

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 124 OF 2017

DAVID GITHINJI..... CLAIMANT

VERSUS

LENGETIA LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday, 20th December, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 13.04.2017 through C.M. King'ori Advocates. The claimant prayed for judgement against the respondent for payment of 12 months' salaries in compensation under section 49(1) (c) of the Employment Act, 2007 at Kshs. 11, 310.00 per month making Kshs. 135, 720.00. The claimant further prayed for a declaration that the termination was constructive and unfair, general damages for pain and suffering (but which the court deems abandoned for want of relevant evidence and submissions), interest, and costs of the suit.

The claimant's case is that he was employed by the respondent from August 2012 as a tractor driver. About 19.01.2016 he sustained serious back injuries while on duty with the result that he could no longer perform strenuous duties. He requested for light duties but the respondent declined to assign light duties. Instead, he was assigned more strenuous duties of carrying sacks of wheat on his shoulders. He continued to complain in that regard. On 14.12.2016, the claimant was suspended from duty due to his said grievances. On 19.12.2016 he reported at work and repeated his demands that he be assigned light duties. His grievances were not addressed and he opted to leave employment. On 16.01.2017 the claimant received the respondent's letter of summary dismissal on account of absconding duty effective 19.12.2016.

The memorandum of response was filed on 30.06.2017 through the Agricultural Employers' Association. The respondent prayed that the suit be dismissed with costs.

The respondent's case is that on 19.01.2016 the claimant complained of backache, he was treated and all expenses paid by the respondent. He reported back on duty and was assigned light duties per medical advice until 15.09.2016 when his services were terminated on grounds unrelated to his medical condition. Further on 14.12.2016 the claimant was suspended from duty for 4 days until 19.12.2016 when the claimant was to attend a disciplinary hearing. The allegations were that the claimant had threatened the respondent's managing director while holding a panga. A show-cause letter dated 14.12.2016 had been issued and the claimant replied by his letter dated 14.12.2016. The claimant denied the allegations and stated that he had the panga as his tool of trade to use at work, he had not disrespected the director, he accepted duties as assigned by the director, and, he had not threatened the director. The letter of final warning dated 19.12.2016 issued. The claimant testified that he received the letter. It is the respondent's case that the claimant walked away and refused to sign for the warning letter.

The **main issue** for determination is whether the termination was unfair. The claimant's case is that after the warning letter was delivered to him, the human resource manager told him to go away to be recalled when he had completed his dose of medicines. The respondent's case is that after the warning letter the claimant declined to sign for it and was not seen at work again. It is clear that after the warning letter, the respondent never commenced disciplinary process, per section 41 of the Employment Act, 2007, against the claimant on account of absence from duty. The court returns that the termination in the case was unfair for want of due process as per section 41 of the Employment Act, 2007. The respondent has

confirmed that the claimant's employment had been terminated and terminal dues paid through the labour office. The court has considered that the claimant had a valid grievance about his medical condition surrounding the injury and the resultant depression. The court has also considered that the claimant contributed to his termination when he refused to sign acknowledging the warning letter. In such circumstances, the court awards him 6 months' pay for unfair compensation under section 49 (10 (c) of the Employment Act, 2009. That is Kshs. 11, 310.00 per month making **Kshs.67, 860.00**.

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

- a) The declaration that the termination of employment was unfair.
- b) The respondent to pay the claimant **Kshs. 67, 860.00** by 01.02.2018 failing interest at court rates to be payable thereon from the date of the judgment till full payment.
- c) The respondent to pay the costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Wednesday, 20th December, 2017**.

BYRAM ONGAYA

JUDGE