



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 42 OF 2013**

**CHARLES MATHENGE..... CLAIMANT**

**VERSUS**

**NYENA SACCO.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 13<sup>th</sup> May, 2016)

**JUDGMENT**

The claimant filed on 21.02.2013 the memorandum of claim through Mathenge Gitonga & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. The salary arrears of Kshs. 80,000.00 and accruing at the rate of Kshs. 16,000.00 per month until a formal termination is issued to the claimant, unpaid leave days Kshs. 11, 193.00 and unpaid overtime Kshs. 34, 112.00.
- b. Costs of the suit.
- c. Interest in (a) and (b) above.
- d. Any other relief the court may deem just.

The defence to the claim was filed on 23.05.2013 through Kebuka Wachira & Company Advocates.

The respondent employed the claimant as a driver at Kshs. 16,000.00 per month effective 06.10.2011. The claimant worked for 8 months and was terminated without a notice and a hearing. The appointment was subject to 6 months probationary service and confirmation in appointment was to be based on satisfactory performance. At time of termination the vehicle the claimant was driving from Mombasa to Nairobi developed a mechanical problem. The claimant was subsequently summoned at the office by the respondent's chairman who told him not to go back to work because the chairman alleged the claimant had caused the motor vehicle to develop a mechanical problem.

The respondent's chairman one Peter Theuri Ndirangu testified that after an accident at Makindu the claimant abandoned the vehicle and never reported on duty. Further, the claimant coincidentally met the chairman at the garage long after the accident and the claimant's absence from work for several days. In a dispute at labour office, the respondent deposited Kshs.12, 400.00 being pay for leave days. The chairman (RW) lamented that in the short service the claimant had been involved in numerous road accidents and paid for the liability out of the respondent's revenues, he consumed alcohol while on duty and he over sped while driving the assigned motor vehicle. RW relied on a letter from the Transport Licensing Board to verify his claims.

The **1<sup>st</sup> issue** for determination is whether the claimant was unfairly terminated. If the account by RW is

considered, it is not clear why after the alleged absence from duty following the accident at Makindu, the respondent never took steps to initiate disciplinary proceedings in view of that absence without leave. The court finds that the account by the claimant is credible that he was verbally dismissed by RW after the accident. The dismissal was without a hearing and a notice as provided for in section 41 of the Employment Act, 2007.

The 2<sup>nd</sup> issue for determination is whether the claimant is entitled to remedies as prayed for. The court makes findings as follows:

- a. The claimant has not established the basis for the prayer for salary arrears of Kshs. 80,000.00 and accruing at the rate of Kshs. 16,000.00 per month until a formal termination is issued. The evidence is that the claimant was terminated orally and no reinstatement has been prayed for.
- b. The claimant prays for unpaid leave days Kshs. 11, 193.00 and unpaid overtime Kshs. 34, 112.00. At the labour office the parties agreed to 14 days prorated leave. The statutory leave being 21 days, the claimant is hereby awarded Kshs. 10, 666.70 for the leave. As for overtime, the claimant did not establish the hours worked and the parties appear to have agreed on 8 days worked on public holidays making Kshs. 4, 266.00 per month. The court returns that as per the prayers made the claimant is entitled to Kshs. 14, 932.70.

The court has considered the unfair termination and has considered the respondent's willingness to pay the claimant as per the findings of the labour officer where the amount due is not substantially different from the amount found due in this judgment. On a balance of things, each party will bear own costs of the suit.

In conclusion, judgment is entered for the parties with orders as follows:

- a. The respondent to pay the claimant a sum of Kshs. 14, 932.70 by 01.06.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- b. Each party to bear own costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 13<sup>th</sup> May, 2016**.

**BYRAM ONGAYA**

**JUDGE**