



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 3 OF 2016

SIMON MUNGA GACHUHI.....CLAIMANT

VERSUS

KIRU TEA FACTORY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 4th November, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 08.01.2016 through Wahome Gikonyo & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Three months' salaries in lieu of termination notice Kshs. 55, 710.00.
- b) One year salary Kshs. 222, 840.00 for unfair termination.
- c) Immediate reinstatement to employment.
- d) Any other or better relief the honourable court may deem fit and just to grant.
- e) Interest on (a) and (b) above at court rates.
- f) Costs of the suit plus interest at court rates.

The memorandum of response was filed for the respondent on 19.04.2016 through Millimo, Muthomi & Company Advocates. The respondent prayed that the respondent's suit be dismissed with costs.

The respondent employed the claimant in December 2007. On 25.07.2013 the claimant was involved in an accident while on duty when a piece of wood he was working on flew and hit the claimant thereby injuring the claimant. He was taken to hospital for treatment. His payslip for August 2013 was Kshs. 18, 570.00.

The treatment took some time and the claimant resumed duty about 1st or 3rd of November 2013. The claimant was assigned duty for the day and at about 4.00pm the assistant production manager, one Mwau, came and told the claimant to go home until further notice. He testified that in October 2013 he was paid for 5 days only and November 2013 for one day only, the day he had worked. During Christmas holidays in 2013, the claimant testified that he was given some token payment or bonus for the Christmas holiday. In January 2014 he was paid full salary and in February 2014 he was not paid at all. He was subsequently paid half salary till end of July 2014. He left employment around 3.11.2013. The claimant's testimony

was that he worked for the respondent without a break from 2007 till around 3.11.2013 and he was not a casual employee. The claimant's case was that he was willing to continue in employment but Mwau told him to leave job and he complied.

The claimant admitted signing all the contracts of service on record and after 01.01.2012 he did not sign any other contract and he denied that he signed the contract of 01.07.2013.

The respondent's case was that the claimant was employed on renewable three months' contracts the last one being from 01.07.2013 to 30.09.2013. On 25.07.2013 the claimant was involved in an accident while on duty. He was treated and then paid all his salaries until 30.09.2013, the last pay. The employment terminated by lapsing of the three months' fixed seasonal contract. Thus, the respondent's termination was that there was no unfair termination. RW testified that after 30.09.2013 the respondent continued to pay the claimant until after 65 days because the claimant was out on medical grounds. The half salary was paid per CBA and the last pay was in July 2014. RW testified that from October 2013 to July 2014 the claimant was paid but without a service contract as he was out on medical grounds. RW further testified that the claimant was not given a letter to notify that the fixed term contract was ending. RW testified that the sick chit dated 08.11.2013 issued by the respondent stated that the claimant was the respondent's employee and that position was necessary to facilitate insurance health cover for the claimant and who was still undergoing treatment.

The **1st issue** for determination is whether the termination was unfair. The evidence is clear. First, on 3.11.2013 Mwau (the assistant production manager) told the claimant to go home until further notice. Second, the claimant continued to earn until July 2014 when the payment stopped. The court returns that the claimant was entitled to consider himself terminated from employment because after 3.11.2013 he was not notified to report on duty and thereafter, he was not given a reason for stoppage of his salary after July 2014 yet he was willing to continue in employment and to work for the respondent. The court finds that the termination was constructive and unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007. Even if the respondent desired to terminate the claimant's employment on health grounds or incapacitation, then the respondent clearly failed to invoke the procedure of a notice and a hearing as provided for in section 41 of the Employment Act, 2007.

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 was last at work on 03.11.2013 when he was advised to go home until further notice. It is now 3 years and a day since that date and the court considers that reinstatement would not be an effective and efficient remedy in the circumstances of this case due to the considerable lapsing of time and further due to the injuries that the claimant suffered and whose status as relates to claimant's suitability to comfortably work is unknown. Thus, the court will decline the prayer for reinstatement.

b) The termination has been found to have been unfair. The claimant had a clean record of service since his employment. The court has considered that the claimant did not contribute to his termination. The court has further considered that the injuries sustained by the claimant appear to have been the catalyst to the claimant's termination and therefore an aggravating factor in the claimant's predicament. Consequently 12 months' pay under section 49(1) (c) for the unfair termination will be just in this case and the claimant is awarded accordingly and as prayed, **Kshs. 222, 840.00** at Kshs. 18, 570.00 per month.

c) The claimant is awarded one month pay in lieu of the termination notice under section 35(1) (c) of the Employment Act, 2007 making **Kshs. 18, 570.00**.

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

1. The respondent to pay the claimant **Kshs.241,410.00** by 15.12.2016 failing interest to be payable thereon at court rates from the date of the suit till full payment.

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

Signed, dated and delivered in court at **Nyeri** this **Friday, 4th November, 2016.**

BYRAM ONGAYA

JUDGE