



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

AT NYERI

CAUSE NO. 191 OF 2017

DOMINIC MURITHI NYAGA.....CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 17th November, 2017)

JUDGMENT

The claimant filed the statement of claim on 17.05.2017 through Mugendi Karigi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that he was wrongfully and constructively dismissed from his employment.
- b. One month salary in lieu of notice Kshs.14, 500.00.
- c. Unpaid leave from 2009 to 2016 Kshs. 100,000.00.
- d. Compensation for 12 months Kshs.174, 000.00.
- e. House allowance Kshs. 50,000.00.
- f. Certificate of service.
- g. Costs of the suit.

Despite service the respondent failed to enter appearance, to file a response, and to attend court including on the hearing date.

The claimant testified to support his case. It was his testimony that he was employed by the respondent as a security guard sometimes in February 2009. One of the contracts on record shows that the claimant served on renewable annual contracts. The claimant testified that he served without a break until he received the suspension letter dated 22.02.2016. By that letter the claimant was suspended from duty consequential to a report to the respondent's management that on 20.02.2016 at the place of his deployment being at Consolidated Bank, Embu, at around 2130 Hours, upon being asked about his whereabouts between 1800 Hours and 2130Hours, the claimant had fought with his supervisor and made threats to life of the supervisor (details of which were stated to be in the claimant's knowledge and were

reported at Embu Police Station). The suspension was without pay and was to last until the case had been investigated and finalised.

The claimant's evidence was that he never engaged in the fight and other illegal activities as was alleged in the letter of suspension. Further, since the suspension, he was not aware of such reports to the police station as was alleged, he had not been arrested or summoned to go to the police station, and he continued to reside in Embu Town without hearing from the respondent or the police. His evidence was that the suspension was a fabrication to render him jobless as demonstrated through the respondent's inaction subsequent to the suspension letter. Thus, the claimant considered himself constructively terminated and wrongfully and unfairly so.

First, in absence of a response and evidence by the respondent, there is no reason to doubt the account of the facts and circumstances of case as per the claimant's evidence.

Second, the court returns that the claimant was entitled to consider himself terminated in view of the respondent's decision to issue the suspension letter and the inaction that followed thereafter. The court returns that the respondent failed to give reasons for the unfair constructive termination as was required in section 43 and 47 (5) of the Employment Act, 2007. The court finds that the constructive termination was unfair for want of a valid reason for the termination.

Third, the court has considered the remedies as prayed for and returns as follows:

- a. The claimant earned Kshs. 13, 700.00 per month at the time of his termination and as per his own testimony, and, is awarded **Kshs.13, 700.00** as pay in lieu of the termination notice.
- b. Throughout his unbroken service from February 2009 to February 2016 being 7 years he was granted pay of half monthly salary in lieu of annual leave. Accordingly, the court returns that he is entitled to the half month salary being withheld annual leave pay making Kshs.6, 850.00 x 7 years, thus **Kshs.47, 950.00**.
- c. The court has considered the aggravating allegations of a criminal nature that were levelled against the claimant. The court has considered the unbroken service of 7 years with clean record. The court finds that there is no evidence that the claimant contributed to his termination. The evidence was that the newly deployed supervisor simply wanted the claimant out of job and without a justification but through the fabricated allegations. The court returns that in such circumstances the claimant is entitled to 12 months' salaries under section 49(1) (c) of the Act making **Kshs.164, 400.00**.
- d. The claimant stated that he was entitled to house allowance per payslips. The claimant filed a contract which indeed showed that he was entitled to the allowance. However he moved no justification for the prayer and claim as was made in the statement of claim. For want of such justification, the court returns that the prayer will fail.
- e. The claimant is entitled to a certificate of service per section 51 of the Act.

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

1. Payment of **Kshs.226, 050.00** by 15.01.2018 failing interest to be payable thereon at court rates till full payment.
2. The respondent to deliver a certificate of service to the claimant per section 51 of the Act by 15.12.2017.
3. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 17th November, 2017**.

BYRAM ONGAYA

JUDGE