



**REPUBLIC OF KENYA**

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

**CAUSE NO.27 OF 2016**

**NYIYO MATASIAN MOILE..... CLAIMANT**

**VERSUS**

**JULIAN WRIGHT.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 7<sup>th</sup> October, 2016)

**JUDGMENT**

The claimant filed the memorandum of claim on 16.02.2016 through Kiget & Company Advocates. The claim was for unpaid salary for January 2015 Kshs. 7, 500.00; 3 days worked in February 2015 Kshs. 750.00; 8 days accrued leave till 03.02.2015 Kshs. 2, 000.00; one month pay in lieu of termination notice Kshs. 7, 500.00; 12 months compensation Kshs.90,000.00; and total being Kshs. 107, 750.00. The claimant prayed for judgment against the respondent for:

- a) Kshs. 107, 750.00.
- b) General damages for wrongful termination of employment.
- c) Costs of the suit and interest thereon from the date of wrongful termination.
- d) Any other or alternative relief that the court may deem just and fit to grant in the circumstances.

The defence was filed on 29.04.2016 through Mwangi Kariuki and Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimant was employed by the respondent as a guard for 4 months and 3 days from 01.10.2015 to February 2016. The respondent's case is that on 03.02.2016 the claimant absconded from his duties only to resurface when the suit papers were served by the claimant's advocates.

The claimant's case is that he was employed as a guard from 26.11.2014 to 03.02.2015. On 03.02.2015 the claimant testified that he was nursing an injury but remained on duty. On 02.02.2015, the claimant testified that the respondent telephoned him and asked him to stop working. The respondent's messenger then arrived on 03.02.2016 and delivered the respondent's verbal word that the claimant stops working. The claimant's case was that he had been replaced on 03.02.2016. So on 03.02.2016 the person to replace him arrived, the claimant handed over the key and he left. The parties met at labour office on 03.02.2015 and the respondent paid the claimant one month salary being January 2016 salary and being the only terminal dues. The claimant rejected the deal and filed the present suit.

The **1<sup>st</sup> issue** for determination is whether the claimant absconded on 03.02.2016 or the respondent terminated the employment. The court returns that there is no reason to doubt the account by the claimant. If the claimant had absconded duty then the proper action would have been for the respondent to institute disciplinary proceedings but which was never the case. The respondent testified that the claimant guarded an open fallow land and the respondent never lamented that the claimant left the land without a guard and the court finds that there was a hand over and smooth transition as per the claimant's testimony. The respondent testified that he send someone to take over on 03.03.2016 because the claimant had on 02.03.2016 told the labour officer that he would leave job but the respondent did not testify that the claimant had expressed that much to the respondent. Thus the court returns that the respondent terminated the claimant's employment.

The **2<sup>nd</sup> issue** is whether the claimant is entitled to the remedies as prayed for. It was submitted that the respondent was willing to pay for unpaid salary for January 2015 Kshs. 7, 500.00; 3 days worked in February 2015 Kshs. 750.00; and 8 days accrued leave till 03.02.2015 Kshs. 2, 000.00. The claimant is awarded accordingly. The court has considered the length of service being less than 5 months and returns that the claimant would be entitled to only one month pay Kshs. 7, 500.00 being pay in lieu of the termination notice and for the wrongful termination. The court considers that the claimant is not entitled to any further compensatory pay especially that he rejected (without explanation) part of the claim as offered by the respondent at the labour office. Accordingly, the respondent will pay only 50% of the costs of the suit to be agreed upon or taxed in the usual manner.

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

- a) The respondent to pay the claimant **Kshs.17, 750.00** by 20.11.2016 failing interest to be payable at court rates from the date of the suit 17.02.2016 till the full payment.
- b) The respondent to pay 50% of the claimant's costs of the suit to be agreed upon or taxed in the usual manner.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 7<sup>th</sup> October, 2016.**

**BYRAM ONGAYA**

**JUDGE**