



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 230 OF 2013

MOSES EKIRAPA OKEMO.....CLAIMANT

- VERSUS -

HARGUR ENTERPRISES.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th June, 2014)

JUDGMENT

The claimant **Moses Ekirapa Okemo** filed the statement of claim on 22.07.2013 through Wambua Kigamwa & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that he was unfairly and unlawfully terminated and during his employment he was not remunerated according to law.
- b. One month salary in lieu of termination notice Kshs.9,102.90.
- c. 12 months compensation for unfair termination Kshs.109,234.00.
- d. Underpayment of wages Kshs.32,434.80.
- e. Service years pay for 12 years times 9,102.90 making Kshs.109,234.80.
- f. Leave pay for 12 years times 9,102.90 making Kshs.109,234.80.
- g. Total Kshs.369,241.30.

The respondent Hargur Enterprises filed the defence on 30.07.2013 through Nyairo & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

It is not disputed that the claimant was employed by the respondent as a general worker from 2001 to April 2013. As at termination of the claimant's employment, there were 10 general workers in the employment of the respondent.

The issues for determination are two. First, whether the claimant's termination was unfair. Secondly, whether the claimant is entitled to the remedies as prayed for.

For the first issue, the claimant testified that on 2.04.2013 he reported at work to collect his pay for March 2013. The respondent's director was called Kuldhan Singh (also the respondent's witness - RW). The claimant was at about 4.00 pm on that date paid Kshs.10,000 being pay for March, 2013 and April 2013. It was his testimony that he had received some advance pay for March 2013. The director, after paying the claimant, told the claimant that work had reduced and he was to go home to be recalled when the work improved. The claimant's case was that he was not recalled and at termination his monthly pay was Kshs.7,400.00. The given reason for his termination, as per his testimony, was alleged reduced workload. The issue of work reducing had earlier been announced to all employees in a meeting in January, 2013 by the respondent's employee called Lazarus and upon the director's instructions.

RW testified that the claimant was habitually late and despite warnings, he failed to improve. RW testified that the claimant's last monthly pay was Kshs.7,600.00. RW denied allegations of redundancy by the claimant. RW admitted that on 2.4.2013, the claimant had come to collect his pay and not to work and there was no redundancy. RW stated that he wrote no disciplinary letters and he gave verbal warnings but the claimant failed to improve.

The court has considered the evidence on record. RW's account is that the claimant was a habitual late comer. However on the material date the claimant is said to have reported to collect his pay. It is not alleged that he was late for duty on the material date. The court finds that RW's account is incredible and mostly improbable because there is no account of specific date when the claimant was late. The voluntary pay of the alleged claimant's April 2013 salary is inconsistent with a dismissal decision.

The court finds that the account by the claimant is true that he was terminated on alleged reducing workload as announced to staff in January, 2013 by one Lazarus and upon RW's instructions. In unexplained design, the respondent never called Lazarus to testify and the announcement was never addressed in the respondent's evidence.

It is obvious that the respondent did not bother to comply with section 40 of the Employment Act, 2007 on redundancy and the court finds that the termination was unfair. The court has considered the claimant's long service of 12 years. There is absence of any contribution of the claimant to his termination. The claimant anticipated long service prior to normal retirement at the agreed or applicable mandatory retirement age. The court finds that the claimant is entitled to **Kshs.91,200.00** being 12 months gross pay at Kshs.7,600.00 for the unfair termination.

The second issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes the following findings:

- a. The claimant prayed for one month salary in lieu of termination notice Kshs.9,102.90. RW testified that he paid the claimant salary for April 2013 and salary for March 2013 less the advances. The termination was on 2.4.2013. In the circumstances, the court finds that the one month pay for April 2013 served as pay in lieu of termination notice and the claimant is not entitled as prayed for.
- b. The claimant did not establish by evidence the alleged underpayment of wages of Kshs.32,434.80 and the claim will fail.
- c. The claimant prayed for service pay for 12 years times Kshs.9,102.90 making Kshs.109,234.80. Section 40 of the Employment Act entitled the claimant to half monthly pay for each year served. The claimant is awarded **Kshs.45,600.00** at Kshs.3,800.00 per each of the 12 years served.
- d. The claimant prayed for leave pay for 12 years times 9,102.90 making Kshs.109,234.80. RW testified that the claimant took all his due leave. There was no evidence of disputes on leave while the relationship subsisted and RW testified that staff took leave as per the documents filed in court. There is no reason to doubt RW's evidence and the court finds that on a balance of probabilities, the claimant failed to establish the claim.

In conclusion, the court enters judgment for the claimant against the respondent for:

- a. A declaration that the termination of the claimant's employment by the respondent was unfair.
- b. The respondent to pay the claimant **Kshs.136,800.00** by 1.07.2014 and in default, interest to be payable at court rates from the date of the judgment till full payment.
- c. The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nakuru this **Friday 6th June, 2014.**

BYRAM ONGAYA

JUDGE