



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 193 OF 2013

(Formerly Cause No. 1038 of 2011 at Nairobi)

DANIEL KIPKORIR LANGAT.....CLAIMANT

- VERSUS -

NAKURU SNACKWAYS LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th June, 2014)

JUDGMENT

The claimant **Daniel Kipkorir Langat** filed the memorandum of claim on 30.06.2011 through Gordon Ogolla & Associates. The claimant prayed for underpayment from July, 2006 to 31.12.2010; annual leave between July, 2006 to 31.12.2010; compensation under section 49(1) (c) of the Employment Act, 2007 being Kshs.89,161.80 (Total being Kshs.257,055.00); the respondent to issue the claimant's certificate of service under section 51 of the Employment Act, 2007; and the respondent to pay costs of the suit. Later on 4.11.2013, the claimant appointed Ndeda & Associates to act for him.

The memorandum of defence was filed on 29.07.2011 in person and the respondent prayed that the claimant's suit be dismissed with costs. The reply to the memorandum of response was filed on 24.02.2014.

The suit was heard on 26.05.2014 when the claimant and claimant's witness Richard Kipsang (**CW**) gave evidence to support the claimant's case. The respondent's witness was Murtaza Abdulhusseim (**RW**).

The claimant testified that he was employed by the respondent in July, 2006 as a cook. The arrangement was oral at a pay of Kshs.165.00 per day increasing to Kshs.180 per day effective sometime in 2009. He worked from 7.00 am to 6.00 pm for 7 days a week including on public holidays and on Sundays without any rest day. The claimant testified that on 31.12.2010 after work, the respondent called a meeting and notified staff that they would stop work and be recalled after renovations. His workmates resumed after a week but the claimant was not recalled as promised. Later, he was told that work had reduced but his workmates told him that he had been replaced. The dispute was reported to the labour officer and the claimant was paid Kshs.21,730.00 but no explanatory breakdown was made. The claimant was dissatisfied and he filed the suit.

The 1st issue for determination is the claimant's date of appointment. The claimant testified it was July, 2006. RW testified the claimant was employed August, 2009. CW testified that he was employed by the

claimant about May, 2008 to February, 2011 and the claimant was his workmate throughout that time. The court has evaluated the evidence and in view of the evidence by CW, the claimant's testimony is found credible. On a balance of probability, the court finds that the claimant was employed in July, 2006.

The 2nd issue for determination is whether the termination was unfair. The claimant says he was told the work had reduced. RW testified that the claimant used to be absent some times as a casual worker and he left employment when he failed to turn up. That there was work for the claimant to perform but he could be absent or late was the RW's case. The claimant failed to show up and as per RW's testimony, RW told him not to show up. RW stated business had been growing and no worker was laid off on redundancy.

The court has considered the evidence and finds that on a balance of probability, the claimant's account of the reason for termination is more credible. First, it is not explained why the respondent failed to comply with the law and maintain the relevant records. Secondly, if the claimant had been absent without explanation, then the claimant was entitled to clear disciplinary action but which never took place as envisaged in section 41 of the Employment Act, 2007 entailing a notice and a hearing. The termination was therefore unfair in view of the invalid reasons and in view of absence of due process.

The court has considered that the work was of a permanent nature and the claimant worked for over 4 years and finds that the casual employment converted to employment subject to the minimum terms of employment under the Employment Act, 2007 and as provided in section 37 of the Act.

The next issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows.

- 1. In absence of relevant records by the respondent, the court has no reason to doubt that the claimant worked overtime, during public holidays and without rest as claimed and as submitted.**
- 2. The respondent did not maintain records and there is no ground to doubt that the claimant did not proceed on annual leave and was not paid as submitted.**
- 3. The claimant is entitled to the certificate of service under section 51 of the Employment Act, 2007.**
- 4. As the termination has been found to have been unfair, the claimant is entitled to 12 months' salaries under section 49 (1) (c) of the Act.**

Accordingly, the court finds that the claimant is entitled to Kshs.257,055.15 as prayed for and the certificate of service under section 51 of the Act.

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.257,055.15 by 1.8.2014, failing, interest to be payable at court rates from the date of the judgment till full payment.**
- 3. The respondent to deliver to the claimant the certificate of service by 1.08.2014.**
- 4. The respondent to pay costs of the suit.**

Signed, dated and delivered in court at Nakuru this Friday 20th June, 2014.

BYRAM ONGAYA

JUDGE