



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 87 OF 2013

MOSES NGANGA

WANJIKU.....CLAIMANT

-VERSUS-

**THE CHAIRMAN, BOARD OF DIRECTORS BEREA THEOLOGICAL
COLLEGE.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 20th September, 2013)

JUDGMENT

This case was initially filed in the Chief Magistrate's Court at Nakuru on 14.09.2012 by the claimant Moses Nganga Wanjiku who filed a plaint through Hari Gakinya & Company Advocates. The respondent filed the statement of defence on 26.10.2012 through Sheth & Wathigo Advocates. The suit was transferred to this court by the order given on 14.03.2013 by Wendoh .J. in the High Court at Nakuru.

In the memorandum of claim filed on 24.05.2013, the claimant has prayed for:

- a. **A declaration that the claimant was a permanent employee of the respondent for a period of four years hence entitled to leave allowance, medical allowance, housing allowance among other lawful benefits.**
- b. **A declaration that the claimant was unlawfully dismissed from employment and therefore entitled to payment in lieu of notice and other benefits and indemnity for the unlawful termination from his employment.**
- c. **General damages for unlawful dismissal and costs of the suit and interest.**

The respondent filed the reply to memorandum of claim on 06.06.2013 and prayed that the claim be dismissed with costs.

The claimant testified that he was employed by the respondent on 10.04.2008 without a written contract and he served for three years without a break. He testified that he was deployed to serve at the farm for one year and at the kitchen for 2 years. His daily rate wage was Kshs.127 and commuted and paid at the monthly rate of Kshs.2,300/=. Later, his daily wage was increased to Kshs.140 and paid monthly at an amount he did not recall. Later, he was deployed to the dairy unit.

The claimant testified that he was given Kshs.4,200/= on the evening of 1.05.2012. It was the pay for end

of April 2012. The claimant testified that he reported on duty on 2.05.2012 as usual and his supervisor Jackson Malowe told him that his employment had been terminated. On 3.05.2012, the claimant told the court that the respondent employed another person to his position. He was not given any termination letter but was given a certificate of service dated 7.05.2012 being **exhibit C1**. At termination he had served for 4 complete years.

It was the claimant's evidence that at appointment he served for six months then he was employed on permanent employment without a letter of permanent employment. He signed some document after the monthly payment and was not deducted for the National Social Security Fund (NSSF) and the National Hospital Insurance Fund (NHIF) as required by the statutes.

The respondent's witness No. 1 was Shadrack Mwangangi. He stated that the respondent employed the claimant as a casual worker in September, 2008. He explained that the claimant served at the construction site, in the kitchen and later at the farm as he had to be deployed out from the kitchen because he frequently fainted due to high temperatures in the kitchen. He denied engaging a village elder to convey to the claimant that the respondent was willing to settle the claimant's claims at the District Labour Office by paying Kshs.15 000/=. The witness testified that if the claimant was a permanent staff the respondent would have issued a letter to him stating as much. It was his further evidence that medical and leave allowances were payable to permanent staff under the respondent's church policies. The witness admitted that the claimant was paid at a daily rate and at the end of the period of service. The records were maintained but he had not filed or produced in court any of them. The claimant, according to the witness was employed in September 2008 and worked for 18 or so days per month and the claimant was contracted for 3 to 4 weeks per month till he left on 2.5.2012.

The respondent witness No.2 was Jackson Marui employed by the respondent to assist in water, electrical and farm sections since 2006. He was the claimant's workmate and he stated that the respondent's establishment had a lot of work that there was need to engage casuals. The claimant was one of such casuals. He inducted the claimant upon engagement in 2008 and they worked from 8.00 am to 4.00 pm with an hour's lunch break. He is the one who informed the claimant on 2.5.2012 that the job had reduced and he had to break from employment.

The two main issues for determination are whether the claimant was a casual worker or not and secondly, whether the claimant is entitled to the remedies as prayed for.

For the first issue, the claimant has submitted that he is an employee whose contract converted to permanent service because he worked for more than two continuous months and he is therefore entitled to minimum conditions and terms of service under the employment law as per section 37 of the Employment Act, 2007. The respondent's witnesses confirmed that there were records maintained with respect to the claimant's service. Further, the evidence confirmed that there was a lot of work to be performed by the claimant variously including at the kitchen, dairy unit, farm, biogas project, baking project and construction site. In absence of the records and in view of the claimant's coherent evidence, the court finds that the claimant served without a break for four complete years of service and his initial engagement converted to service subject to the minimum terms and conditions of service under the Act.

The second issue for determination is whether the claimant is entitled to the remedies as claimed for. It is obvious that the claimant was not given any termination notice and was not heard as envisaged in section 41 of the Employment Act, 2007. The termination was unfair and the court finds that the ends of justice will be served by the respondent paying the claimant **Kshs.25,200/=** at Kshs.4,200/= per the undisputed last monthly pay for six months.

It was not disputed that the claimant was not a member of the NSSF and the court finds that a monthly pay for each year served will be a fair and reasonable service pay and the claimant is awarded **Kshs.16,800/=** for the four years. The court finds that the claimant has failed to establish and justify the other remedies prayed for by way of allowances as no evidence was provided and the same shall fail.

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 a sum of **Kshs.42,000/=** by 1.11.2013 failing which, 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, 20th September, 2013.

BYRAM ONGAYA

JUDGE