



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 41 OF 2013

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

KAHARATI HARDWARE..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 11th November, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 16.04.2013 claiming failure or refusal by the respondent to pay terminal dues for Alice Muthoni Gichuguma, the grievant. The claimant prayed for judgment against the respondent for:

- a) The respondent's action in dismissing the grievant without following proper administrative procedure contravened fair labour practice and therefore was unlawful and unfair consequently awards 12 months' salary under section 49 (1) of the Employment Act, 2007.
- b) The respondent to pay the grievant Kshs.7,811.00 being one month pay in lieu of notice plus underpayment for 2004 to 2011 Kshs. 248, 447.00; overtime for 8 years Kshs.562, 406.40; annual leave for 8 years Kshs. 43, 741.60; public holidays worked for 8 years Kshs. 22, 912.30; house allowance for 8 years served Kshs. 112, 478.40; salary for 11 days worked Kshs.2, 864.00; service gratuity for 8 years served Kshs.31, 244.00; and total claim for Kshs. 1, 024, 094.00.
- c) The manner and conduct of the respondent in dismissing the grievant was conspicuously laced with discrimination in violation of Article 27 of the Constitution consequently and pursuant to Article 23(3) the honourable court orders compensation of 10 years' salary on account of discrimination.
- d) Costs to the claimant.

The defence to the claim was filed on 25.04.2013 through Mwangi Kamau & Company Advocates. The respondent prayed that the claim be dismissed with costs.

The **1st issue** for determination is whether there existed a contract of service between the parties. At paragraph 12 (b) of the defence it is stated that the claimant commenced work on 07.04.2006 at a monthly pay of Kshs. 6,000.00. The court has considered that pleading together with the claimant's evidence that she was employed by the respondent on 11.03.2004 and the court returns that the respondent employed the claimant at the shop and was assigned the duties to clean, to do sales, weighing of goods and to keep books of records. The court returns that the employment was effective 11.03.2004 as per the claimant's

evidence.

The **2nd issue** for determination is whether the termination was unfair. The claimant received an SMS on her cell phone on 12.04.2012 at 01.23.35 hours from the employer conveying thus, **“Tomorrow we shall not work. No opening.”** The following morning she reported at work and found another lady had been employed in her place. The court finds that the termination was unfair for want of a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. Further the claimant was not given the valid reason for the termination as envisaged in section 43 of the Act. The termination of the contract of employment was unfair and the claimant is entitled accordingly.

The **3rd issue** for determination is whether the claimant is entitled to 12 months’ pay compensation under section 49 (1) of the Act. The evidence is clear that the claimant started to run a hardware shop next to the respondent’s shop. In that way the court returns that the claimant contributed substantially to the termination of the contract of employment and she is awarded only 3 months’ salaries for the unfair termination making **Kshs. 13, 800.00** the last monthly pay having been Kshs. 4, 600.00. The claimant is awarded **Kshs. 4, 600.00** being a month’s pay in lieu of the termination notice under section 35 of the Act and is further awarded **Kshs. 2, 864.00** for days worked and not paid in April 2012.

The **4th issue** for determination is whether the claimant is entitled to underpayment, overtime, annual leave, public holidays, and house allowance as claimed. The termination was on 12.04.2012 and the suit was filed on 16.04.2013 after the 12 months period of limitation for continuing injuries had lapsed as provided for in section 90 of the Employment Act, 2007. The claims and prayers will therefore fail as they were time barred.

The **5th issue** is whether the claimant is entitled to gratuity or service pay. There was no evidence that the claimant was a member of the NSSF and there was no alternative arrangement for gratuity or pension. For the 8 years’ service the court awards the claimant one month pay for each year served for service pay under section 35(5) making **Kshs.36, 800.00**.

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.58, 064.00** by 15.12.2016 failing interest to be payable at court rates till full payment.
- c) The respondent to pay the claimant’s costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 11th November, 2016**.

BYRAM ONGAYA

JUDGE