



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 94 OF 2013

JANUARIUS MUSYOKI NDETO.....CLAIMANT

-VERSUS-

PATMAT BOOKSHOP LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th November, 2013)

JUDGMENT

The claimant is **Janaurius Musyoki Ndeto**. The respondent is **Patmat Bookshop Limited**. The claimant filed the memorandum of claim on 23.04.2013 through Orina & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. **underpayments Kshs.500,976.45;**
- b. **overtime Kshs.897,781.75;**
- c. **rest days off duties Kshs.465,516.50;**
- d. **public holidays Kshs.73,084.80;**
- e. **leave Kshs.60,579.45;**
- f. **compensation under section 49 (c) of the Employment Act, 2007; and**
- g. **total claim being for Kshs.2,216,570.00.**

The respondent filed the reply to the memorandum of claim on 24.05.2013 through Ikuu, Mwangi & Company Advocates and prayed that the suit be dismissed with costs.

The case was heard on 31.10.2013 and 4.11.2013. Mr Magatta Advocate appeared for the claimant and Mr. Ikuu Advocate for the respondent. The claimant gave evidence to support his case. The respondent's witnesses included its director, Patrick Gitau Matindi (**RW1**), respondent's salesman, Michael Macharia (**RW2**) and Boniface Rono from KCC (**RW3**).

The claimant was employed, initially, by RW1 in 2007. RW1 then traded as Patmat General Merchants and later as Patmat Bookshop being registered business names. In January 2009, the respondent was registered as a limited company, took over the Patmat Bookshop business and the claimant continued in employment under the respondent. It was not disputed that over the claimant's service his salary had risen through from Kshs.5,000.00 to Kshs.10,000.00 at the time of termination.

The claimant testified that he worked 7 days a week, waking up at 5.00 am and working up to 8.00 pm. The respondent's evidence was that the claimant did not work on public holidays and that he worked as a driver and messenger from 8.00 am to 5.00 pm.

In December 2012, the claimant was assigned duties to deliver tender forms to a place called Subukia.

He was to use the respondent's motor bike. The bike ran out of fuel midway the journey with the consequence that the claimant was late to make the delivery. The claimant was sent on a three months leave and according to the respondent, instead of waiting to receive explanation, the claimant reported a dispute to the labour officer. It was the respondent's case that the claimant had been sent on leave to pave way for investigations over various failings on the part of the claimant. The respondent stated that after investigations, the claimant would be summoned for a hearing and subsequently a decision made one way or the other. However, the respondent submitted that the process was interrupted by the claimant's report to the labour office. Thus, the dismissal was not unfair.

The court has considered the pleadings, evidence and the submissions.

The first issue for determination is whether the dismissal was unfair.

Section 41 of the Employment Act, 2007 required the respondent to accord the claimant a notice and a hearing. Instead, the respondent invented a process it calls sending the claimant on leave pending investigations. Such process was never agreed between the parties and the court finds that the respondent failed to comply with section 41 of the Act. The court finds that the respondent was required to comply with the provisions of the section and whose implementation demanded compliance with the steps set out by this court in **Titus Musau Ndivau & Another –Versus- Waridi Limited, Cause No. 903 of 2012 at Nairobi, pages 14-15.** Accordingly, the termination in this case was unfair and the claimant is entitled to Kshs.120,000.00 being 12 months gross salaries at Kshs.10,000.00 per month.

The second issue for determination is whether the claimant is entitled to the other remedies as prayed for.

First, the evidence on record shows that the claimant performed the duties of a driver and messenger. Indeed, the circumstances leading to the termination are said to have entailed late delivery of tender documents. Thus, the court finds that the claimant did not perform and was not employed to perform duties of a driver and salesman. He was essentially employed as a messenger. Accordingly, the claim for underpayment shall fail.

Secondly, the court has considered the claim for overtime, rest days, and public holidays. There was no dispute or grievance about the substance of the claim while the claimant was in the respondent's service. The court finds the claim was an afterthought coined by the claimant after the termination and the claimant is not entitled as prayed for.

There is no dispute that the respondent took up the Patmat Bookshop enterprise and the claimant continued in employment. It is irresistible that the claimant is entitled to claim pay for due annual leave from the respondent for the entire period of service of 5 years being 2007 to 2012. The court has considered that the pay for the due leave would be belated and the claimant is awarded **Kshs.50,000.00** at Kshs.10,000.00 per annum as the reasonable due pay under the claim.

The court has noted that it is undisputed that the respondent paid the claimant Kshs.20,000.00 after cessation of the employment and the court has reckoned the pay as a reasonable pay in lieu of the termination notice.

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

- a. **a declaration that the termination of the employment was unfair in the circumstances of this case;**
- b. **the respondent to pay the claimant Kshs.170,000.00 by 15.12.2013, failing interest at court rates to be payable from the date of the suit, 23.04.2013; and**
- c. **the respondent to pay costs of the suit.**

Signed, dated and delivered in court at Nakuru this Friday, 29th November, 2013.

BYRAM ONGAYA

JUDGE