



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.90 OF 2015

RICHARD ACHINGA KANGERE.....CLAIMANT

VERSUS

PERIS NYAMBURA..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 11th March, 2016)

JUDGMENT

The claimant filed the statement of claim on 15.05.2015 through Mwaniki Warima & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant's termination was unlawful in that it was done without following the laid down legal procedure.
- b. Damages.
- c. Kshs. 12, 250.00 benefits being unpaid salary Kshs. 6, 250.00 and Kshs. 6, 000.00 being one month pay in lieu of the termination notice.
- d. Cost of this claim.

The respondent filed in person, on 26.06.2015, the response to the statement of claim and counterclaim. The respondent prayed that the suit be dismissed and the claimant be ordered to pay costs of the suit. The respondent further pleaded that the claimant was connected to an alleged crime of stealing Kshs. 21, 500.00 from the respondent. Further the respondent pleaded that the claimant borrowed Kshs. 1,500.00 from the respondent, the claimant repaid Kshs. 430.00 and the outstanding debt is Kshs. 1, 070.00.

The **1st issue** for determination is whether the parties were in employment relationship. The claimant has pleaded that he was employed by the respondent effective June 2014 as a casual labourer at Kshs. 350.00 per day exclusive of the allowances and payable on monthly basis. The respondent has pleaded that she employed the claimant as a casual labourer and paid him as per the kilos of tea leaves picked at Kshs. 10.00 per kilo. The court has considered the parties' respective pleadings and return that there is no dispute that the claimant was employed by the respondent to pick tea leaves on casual basis and whose terms of remuneration are in dispute.

The **2nd issue** for determination is whether the parties are entitled to the remedies as prayed for. The court makes findings as follows:

- a. The parties are in agreement that they were in casual employment relationship. The respondent testified that she employed the claimant from June 2014 to September 2014 but prior to that September he took jobs on other farms. The respondent then testified that the claimant left

employment voluntarily on 19.12.2014. The court finds that the claimant was on unbroken service from September 2014 to 19.12.2014. Thus the claimant worked for a period in the aggregate to the equivalent of not less than one month and the job was such that it could not have been completed in less than three months; and the court finds that as submitted for the claimant the casual employment converted to employment subject to the provisions of section 35(1) (c) of the Employment Act, 2007 as per section 37 (1) of the Act. The court returns that the claimant was entitled to **Kshs. 6,000.00** being one month pay in lieu of the termination notice and as prayed for in line with the provisions of section 35(1) (c) of the Act. While making that finding, the court has considered that in absence of any further material on the agreed wage, the amount would pass for reasonable last monthly pay.

- b. The claimant prayed for Kshs. 6, 250.00 benefits being unpaid salary. The respondent admitted that she owed that money but later discovered that the claimant had been paid. The respondent's witness RW3 testified that the reconciled records were provided by him to the respondent in October 2014. It was at the meeting of January 2015 that the respondent agreed that she owed the claimant Kshs. 6, 250.00. Thus the court finds that the respondent's explanation that the agreement to pay was erroneous because she had not looked at the reconciled records was not believable. The evidence by RW3 is clear that all records of payments made to the claimant by RW3 while the respondent was unwell had been discussed between the respondent and RW3 sometimes in October 2014. Accordingly the court finds that the claimant is entitled to **Kshs. 6, 250.00** as prayed for.
- c. The claimant has prayed for a declaration that the termination was unfair. The court has found that the claimant was entitled to a termination notice as provided for in section 35(1) (c) of the Act. The termination was not given, the court finds that the termination was unfair, and the one month pay in lieu of the notice as found due will meet the ends of justice in the circumstances of this case. The claimant has submitted as much and the court finds that in absence of specific submissions on damages for unfair termination, the same was abandoned by the claimant. The court further finds that the claimant left employment when he was mistakenly arrested on alleged theft of the respondent's money and the claimant was entitled to consider himself dismissed; the termination was constructive and unfair.
- d. The evidence shows that the claimant borrowed Kshs. 1, 500.00 from the respondent and repaid only Kshs. 430.00 and the respondent is entitled to Kshs. 1, 070.00 as prayed for in the counterclaim. The counterclaim will succeed to that extent and upon that consideration the claimant will get 50% of the costs of the suit.

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

- a. The declaration that the termination of the claimant's employment was constructive and unfair.
- b. The respondent to pay the claimant Kshs.11, 180.00 by 1.04.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- c. The respondent to pay 50% of the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 11th March, 2016**.

BYRAM ONGAYA

JUDGE