



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 442 OF 2013

BARNABA MUCHILE ANDAYICLAIMANT

-VERSUS-

**SUPER BARGAINS GLASS & HARDWARE (NKU)
LTD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 31st July, 2014)

JUDGMENT

The claimant filed the memorandum of claim on 23.12.2013 through M. Korongo and Company Advocates. The claimant prayed for judgment against the respondent for Kshs.4,500,569.80 comprising of 12 months' gross salaries for remaining 33 years of service being Kshs.4,304,440.80; Kshs.28,356.00 being three months salary in lieu of termination notice; unpaid leave for 4 years 9 months Kshs.47,260.00; house allowance for 5 years Kshs.7,089.00; and Kshs.113,424.00 being 12 months pay under section 49 (1) (c) of the Employment Act, 2007.

The response to the statement of claim was filed on 3.2.2014 through Sheth and Wathigo Advocates. The respondent prayed that the claimant's claim be dismissed with costs. A reply to the response to the claim was filed on 17.2.2014.

The **1st issue** for determination is the date of the claimant's employment by the respondent. The claimant was an employee of the respondent effective a date disputed by the parties. The claimant testified that he was employed sometimes in February, 2009 as a casual worker while the respondent relied on a signed contract which showed that the claimant was employed on 10.10.2010 as a loader. The claimant testified that he was in continuous service since 2010 to 2013. In view of that testimony by the claimant, the court finds that the claimant was employed by the respondent as a loader effective 10.10.2010. While making that finding, the court further observes that the claimant contradicted himself when he stated in his testimony that casual employment was effective February, 2009 as opposed to August, 2009 as pleaded at paragraph 3 of the memorandum of claim. The court holds that such contradictory evidence is unacceptable as it is untenable.

The **2nd issue** for determination is whether the claimant's employment was unfairly terminated by the respondent. The claimant's testimony was that while at work carrying some glass, he was involved in an accident whereby the glass cut his arm. Further, throughout his service he never received a warning letter. The claimant testified that the respondent's manager sent him away from work without any notice, hearing or reason. He reported the dispute to the labour officer where the respondent appeared and alleged that the claimant had signed a resignation letter dated 30.11.2010. The claimant testified that it was a lie that he had signed such a letter. He further testified that it was his desire that he worked till old

age and retire upon attaining a mandatory retirement age which he said was attainment of 60 years old. He further testified that at termination his monthly pay was Kshs.9,452.00. The claimant's account on the termination is that following the injury at work on 3.5.2013, he underwent 2 weeks treatment and when he resumed duty, he requested for pay for the injury. The respondent's manager called Ashok Patel also being respondent's witness No. 1 (RW1) was not happy with the request and decided to fire him on 28.6.2013. RW1 testified that the claimant signed the resignation letter when he took money at labour office. The labour officer in issue was never called by the respondent to testify and there was no expert evidence that the claimant had indeed signed the alleged resignation letter. It is not disputed by the respondent that the claimant had made a claim to be compensated following the injury sustained while at work. Accordingly, the court finds that the claimant did not resign as alleged by the respondent but was terminated by RW1 on account of the claimant's valid claim and grievance to be compensated for the injury sustained by the claimant while at work.

Under section 46 (h) of Employment Act, 2007, an employee's initiation or proposed initiation of a complaint or other legal proceedings against the employer except where the complaint is shown to be irresponsible and without foundation, will not constitute a fair reason for dismissal. In the present case, the court finds that the claimant's claim and grievance to be compensated for the injuries sustained was not irresponsible and was with foundation. Thus, the court finds that the termination was unfair because the reason was invalid as at the time of termination and as envisaged in section 43 of the Act.

The court has considered that the claimant did not contribute to his termination; the reason for termination was prohibited under the Act as it was illegal; and the claimant desired to continue in employment. The court awards him 12 months' salaries being **Kshs.113,424.00** for the unfair termination and as prayed for.

The **3rd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

1. The claimant has prayed for lost future earnings for 33 years from the date of termination to the date of retirement. There is no agreement that the claimant would retire upon attaining 60 years of age. The court further considers that the claimant has not pleaded or established that following the termination he will not be able to obtain similar alternative employment. In the circumstances, the prayer will fail.
2. The claimant has prayed for pay in lieu of annual leave. The court has taken into account the evidence on record and as already found, the claimant worked for the respondent from 10.10.2010 to 28.6.2013 making about 2 years 9 months service. Under section 28 of the Act, the court finds that he is entitled to **Kshs.25,993.00**.
3. The contract provided for 1 month termination notice and the court finds that the claimant is entitled to **Kshs.9,452.00** being pay in lieu of termination notice.
4. There was no dispute between the parties that under the letter of appointment the respondent paid the claimant house allowance at 15% of the basic pay. Accordingly, the court finds that the prayer for house allowance will fail.

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

1. The respondent to pay the claimant **Kshs.148,869.00** by 1.09.2014, failing, interest at court rates to be payable from the date of this judgment till full payment.
2. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Thursday, 31st July, 2014**.

BYRAM ONGAYA

JUDGE