



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 274 OF 2016

MARY MUKAMI MAINA.....CLAIMANT

VERSUS

BARAGU HOLDINGS LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 24th November, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 14.12.2016 through Mwaura Kamau & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's dismissal from her employment was wrong, unfair, and unlawful.
- b) A declaration that the claimant is entitled to payment of her terminal dues and compensatory damages in the sum of Kshs. 402, 807.08 under the headings of underpayment, pay in lieu of housing, pro rate leave, pay in lieu of annual leave, service gratuity and 12 months' pay in compensation for unfair termination.
- c) Interest and costs of the suit.

The respondent filed on 09.11.2017 the notice of appointment of Wahome Gikonyo & Company Advocates to act in the suit but no statement of response was filed and the respondent did not attend the hearing.

The claimant testified to support his case. He stated that the respondent employed him in 2009 as a general worker performing duties of a gardener and cleaner. He was paid Kshs. 2, 080.00 per month. On 16.11.2014 he reported on duty and he was told by his supervisor known as Naomi that his employment had been terminated because there was no job for him to perform. The respondent's flower enterprise was a going concern and the respondent was still in business as at the time of the hearing of the case. At termination the claimant earned Kshs. 3, 120.00.

To answer the **1st issue** for determination the court returns that the termination was unfair because section 40 of the Employment Act, 2007 on redundancy was not complied with. As the respondent was still in business and the claimant's job was taken up by another employee, the court returns that redundancy was not a genuine reason as envisaged in section 43 of the Act. The court has considered that the claimant did not contribute to his termination and he desired to continue in employment and he is awarded 12 months' compensation under section 49 (1) (c) of the Act at Kshs. 3120 per month making **Kshs.37, 440.00**.

To answer the **2nd issue** for determination being whether the claimant is entitled to the other remedies as prayed for the court makes findings as follows:

- a) As the claimant was a member of NSSF, he is not entitled to gratuity as excluded in section 35(6) of the Act.
- b) The claimant was terminated on 16.11.2014. 12 months prescribed as time of limitation for a continuous injury under section 90 of the Act lapsed on or about 17.11.2015. The suit was filed on 14.12.2016. The court returns that the claims for underpayment, house allowance, and pay in lieu of annual leave were continuing injuries ceasing on 16.11.2014 and the claims and prayers in that regard were time barred.

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 unfair.
- b) The respondent to pay the claimant **Kshs.37, 440.00** by 15.12.2017 failing interest at court rates to be payable from the date of the judgment till full payment.
- c) The respondent to pay costs of the suit fixed at **Kshs. 10, 000.00** only.

Signed, dated and delivered in court at **Nyeri** this **Friday, 24th November, 2017.**

BYRAM ONGAYA

JUDGE