



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

CAUSE NO. 61 OF 2013

JOHN KABORO NJINE.....CLAIMANT

VERSUS

**MAGUNA-ANDU WHOLESALERS (K)
LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday, 9th June, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 04.06.2013 and the amended memorandum of claim on 12.11.2013 through M’Njau & Mageto Advocates. The claimant prayed for judgment against the respondent for terminal dues in the sum of Kshs. 1, 315, 700 being pay in lieu of termination notice, pay for accrued leave, unpaid house allowance for 148 months, unremitted NSSF for 8 years and 3 months, damages for breach of contract, underpayment to be proved, full compensation for wrongful loss of employment, costs and interest, issuance of the certificate of service. On 15.01.2014 the claimant filed a notice of change of advocates to Keli & Mwaura Advocates.

The response to the memorandum of claim was filed on 28.03.2014 through J.N. Mbutia & Company Advocates. The respondent prayed that the claim be dismissed with costs.

By consent of the parties, it was recorded in court on 05.03.2015 that the employment of the claimant by the respondent be deemed to have commenced on 01.03.2009. The employment contracts for fixed terms of service show that the respondent employed the claimant as follows:

- a) By contract dated 01.03.2009 as a general worker from 01.03.2009 to 28.02. 2010 at Kshs. 6,000.00 consolidated salary per month.
- b) By contract dated 01.03.2010 as a general worker from 01.03.2010 to 28.02. 2011 at Kshs. 6,800.00 consolidated salary per month.
- c) By contract dated 01.03.2011 as a general worker from 01.03.2010 to 28.02. 2012 at Kshs. 8,000.00 consolidated salary per month.
- d) The letter dated 25.03.2011 re-designated the claimant from a general worker to a turn boy at a consolidated monthly pay of Kshs.10, 000.00.
- e) The letter of 25.04.2012 upgraded the claimant to a driver effective 2.05.2012 at monthly consolidated salary of Kshs. 21, 000.00 inclusive house allowances and subject to statutory deductions.

f) By letter dated 01.03. 2012 the contract dated 01.03.2011 and ending on 28.02.2012 was renewed for 12 months effective 01.03.2012 to end on 28.02.2013.

g) By undated letter signed by the claimant on 04.04.2013 the claimant was offered a six months employment contract from 01.03.2013 to 01.09.2013 terminable by either party giving 7 days written notice. The gross monthly pay was Kshs. 21, 000.00.

In April 2013 the claimant's evidence was that he was given 21 leave days. He resumed duty on 02.05.2013. He was paid for April 2013 being Kshs. 21, 000.00 for monthly pay, 2 days in May 2013 Kshs.1, 400.00 and Kshs. 1, 400.00 for 2 holidays worked (Easter Monday and Good Friday). Throughout the service the claimant had not taken leave except the 21 days being terminal leave. The pay was on 7.05.2013 and the suit was filed on 04.06.2013. After the payment the claimant signed the discharge certificate on 07.05.2013 that he had no further claims whatsoever against the respondent, its affiliates, successors and assignors.

The claimant's employment was terminated by the letter dated 11.04.2013. The letter stated that the respondent had decided to terminate the claimant's employment effective 11.04.2013. The letter stated thus,

“RE: NOTICE TO TERMINATE EMPLOYMENT

The above mater refers.

This company has decided to terminate your employment contract with effect from 11th April 2013.

Therefore immediately, we issue a notice of seven days to serve from today 11.04.2013 to 17.04.2013.

Subsequently you are required to clear with Human Resource Department upon the completion of your leave days.

We thank you for the period you have been with us.

Yours faithfully,

Maguna-Andu Wholesalers (K) Ltd

Signed

Human Resource Manager”

The court has considered the pleadings, the evidence and the submissions on record and makes findings on the issues in dispute as follows.

The **1st issue** for determination is whether the termination was within the termination clause and therefore fair or it was outside the termination clause and therefore unfair.

The court has considered the termination clause that either party would terminate the contract of 01.03.2013 ending on 01.09.2013 by giving 7 days notice. The purported termination notice in this case was dated 11.04.2013 and it stated that the respondent had decided to terminate the contract effective 11.04.2013. At the same time it stated that a 7 days' notice was being issued immediately from 11.04.2013 to 17.04.2013. All that, while the claimant was serving a 21 days leave.

The court returns that there was no valid 7 days notice to terminate the contract of employment because the purported 7 days were in fact part of the claimant's 21 days of the then ongoing leave and further, in

any event, the termination was said to be effective 11.04.2013. The respondent's reason for termination, namely that it was in exercise of the contractual termination clause is hereby found invalid as at the time of the termination it was not a genuine reason. The termination was unfair under section 43 of the Employment Act, 2007 for want of a valid reason for termination of the contract of employment.

The court finds that the respondent while pretending to invoke the termination clause, the respondent in fact abruptly terminated the claimant's employment without any reason and outside the contractual 7 days' notice. The court returns that the termination was therefore unfair for want of a valid reason for the termination.

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

- a) The claimant served from 01.03.2009 to 11.04.2013. The designations are set out in the various contracts set out in this judgment. Under section 90 of the Employment Act, 2007 the court finds that the claims for arrears with respect to monthly pay are continuous injuries to be claimed within 12 months. For contracts except the last contract (in the last year) the court considers that the same are not available especially that the contracts were fixed term contracts of service which lapsed without the claimant urging a grievance as now claimed for house allowance and salary underpayments. In the circumstances, under the claim for underpayment of house allowance and salary, the court returns that as submitted for the respondent the claimant is entitled to **Kshs. 2, 885.50** being underpaid salary and **Kshs.8, 656.50** being unpaid house allowance.
- b) The court has considered the period the claimant served without a break from 01.03.2009 to 11.04.2013 and the court finds that the claimant was a loyal and dedicated worker throughout that period of service.
- c) The claimant desired to continue in employment. The claimant did not contribute to his termination. The court has considered the aggravating factor that the respondent pretended to give the 7 days' notice and that the claimant was made to go on leave during which time he met the untimely termination without any preparation by his long time employer for that ensuing predicament. The court considers that the respondent subjected its loyal and dedicated worker to a most unfair and undeserved design to terminate the employment. The court finds that such design on the part of the respondent amounted to a gross unfair labour practice. The court returns that the claimant is entitled to 12 months' gross salaries under section 49(1) (c) for that unfair termination making **Kshs. 252, 000.00** at Kshs.21, 000.00 per month and as submitted for the claimant.
- d) In the period beginning January 2009 the NSSF was deducted and remitted. The claimant is not entitled as prayed for in that regard.
- e) The respondent has agreed in the submissions to issue a certificate of service for 01.03.2009 to 11.04.2013 as provided for in the statute.
- f) As the claimant has substantially succeeded in his claim, the respondent will pay the costs of the suit.
- g) As the claimant was a member of NSSF, the claimant is not entitled to service pay under section 35(5) in view of section 35 (6) of the Employment Act, 2007.

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

- 1) The declaration that the respondent's termination of the claimant's contract of employment was unfair.
- 2) The respondent to pay the claimant a sum of **Kshs.263, 542.00** by 01.08.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

3) The respondent to deliver to the claimant a certificate of service in the statutory form by 01.08.2016.

4) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Thursday, 9th June, 2016**.

BYRAM ONGAYA

JUDGE