



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAKURU**

**CAUSE NO. 304 OF 2013**

**NAIBEI GERISHOM KISACH.....CLAIMANT**

**-VERSUS-**

**NATIONAL CEREAL & PRODUCE BOARD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> October, 2014)

**JUDGMENT**

The claimant filed the memorandum of claim on 12.09.2013 through C.D Nyamweya & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Gratuity Kshs.239, 655.
- b. Severance pay Kshs.275, 880.00.
- c. Exemplary damages for wrongful termination at Kshs.22, 990 x12 = Kshs.275, 880.00.
- d. Salary arrears Kshs. 1, 379, 400.00.
- e. 3 months salary in lieu of notice Kshs. 18, 435 x 3 = Kshs.55, 305.00.
- f. Leave for one year.
- g. Certificate of service.
- h. Costs of the suit.
- i. Interest on a, b and c.

The respondent's statement of defence was filed on 09.12.2013 through Nyaundi Tuiyott & Company Advocates. The respondent prayed for judgement against the claimant for dismissing the claimant's claim in its entirety with costs to the respondent.

The claimant testified to support his case. The claimant's witnesses were Bramuel Sijeji Isaji Barasa also known as Emmanuel (CW1); and Danson Lintole (CW2). The respondent's witnesses were Peter Langat (RW1) the Silo Manager stationed at Eldoret Depot at all material time; Johana Kiprop Marbich; and Johana (RW2) the respondent's regional manager for North Rift based at Eldoret; Johana Chebii (RW3) the respondent's internal audit manager; and David Makokha (RW4).

It is not in dispute that the claimant was employed by the respondent as a store clerk and deployed at the Kapsowar Sub-Depot managed under the Eldoret Sub-depot. The claimant testified that he was taken ill on 16.06.2007 and he requested his cousin CW1, who also worked for the respondent as a casual employee to deliver some accountable documents. CW1 delivered the documents to RW4 who accepted by acknowledging receipt in the delivery book Exhibit C3. It was the claimant's testimony that his health deteriorated in a condition called organic psychosis and had to be treated for a long period of time up to

18.05.2009. At the same time, while undergoing treatment, the respondent caused the claimant to be arrested and charged with the offence of stealing by servant and the High Court acquitted the claimant on 20.01.2011 in Miscellaneous Criminal Application No. 54 of 2009 at Eldoret.

CW3 is the clinical officer who attended to the claimant. He confirmed that he attended to the claimant on 16.06.2007 and the claimant's ailment presented as an abnormal behaviour with restlessness and incoherent speech. CW3 testified that when he attended to the claimant, the patient could not identify his place, time and day and CW3 made a diagnosis of organic psychosis (a mental illness of hallucinations and illusions) after ruling out cerebral malaria. CW confirmed that the claimant then attended the psychiatric clinics up to 18.05.2009 when the patient was declared to have healed. On 18.05.2009, the claimant was medically found to be doing well having taken medicines as prescribed; he had improved and was discharged from the psychiatric clinic. Throughout the treatment, CW3 confirmed that the claimant had attended the clinic as an outpatient assigned Male Filter Clinic (MFC) No. 5053 of 2007 on record as exhibit C2.

RW1 testified that the claimant was dismissed on account of desertion of duty and not on account of the audit report on the discrepancies at the claimant's Kapsowar Sub-Depot.

The respondent addressed to the claimant the desertion notice dated 26.06.2007 to show cause why disciplinary action should not be taken against him for absenting himself from duty from 20.06.2007 to 26.06.2007 without permission. The claimant was to respond by 29.06.2007. The desertion notice was forwarded to the claimant's advocates by the respondent's letter dated 16.03.2011. The claimant responded by his letter dated 29.03.2011 stating that his absence from duty was not prompted by intentional neglect or some other ulterior interest but was due to his serious ailment. The claimant pleaded that the respondent considers returning him on duty.

