.59 under the headings of 12 months' compensation, gratuity, underpayments, and house allowance.
- c) Interest and costs.

The reply to the memorandum of claim and counterclaim was filed on 21.04.2017 through Ndungu Njoroge & Company Advocates. The respondent prayed for dismissal of the claimant's case with costs and for judgment against the claimant for:

- a) Kshs.5, 535.00 being payment of one month salary in lieu of notice.
- b) Costs of the suit.
- c) Interest.

The claimant's case is that he worked for the respondent for 8 years from 2007 to 2015 as a general worker. His pay was Kshs. 210 per day and later Kshs. 240 per day payable at end month. The record filed for the respondent shows that the claimant had been engaged on renewable annual contracts and as a general worker. The claimant's case is that he was terminated from employment on 31.07.2015. His evidence was that he had suffered injuries while on duty and he needed time to recover. When he resumed duty after recovering from the injuries, he was told that he had been terminated. He was not given a reason for termination or a termination letter. In the meantime he had filed a suit in the Magistrate's Court for compensation in view of the injuries he had sustained while on duty. It was his testimony that the manager known as King'ori had told him that despite his recovery from the injuries, he had been terminated from employment.

The **1st issue** for determination is whether the claimant was terminated from employment and if yes, whether the termination of the contract of employment was unfair. The respondent's evidence was that the claimant brought the letter dated 16.06.2015 from Kandara Sub-county Hospital stating that the claimant could not be able to continue in employment by reason of his medical status. The respondent's witness (RW) also being the farm manager stated that thereafter the claimant failed to report at work and despite the claimant's brother being asked to inform the claimant to resume duty, the claimant never showed up. RW denied that on 31.07.2015 the claimant had gone to see him and RW stated that he was willing to reengage the claimant if the claimant resumed duty. The last pay had been in June 2015. The last date the claimant had been at the respondent's office was on 16.06.2015 when he delivered the letter dated 16.06.2015 to the effect that he could not continue in employment.

The court has considered the evidence. The evidence by RW was that despite the letter of 16.06.2015, the respondent kept on waiting for the claimant to resume duty. The court returns that such expectation was inconsistent with the medical advisory in that letter. Further, there was no evidence that the respondent took out disciplinary action in view of the respondent's alleged position that the claimant never resurfaced after 16.06.2015. The court returns that the respondent verbally terminated the claimant on 31.07.2015 when RW told him that he had been terminated on account of ill-health. The claimant lamented that he had fully recovered and he was entitled to resume duty. The court returns that the respondent failed to accord the claimant a notice and a hearing per section 41 of the Employment Act, 2007 as per the prescribed procedure for a termination on account of ill-health.

The court has taken into account the service of 8 years without a break, that the claimant desired to continue in employment and the claimant did not contribute to his termination. The court awards the claimant 12 months' compensation under section 49(1) (c) of the Employment Act, 2007 making **Kshs.86, 400.00** at Kshs. 7, 200.00 per month. The claimant is further entitled to **Kshs. 7, 200.00** being pay in lieu of the termination notice.

As for the other remedies as prayed for the court returns that the prayers for underpayment and house allowance were based on continuing injury from 2013 and ceasing at termination on 31.07.2015. For such continuing injuries, the claimant's cause of action was limited to 12 months from the date of cessation being on or about 01.08.2016 and as per section 90 of the Employment Act, 2007. Thus the claims will fail. Further, the court returns that the applicable wage order was the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2013 because the claimant was clearly a general worker on a coffee farm. The claimant was properly paid as unskilled employee serving on the coffee farm.

The claimant confirmed that he was a member of the NSSF and the prayer for gratuity will therefore fail as excluded under section 35(6) of the Employment Act, 2007.

To answer the **3rd issue** for determination, the court returns that the termination having been found to have been unfair and the claimant having not resigned or absconded from duty, the counterclaim for pay in lieu of termination notice on the part of the claimant will fail.

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.
- b) The respondent to pay the claimant **Kshs. 93, 600.00** by 15.01.2018 failing interest at court rates to be payable thereon from today 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, 24th November, 2017.**

BYRAM ONGAYA

JUDGE