



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 118 OF 2013

[Formerly Cause No. 1411 of 2012 at Nairobi]

DENNIS BONYI ORANGI..... CLAIMANT

VERSUS

ISAACK NJOGU KIBERA.....1ST RESPONDENT

SPORA WAMBUI NJOGU..... 2ND RESPONDENT

FARMERS PARTNERS LTD..... 3RD RESPONDENT

JUDGMENT

The Claimant is **Dennis Bonyi Orangi** and the Respondents are **Isaack Njogu Kibera, Spora Wambui Njogu** and **Farmers Partners Limited**.

The Claimant filed the statement of claims on 17.08.2012 through B. I. Otieno & Company Advocates. The Claimant prayed for judgment against the respondents for all benefits due for unfair termination of employment including:

- (a) one month salary in lieu of notice;**
- (b) gratuity or severance pay for 12 years;**
- (c) underpayment for 12 years;**
- (d) salaries for January, 2012 and February, 2012;**
- (e) annual leave for 8 years;**
- (f) certificate of service under section 51 of Employment Act; and**
- (g) compensation based on section 49 (1)(c) of the Act; and**
- (h) respondents to bear the costs of the suit.**

The respondents filed the reply to the memorandum of claim on 18.10.2012 through Masese & Nyamwange Advocates. The respondents prayed that the claimant's cause be dismissed and the claimant be condemned to pay costs of the suit.

In presence of Advocates for both parties, the case was fixed for hearing on 13.11.2013 at 9.00 a.m. At the scheduled hearing, the respondents and their counsel were absent. The claimant and his counsel were present. The hearing proceeded as fixed for 13.11.2013. The Claimant gave evidence to support his case.

The Claimant was employed by the respondents on 8.3.1999 as a loader and earning Kshs.80.00 per day. He was subsequently promoted to a shop assistant with his salary increasing to Kshs.100.00 per day, Kshs.3,600.00 per month and finally Kshs.4,500.00 per month at the time his employment with the respondents came to an end.

In December, 2011 after the christmas holiday, the claimant resumed duty. Upon reporting at work, he found the respondents' shop closed. The 1st respondent arrived and informed the claimant that the shop would not be opened. On 29.12.2011, the claimant obtained permission to visit his village home in Kisii County. He was to report back for duty on 4.1.2011. While on leave and before 4.1.2011, the 2nd respondent telephoned the Claimant and advised him to remain on leave from 4.1.2011 to 28.1.2012. The Claimant had never been on annual leave for the 8 years he had served. So, he was advised by the 2nd respondent to take 24 leave days of the pending leave days.

On 28.1.2012, the 2nd respondent conveyed to the claimant by a short message on the cellphone that the claimant reports at work on 30.1.2012. On 30.1.2012, the 2nd respondent telephoned the claimant and asked him to request the 1st respondent to absorb him at the respondents' Lanet construction project. The claimant tried to reach the 1st respondent by phone but the 1st respondent failed to respond. The claimant was later on 20.2.2012 telephoned by the 1st respondent to convey that the 2nd respondent would convey some useful information. Later that day, the 2nd respondent called the claimant and suggested that she wanted him to go and work in West Pokot on a road construction project.

On 28.2.2012, the 1st respondent called the claimant to a meeting in Nakuru on 1.3.2012. They were to meet on 2.3.2012 but 1st respondent could not be reached so that on 3.3.2012 the claimant travelled back to his Kisii village home.

By the letter dated 7.3.2012 being appendix I on the statement of claim, the claimant demanded his January and February, 2012 salaries, pay for pending leave days and an explanation on the fate of his employment.

No response was given by the respondents. On 20.3.2012, the claimant met the 1st respondent at Nakuru upon 1st respondent's request. The 1st respondent assigned the claimant to deliver tender documents to Wareng District headquarters. The claimant accepted the assignment. The 1st respondent promised to pay him some money that day. Upon reaching Eldoret at Wareng District, the claimant delivered the documents but could not reach the 1st respondent on the cellphone as arranged. In those circumstances, the claimant travelled to his Kisii rural home.

The respondents did not attend the hearing and did not provide any evidence to support their defence.

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

1. The claimant has prayed for one month salary in lieu of notice. The court finds that the claimant is entitled as prayed for and is entitled to Kshs.10,867.50, his last statutory pay.
2. The claimant has enumerated the under payments in view of the wage orders applicable at all material times. He gave evidence of the pay he received throughout the material time. The court finds that on a balance of probability, the claimant has established the underpayment as pleaded and is entitled to Kshs.394,671.90 as prayed for.
3. At paragraph 1.4, the claimant has pleaded that he was employed from 1999 to 31.12.2011. The court has taken that pleading into account with the claimant's evidence and find that the claimant did not work in January and February, 2012. Accordingly, the court finds that the claimant is

not entitled to pay for the two months as prayed for.

4. The claimant worked in a shop and there is evidence that the shop closed. The court finds that the closure of the shop amounted to abolition of the office the claimant held at the shop. In the opinion of the court, the claimant's employment terminated on account of redundancy and section 40 of the Employment Act, 2007 would entitle the claimant to severance pay as prayed for. Accordingly, the court finds that the claimant is entitled to Kshs.32,727.00 for severance and as prayed for.
5. The court has considered the circumstances leading to the cessation of the claimant's employment. It is obvious that the respondents failed to comply with due process. The termination was unfair and the court finds that the claimant is entitled to Kshs.130,410.00 as prayed for and under section 49(1)(c) of the Employment Act, 2007.
6. The claimant testified that he was not granted annual leave throughout his service of 8 years. In absence of any other evidence on the issue, the court finds that the claimant is entitled to Kshs.87,230.80 as prayed for.

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

1. the respondents to pay the claimant **Kshs.655,907.70** by **1.12.2013**, in default interest to be payable at court rates from the date of this judgment till full payment;
2. the respondents to deliver to the claimant the certificate of service by 1.12.2013; and
3. the respondents to pay costs of the suit.

Signed, dated and delivered in court at Nakuru this Friday 15th November, 2013.

BYRAM ONGAYA

JUDGE