The claimant was dismissed from employment by the letter dated 14.07.2011 addressed to the claimant by the respondent's human resource officer. The letter stated as follows:

**“RE: DISMISSAL**

**Refer to our desertion notice letter dated 26<sup>th</sup> June 2007 and your subsequent reply dated 29.03.2011.**

**This is to inform you that the Management has deliberated on your written defence, carried out investigation on the issues raised in your submission and has come to the conclusion that you absented yourself from your place of work without permission or any lawful cause.**

**The Management has therefore decided to dismiss you from Board's services with effect from 26.06.2007 on grounds of desertion of duty.**

**You will be paid your benefits that you are entitled to in accordance with the terms and conditions of service.**

**However, please note that payments of the above dues will be subject to your completing the clearance certificate which is hereby enclosed.**

**This letter is issued in duplicate, sign a copy and return it to this office as soon as possible.**

**Yours faithfully,**

**NATIONAL CEREALS AND PRODUCE BOARD**

**Signed**

**F. Muchina**

## **HUMAN RESOURCE MANAGER**

The claimant was dissatisfied and he filed the suit.

The court has considered the pleadings, the evidence and the submissions and makes the following findings on the issues in dispute.

The **1<sup>st</sup> issue** for determination is whether the dismissal was unfair. The evidence on record shows that the claimant suffered serious mental illness from 16.06.2007 to 18.05.2009. The show cause letter referred to absence from 20.06.2007 to 26.06.2007 and the court finds that throughout the alleged period of absence without permission or any lawful cause, the claimant was in fact sick. The court holds that it would be unreasonable for an employer to expect an employee who is seriously sick, and like in this case, mentally sick, to produce medical records towards procuring permission to be away on account of the ill health. In view of the claimant's ill health, the court finds that at the time of the dismissal, the respondent acted upon a reason that was not valid because, in the findings of the court, the claimant had a valid reason to be absent from duty, namely, he was ill, and the reason was not only lawful but also reasonable. The dismissal was unfair under section 43 of the Employment Act, 2007.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The claimant prayed for gratuity Kshs.239, 655. The manner of arriving at the amount of the money as claimed was not provided in evidence or submissions. Under this heading, the court finds that as the termination was unfair, the claimant be retired effective **26.06.2007** with full benefits including dues under provident fund, staff savings scheme, National Social Security Fund and as contributed by both parties and to be computed, filed and served by the claimant and quantum recorded on a convenient date within 30 days from the date of this judgment.
- b. As the case was not about termination on account of redundancy, the court finds that the claimant is not entitled to severance pay Kshs.275, 880.00.
- c. As the termination was unfair, the claimant is entitled to pay at Kshs.22, 990 x12 = **Kshs.275, 880.00** as the reasonable pay for the unfair termination.
- d. The claimant prayed for salary arrears Kshs. 1, 379, 400.00. Under section 30 of the Employment Act, 2007 the claimant would be entitled to not less than 7 days paid sick leave for every 12 months consecutive service. Is not in doubt that the claimant was sick and that is why he did not work. Taking all circumstances into account, the claimant is awarded one month pay under this prayer making **Kshs. 22, 990.00**.
- e. The claimant prayed for 3 months salary in lieu of notice Kshs. 18, 435 x 3 = Kshs.55, 305.00. The claimant did not establish or submit on the basis of the claim for 3 months and the court finds that he is entitled to statutory one month pay in lieu of notice under section 35 of the Act making **Kshs. 18, 435.00**.
- f. The claimant did not provide evidence or relevant submissions and is not entitled to leave for one year as prayed for.
- g. The claimant is entitled to the certificate of service.

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

- a. A declaration that as the termination was unfair, the claimant be retired effective **26.06.2007** with full benefits including dues under provident fund, staff savings scheme and National Social Security Fund as contributed by both parties and to be computed, filed and served by the claimant and quantum recorded on a convenient date within 30 days from the date of this judgment so they

are paid as per the applicable rules and law.

b. The respondent to pay the claimant **Kshs.317, 305.00** by 1.12.2014 failing interest at court rates to be payable from the date of the judgment till the date of full payment.

c. The respondent to deliver to the claimant the certificate of service by 1.12.2014.

d. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 17<sup>th</sup> October, 2014.**

**BYRAM ONGAYA**

**JUDGE**