



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.57 OF 2015

MOSES WARIUA MURAYA..... CLAIMANT

VERSUS

CHANIA CLEANERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 4th December, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 10.04.2015. He prayed for judgment against the respondent for:

- a. Reinstatement to his former position and treatment in all respects as if his employment had not been terminated; or re-engagement in work comparable to that which the claimant performed prior to his termination or other reasonably suitable job at the same wages; and compensation of 12 months compensation for the unfair termination.
- b. In alternative to (a) payment of Kshs. 9, 103.00 being one month pay in lieu of the termination notice; Kshs. 22, 058.00 being accrued leave; total wage underpayments as particularised and in view of applicable wage orders Kshs. 48, 461.00; service pay for 3 years Kshs. 26, 259.00; 12 months' gross salaries for compensation for unfair termination Kshs. 109, 239.00 making the sum claimed of Kshs. 215, 121.70.

The respondent filed the response to the claim on 20.05.2015 through Gori, Ombongi & Company Advocates. The respondent prayed for dismissal of the suit with costs.

The claimant was employed by the respondent as a cleaner effective 05.05.2008 and deployed to serve at Del Monte (K) Limited at Kshs. 5,520.00 per month. On 04.05.2009 after a year's service, the claimant completed the personal information form as prescribed by the respondent. The claimant's case is that he served diligently until 04.01.2013 when he was verbally terminated from employment on account of absence from duty from 27.12.2012 to 04.01.2013. The claimant's case was that he was given a notice or a hearing as required in law and throughout his 5 years of clean service he had been a good worker. The claimant's further case was as follows:

- a. On 25.12.2012 to 26.12.2012 all respondent's staff took the Christmas break.
- b. On 27.12.2012 he reported on duty and worked all day and on 28.12.2012 he also worked. On 29.12.2014 one Muinde gave him oral permission to attend the requiem mass for a departed relative. On 30.12.2012 was his off duty day as it was a Sunday. On 31.12.2012 he reported on duty but he was unwell due to some swelling on his left leg. So he went for oral permission from Muinde who granted the permission. Upon treatment at a public clinic he was given 3 days rest days to recover and as per medical chits filed in court.

- c. The 3 days medical rest days ended on 04.01.2013 when he reported on duty and his supervisor summoned her. His supervisor told him to leave as he had been terminated from employment; without a notice or room to in self defence.
- d. At termination he earned Kshs.7, 555.00 per month deposited at his bank account and the last such pay was December 2012. The claimant stated he was underpaid per wage orders and he was a member of NSSF and NHIF.
- e. The claimant was a member of the Kenya Union of Commercial, Food and Allied Workers but there was no collective agreement between the union and the respondent.

Respondent's witness (RW) was the respondent's operations officer one Jennifer Wambui Njau. Her testimony was that the claimant was never dismissed but that when he was asked to explain his whereabouts from 27.12.2012 to 4.01.2013, the claimant walked away from his supervisor one Muinde. RW further testified that she had not heard from the said Muinde since 4.01.2013.

The 1st issue for termination is whether the termination was unfair. The court has considered the evidence on record. There is no reason to doubt the account by the claimant about the circumstances surrounding his termination. The court finds that the termination was without a notice and a hearing as per section 41 of the Employment Act, 2007 and it was verbal and by the claimant's supervisor one Muinde who according to RW also lacked the authority to dismiss the claimant. Thus the termination was unfair for want of a valid reason and due process. While making that finding the court finds that RW's evidence that the claimant walked away instead of making the explanation is not tenable because in that event the respondent would be expected to institute disciplinary proceedings on account of the alleged ensuing absence from duty without permission or reasonable cause. The court upholds its opinion against the principle of soft landing in Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR where in the judgment it was stated thus,

“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.”

The court has evaluated the evidence. Upon being given the 3 days sick off, the claimant did not take steps to notify the respondent about that medical off until he reported back at work on 04.01.2013 to submit the medical chits. Thus the court finds that the claimant substantially contributed to his termination and is awarded 6 months' gross salaries for the unfair termination and not 12 months as prayed for. That award is **Kshs. 54, 619.80**.

The 2nd issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

1. The court has considered the strained relationship between the parties and returns that reengagement or reinstatement would not be justified as will not meet the ends of justice. The prayers are accordingly declined.
2. RW testified that she did not know the claimant's pay. The claimant claimed that he was underpaid and there is no material on record to defeat that prayer. The court finds that the claimant has established on a balance of probabilities that he is entitled to **Kshs.45, 261.40** as submitted for the

claimant.

3. The claimant is entitled to **Kshs.22, 058.00** for pay in lieu of accrued leave and as prayed for as well as **Kshs. 9, 103.00** being pay in lieu of the termination notice.

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

1. The declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant **Kshs.131, 069.20** by 01.01.2016 in default interest to be paid thereon at court rates from the date of the judgment till full payment.
3. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 4th December, 2015.**

BYRAM ONGAYA

JUDGE