



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

CAUSE NO.141 OF 2015

(Formerly Cause No.1868 of 2014 at Nairobi)

SAMUEL MWANGI MBURUCLAIMANT

VERSUS

GAICHANJIRU ESTATED LIMITED.....1ST RESPONDENT

STANLEY ALEX MAINA GATU.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 30th September, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 22.10.2014 and then the amended memorandum of claim on 20.07.2015 through Namada & Company Advocates. The claimant prayed for judgment against the respondents for:

- a) A declaration that the respondents' actions complained of above amounted to summary dismissal of the claimant from his employment and which dismissal was unlawful and unfair.
- b) A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c) An order for the respondents to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs.984,136.00.
- d) Interest on c above from the date of filing the suit till payment in full.
- e) Costs of this suit plus interest thereon.

The respondents relied upon the amended response to the memorandum of claim filed on 25.05.2016 through Muchoki Kang'ata, Njenga & Company Advocates. The respondents prayed that the claimant's suit be dismissed with costs.

The **1st issue** for determination is whether the parties were in employment relationship. It has been submitted for the respondents that RW Danson Maina Njuguna testified that sometimes in 2008 the 1st respondent was going down in its enterprise. The shareholders met and discussed a revival scheme. Some shareholders agreed to serve as workers and one of them was the claimant. The terms of service were agreed at the shareholders' meeting held for that purpose. The claimant's evidence was that he was

employed on 1.11.2008 when he was invited to work for the company as a night watchman working 6pm to 6am. The court returns that parties were in a valid contract of employment.

The **2nd issue** is whether the claimant was unfairly dismissed from employment. The claimant testified that on 29.07.2013 his supervisor called Kariuki summoned him and told him not to report at work in the evening until when he would be recalled on duty. No reason was given and the claimant testified that he was never recalled at work. The respondents' case is that the claimant served on casual basis with liberty to serve on other farms. The villagers who had stakes in the 1st respondent met and agreed that the claimant would be relieved of his duties. He was called and told not to work. He had served from November 2008 to July 2013 and he was paid all valid dues as per the respondent's case. The court finds that the claimant served for a considerable period of about five years. There is no reason to doubt the claimant's case that he was in respondents' continuous service and he was not a casual worker. The respondent has not advanced any reason for the termination of the claimant's employment except that he was simply told to leave employment. The court returns that the termination was unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007. The claimant was paid Kshs. 5, 850.00 per month and is awarded 12 months' wages in view of the unfair termination taking into account his long dedicated service, that he desired to continue in employment and he did not contribute to his termination. He is awarded **Kshs.70,200.00**.

The **3rd issue** for determination is whether the claimant is entitled to the other remedies as prayed for.

The claimant claims underpayments from 1.05.2009 to 29.07.2013 in view of the minimum wage orders; overtime for 4 hours worked on daily basis; pay in lieu of unpaid annual leaves, public holidays and off days; and house allowance over the period of service. The evidence is that the parties agreed on the salary and other terms of service and there is no evidence of a grievance in that regard and on the part of the claimant. The claims, in the opinion of the court, are in the nature of continuing injuries. Under section 90 of the Employment Act, 2007 the claimant ought to have filed suit in 12 months from the date of termination when the continuing injuries ceased and which the claimant has testified to have been 29.07.2013. The 12 months of limitation lapsed on or about 27.07.2014 and the claim was filed belatedly on 24.10.2014 and the court returns that the claims were therefore time barred.

The claimant served for over 4 complete years of service and the court considers that a month's pay for each completed year making **Kshs.23, 400.00** under section 35 (5) of the Employment Act, 2007 for service pay or as is called, gratuity, will meet the ends of justice especially that the claimant was not a member of NSSF or other pension arrangement. The court further awards the claimant **Kshs.5,850.00** being one month pay in lieu of the termination notice under sections 35(1) as read with section 36 of the Act.

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

- a) The declaration that the termination of the claimant's contract of employment by the respondent was unfair.
- b) The respondent to pay the claimant **Kshs.99,450.00** by 01.12.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- c) The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 30th September, 2016**.

BYRAM ONGAYA

JUDGE