



**REPUBLIC OF KENYA**

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

**CAUSE NO. 140 OF 2014**

**PETER MAINA GICHUKI..... CLAIMANT**

**VERSUS**

**ANORD SHAH T/A NAGARIA HARDWARE & SUPPER**

**MUKUYU..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 23<sup>rd</sup> October, 2015)

**JUDGMENT**

The claimant filed the statement of claim on 29.10.2014 through Macharia Gakaria & Associates Advocates. The claimant prayed for judgment against the respondent for terminal benefits, cost of the suit, and interest. The amended claim was filed on 05.12.2014 introducing a claim for Kshs. 523, 013.90 being compensation for loss of employment, house allowance for 2013, underpayment in 2013, and service gratuity for 7 years, 33 public holidays, and 176 off duty days due and not taken, overtime worked and not paid, accrued leave and one month pay in lieu of termination notice.

The respondent filed the response to the claim on 28.11.2014 through J.N.Mbuthia & Company Advocates. The respondent prayed that the claim be dismissed with costs.

The amended response to the claim was filed on 18.12.2014.

The **main issue** for determination is whether the termination was unfair. The claimant was employed by the respondent since 2006. The claimant's testimony was that on 29.04.2014 he was outside the respondent's shop where he was engaged as the shop attendant. In that moment the respondent's plastic water tank on display toppled as it rolled over and the claimant testified that as he returned the tank into position, a black paper bag was exposed from underneath tank; the respondent saw him and claimed the claimant was designing to steal the nails that were found in the black paper bag. The respondent's evidence was that the claimant was found in a compromising environment and was dismissed upon the suspicion on reasonable and sufficient grounds that the claimant had committed the offence of theft as envisaged in section 44(4) (g) of the Employment Act, 2007.

The claimant testified that he was terminated when he was told that he had stolen the nails. The evidence shows that the claimant was given a hearing and the court finds that in the circumstances there was due process before the oral summary dismissal.

Was the reason for termination valid? The claimant says he did not know the source of the black paper bag. The police report was made by the respondent but no investigations were conducted to establish the claimant's culpability. The court finds that the reason was not valid in terms of section 43 of the

Employment Act, 2007. The circumstantial presence of the bag did not create a basis of wrong doing as nothing else linked the claimant to the bag and its contents. The respondent (RW1) testified that no person had seen the claimant picking the nails that were found in the black paper bag. RW1 had no basis to believe that the nails were part of his stock and he testified as much.

The claimant had a clean record of service; he had worked from 2004 to 2006 and had expectation to continue in employment. He testified that his last pay was Kshs. 7,000.00 per month. The court awards him 12 months' salaries making **Kshs.84, 000.00** for unfair termination. The court finds that the claimant is further entitled to one month pay in lieu of the termination notice making Kshs. **7, 000.00**. The respondent submitted that the claimant was entitled to **Kshs. 9, 800.00** for leave due but not taken and the court finds that the claimant is entitled accordingly. There is no reason to doubt RW1's evidence that the claimant took all his other annual leave days.

RW2 was Eric Odera Orera, the respondent's staff who confirmed that the staff did not work overtime. The court has considered that prior to termination the claimant had not raised a grievance on overtime, underpayment, off duty, and public holidays. The court finds that the claims were afterthoughts and the same shall fail as the claimant has failed to establish the same. The hours and days as claimed were not strictly proved by the claimant.

There was no evidence that parties were in a scheme for retirement benefits or pension or the contribution to NSSF was remitted and the court finds that the **Kshs. 31, 968.05** was reasonable service pay as prayed for and as per section 35 (5) and now fixed by the court as claimed.

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

1. The respondent to pay the claimant **Kshs. 132, 768.05** by 1.12.2015 in default the respondent to pay interest thereon from the date of the judgment 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, 23<sup>rd</sup> October, 2015.**

**BYRAM ONGAYA**

**JUDGE**