



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 100 OF 2013**

**(FORMERLY CAUSE NO. 1010 OF 2012 AT NAIROBI)**

**JOEL ORERI MOGIRE.....CLAIMANT**

**-VERSUS-**

**ABDUL HUSSEIN T/A SUNSHINE CAFE NAKURU.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 20<sup>th</sup> September, 2013)

**JUDGMENT**

The Claimant **Joel Oteri Mogire** filed the memorandum of claim on 14.06.2012 through Nyagaka & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. **A declaration that the claimant's dismissal was unfair.**
- b. **Kshs.963,000.00 being terminal and contractual dues.**
- c. **General damages.**
- d. **Costs and interest at court rates.**
- e. **Such other and further relief as the honourable court may deem fit to grant.**

The respondent **Abdul Hussein** filed the reply to the memorandum of claim on 16.07.2012 in person and later appointed Gitonga Mureithi & Company Advocates to act for him in the case.

The case was heard and both parties gave evidence to support their respective claims. The claimant also called one witness, Nicholas Acheri Opindi. The issues for determination in this case are:

- a. **Whether the claimant was employed effective 1990.**
- b. **Whether the claimant was unfairly terminated from employment.**
- c. **Whether the claimant is entitled to the remedies as prayed for.**

For the first issue, the claimant testified that he was employed by the respondent as a cook with effect from 1990. The respondent testified that he was not sure whether the claimant was employed in 2004 or effective 1990. He further told the court that the claimant could have been employed in 1990 as per records which were not filed in court. On a balance of probability, the court finds that the claimant was employed by the respondent as a cook with effect from 1990.

On the second issue, the claimant testified that he was grossly underpaid. He had two of his children in high school and had trouble paying the school fees. On 4.10.2011, he was scheduled to report at work at

11.00 am and prior to that he had to go to the schools to deal with matters of outstanding fees. He reported at work at about noon and the respondent pushed him from the kitchen and out of the work place premises. It was the only day he had been late. The claimant testified that despite demands by the union and the claimant's advocates, the respondent declined to respond to the claimant's demands.

The respondent testified that the claimant left employment voluntarily on a date the respondent did not recall. The respondent stated that the claimant came back to be reemployed despite the voluntary notice to quit employment. The respondent did not produce in court the alleged quit notice. He stated that the claimant brought his son to be employed by the respondent but the particulars of the son such as the name and capacity of engagement were not provided.

The court has considered the evidence and finds that the account as given by the respondent is not credible. The alleged notice of voluntary quitting was not produced in court. The court considers that the lateness of one hour or thereabouts was not proportionate to the conduct of the respondent pushing the claimant out of the kitchen and the work station. The court holds that the respondent's action of pushing the claimant from the respondent's premises was sufficient for the claimant to consider himself terminated from employment. The court finds that the claimant was constructively terminated from employment. The reasons were not given and the due process of notice and hearing prescribed in section 41 of the Employment Act, 2007 was not adhered to. The court finds that the termination was unfair and in view of the long service, the claimant was entitled to due process because his otherwise casual service had converted to permanent employment under section 37 of the Employment Act, 2007.

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

- a. There was no evidence that the claimant was accorded annual leave or paid in lieu of taking the leave except payment of Kshs.2,000.00 in February 2010 as testified by the respondent. He is entitled to **Kshs.76,000.00** being the amount as prayed for less the Kshs.2000.00.
- b. The basis for the claims for underpayment was not established by evidence and no submissions were made to support the specific claims. The court finds that the claimant is not entitled to Kshs.300,000.00 for underpayment.
- c. The claimant has prayed for severance pay. There is no evidence that this was a case of redundancy. The court has found that the claimant was unfairly and constructively terminated from employment. The court therefore finds that the claim for Kshs.585,000.00 for severance pay shall fail.
- d. The claimant has prayed for any other relief the court may find just in the circumstances of the case. The court has considered the long service and the unfair constructive termination and finds that ends of justice shall be met by awarding the claimant 12 months gross salaries for the unfair termination. The respondent testified that the claimant's last monthly pay was Kshs.7,530.00 and the claimant is awarded **Kshs.90,360.00** under section 49 (1) (c) of the Act.
- e. The claimant is entitled to one month payment in lieu of the termination notice and is awarded **Kshs.7,530.00**.

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

- a. A declaration that the claimant was constructively and unfairly terminated from employment by the respondent.
- b. The respondent to pay the claimant a sum of **Kshs.173, 890.00** by 1.12.2013, failing interest to be payable at court rates from the date of this judgment till full payment.
- c. The respondent to pay costs of the case.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 20<sup>th</sup> September, 2013**.

**BYRAM ONGAYA**

**JUDGE**