



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.231OF 2015

FRANCIS NGUNJIRI MUKOMA..... CLAIMANT

VERSUS

ROBEN ABERDARE (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 14th October, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 29.01.2016 through Warutere & Associates Advocates. The claimant prayed for judgment against the respondent for:

- (1) General damages for unlawful dismissal.
- (2) 1 month's salary in lieu of notice at Kshs.20, 400.00.
- (3) Unpaid salary for the three and half months at Kshs.71, 400.00.
- (4) Any other entitlement like leave allowance.
- (5) Costs of the suit.

The respondent filed the statement of defence on 31.03.2015 through Ng'ang'a Munene & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant's case is that the respondent employed the claimant as a lorry driver effective 08.12.2012. On 27.03.2013 the claimant while on duty was assigned to drive lorry registration no. KBR 526X and the claimant was involved in a road traffic accident. The claimant was on off duty on account of a sick leave from 27.03.2013 to 04.06.2013. On 02.05.2013 the claimant testified that the manager summoned him and asked the claimant to present his appointment letter and the claimant complied. The manager then asked the claimant to wait outside the office and when the manager summoned the claimant the second time, the termination letter dated 02.05.2013 was handed to the claimant. The letter dated 02.05.2013 was headed "**Letter of Termination on Probation**" and it terminated the claimant's employment effective 02.05.2013. The letter stated that the claimant had not met the respondent's expectations during the probationary period and was being terminated on account of unsuccessful probation. The claimant testified that the respondent refused to return the letter of appointment to the claimant. It was the claimant's case that he was not paid from December 2012 to the date of termination on 02.05.2013 except for pay of March and April 2013. He was therefore not paid for December 2012, January 2013, and February 2013 – the three months' pay claimed in the memorandum of claim. During cross examination the claimant stated that in February 2013 he had been paid Kshs.9, 248.00 and paid in March and April,

2013 Kshs16, 481.00 per month. The claimant denied that he had been employed on probationary service or need basis.

The respondent's witness (RW) was one Ambrose Kinyua Kiamba, the respondent's General Manager. He testified that the claimant was employed on 3 months' probationary period effective 14.02.2013 after which the respondent would decide to confirm or terminate the appointment. RW testified that the claimant did not complete the 3 months probationary service because on 27.03.2013 the claimant was involved in an accident. After the accident the claimant resumed duty on 14.02.2013 and he was paid half monthly pay. The claimant was paid in April and March 2013 and was terminated on 2.05.2013. Thus the claimant was not terminated unfairly. The respondent's case was that there was no appointment letter.

The **1st issue** for determination is whether the termination of the claimant's employment was unfair. Section 42(1) of the Employment Act, 2007 provides that section 41 of the Act (providing for notice and hearing before termination of employment on account of misconduct, poor performance or ill health) shall not apply in cases of termination of a probationary contract. Section 42(2) of the Act provides that a probationary period shall not be for more than 6 months but it may be extended for a further period of not more than 6 months with the agreement of the employee. Under section 42(4) an employer may terminate a probationary contract of service by giving not less than seven days' termination notice or seven days pay in lieu of the termination notice. The parties have not filed the letter of appointment and the respondent disputes that there was such letter.

The court returns that the minimum terms of service under section 42 of the Act and as cited would apply. The claimant says he was employed on 08.12.2012 and the respondent says the employment was effective 14.02.2013 and to serve 3 months probationary term which in that case would lapse on or around 14.05.2013. If termination was undisputedly on 02.05.2013, then it was within the probationary contractual term. If the employment ran from 08.12.2012 as per claimant's position, then possible statutory 6 months for probation service would lapse on or about 08.06.2013. Taking into account of those timelines, the court returns that the respondent would be entitled to terminate the probationary service by giving 7 days' notice or pay in lieu of that notice. If the claimant last earned Kshs. 16, 481.00 per month then his entitlement to pay in lieu of the 7 days' notice is about **Kshs.5, 494.00** and the claimant is awarded accordingly.

The claimant has not established the justification for the other reliefs made and the court returns that the same will fail. In particular the claimant's evidence on the 3 months' pay as claimed was inconsistent and the 3 months' pay as claimed was not, in the opinion of the court, established by the claimant on a balance of probability. If there was a letter of appointment as alleged for the claimant, it is not clear how the letter was readily available for return to the respondent's custody as was testified for the claimant. Accordingly, the court returns that as testified for the respondent, the employment commenced on 14.02.2013.

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

- (1) The respondent to pay the claimant **Kshs.5, 494.00** by 01.11.2016 failing interest at court rates to be payable until full payment.
- (2) Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 14th October, 2016.**

BYRAM ONGAYA

JUDGE