



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 212 OF 2013

BONIFACE NYAMWEYA OGETO.....CLAIMANT

-VERSUS-

MUTSIMOTO MOTOR COMPANY LIMITED.....RESPONDENT

(BEFORE HON. JUSTICE BYRAM ONGAYA ON FRIDAY 20TH DECEMBER, 2013)

JUDGMENT

The Claimant is **Boniface Nyamweya Ogeto** and the respondent is **Mutsimoto Motor Company Limited**. The claimant filed the memorandum of claim on 11.07.2013 through Oumo & Company Advocates and prayed for:

- a. **One month salary in lieu of notice Kshs.9,389.00.**
- b. **Gratuity Kshs.20,998.80.**
- c. **Compensation Kshs.112,668.00.**
- d. **Damages Kshs.2,366,028.00.**
- e. **Total claim Kshs.2,509,083.80.**

The respondent filed the response to the memorandum of claim on 29.07.2013 through Sheth & Wathigo Advocates and prayed that the claimant's claim be dismissed with costs.

The case was heard on 13.11.2013. The claimant testified to support his case. The respondent's witness was Michael Onyango Sodho, a sectional head.

The claimant was employed by the respondent as a general labourer effective 1.7.2006 at Kshs.4,000.00 per month. He was terminated on 1.03.2011 at a monthly pay of 8,289.00. The claimant testified that at termination he was a general machine operator.

On 28.02.2011, the claimant reported at work as usual after his leave period. The security personnel at the gate advised him not to enter and the human resource officer came to advise him across the gate to report the following day. On 1.03.2011, he reported at 7.30 am and the human resource officer handed him the dismissal letter exhibit **BON VII**. The letter referred to a disciplinary transfer to Mombasa that was not negotiable. The letter stated that the claimant's refusal to proceed on transfer amounted to gross misconduct under section 44(4) (d) and (e) of the Employment Act, 2007. The claimant was accordingly summarily dismissed from employment and to collect his final dues from the respondent in 14 days thereafter. He was paid Kshs.4,739.00 for terminal dues.

Prior to termination, the claimant had been transferred to Mombasa. He raised objections because he was a serving chief shop steward. The issue was discussed between the respondent's management and the

union officials. The claimant was to mandatorily take his annual leave pending the outcome of the discussions. The dismissal then issued. The claimant denied ever receiving the suspension letter of 3.09.2010 being exhibit **MMC2**. The suspension letter alleged the claimant had incited workers and spread hate speech. The claimant testified that he did not know the reasons for his termination but he had been promoting the workers' rights and he attributed his termination to that promotion. The claimant was a member of the National Social Security Fund, NSSF.

RW testified that the claimant was elected chief shop steward in 2010 and he championed rights of workers so that the management accused him of inciting the workers. One instance, is when the claimant raised concerns about the calculation of salary arrears. He knew claimant was dismissed after failing to report at the Mombasa depot.

There are two issues for determination in this case namely:

- a. **whether the claimant was fairly or unfairly terminated; and**
- b. **whether the claimant is entitled to the remedies as prayed for.**

The court has evaluated the evidence on record and finds that the root cause of the claimant's termination was his championing of the workers' rights disguised as refusal to take up a transfer to Mombasa. The court finds that the claimant had a valid grievance to object to his transfer in view of his acquired skills that would not be useful in Mombasa and the duties as the chief shop steward. The claimant was entitled to be a chief shop steward and to participate in union activities under section 46 (d) and (e) of the Employment Act, 2007 and such did not constitute a valid reason for disciplinary action, namely a punitive transfer to Mombasa. The court further finds that the punitive transfer was unfair so that the ensuing dismissal was predicated upon a genuine grievance by the claimant; an unfair reason for termination under section 46 (h) of the Act. Accordingly, the court finds that the claimant's dismissal was unfair and the claimant is entitled to 12 months gross salaries at Kshs.9,734.00 per month being **Kshs.116,808.00**.

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

- a. The termination was without the due termination notice and the claimant is entitled to one month pay in lieu of termination notice being **Kshs.9,734.00**.
- b. There is no dispute that the collective agreement filed in court applied. Clause 24(c) provided that an employee would be entitled to 19 days pay for each completed year of service by way of gratuity. Thus, the claimant is entitled to **Kshs.20,998.80** as submitted for the claimant.
- c. As submitted for the respondent, the claimant is fully compensated in this case with the award on unfair termination and the claimant has not established basis for payment for future earnings as claimed. The prayer will fail because the claimant will have a chance to mitigate his circumstances by seeking alternative employment and he has not showed that it would be difficult to obtain alternative productive engagement.

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

- a. the declaration that the claimant's termination was unfair;
- b. the respondent to pay the claimant **Kshs.147,540.80** by 1.2.2014, failing, interest to be payable at court rates from the date of the judgment; and
- c. the respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 20th December, 2013**.

BYRAM ONGAYA

JUDGE