

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. E895 OF 2023

(Before Hon. Lady Justice Agnes Kitiku Nzei)

DICKSON ALUBALACLAIMANT

VERSUS

**ZHONGIAO THIRD HIGHWAY
ENGINEERING E.A. CO. LTD.....RESPONDENT**

JUDGMENT

1. The Claimant sued the Respondent vide a Statement of Claim dated 31st October, 2023 and sought the following reliefs:-

(a) *A declaration that the Claimant's termination was unfair and wrongful.*

(b) *1 month salary in lieu of notice
Kshs.95,000/=.*

(c) *Unpaid dues ... Kshs.95,000 x 4 months (plus
Kshs.30,000/=) = Kshs.410,000/=.*

- (d) *Compensation for unfair termination at the rate of 12 months' salary (Kshs.95,000 x 12 months) Kshs.1,140,000/=.*
- (e) *General damages for the unpaid dues and unfair termination.*
- (f) *Costs of the suit.*
- (g) *Interest on (b) - (d) above.*
- (h) *Any other or further relief that the Court may deem fit and just.*

2. The Claimant pleaded:-

- (a) *that he (the Claimant) was employed by the Respondent as a **Health Safety and Environmental HSE Manager** vide a Service Level Agreement dated 23rd June, 2021 and signed on 28th June, 2021; a position the Claimant held until September 2023 when his services were terminated by the Respondent vide a phone call through an employee of the Respondent.*
- (b) *that the agreement provided that working hours were from 00700 to 1600 hours, a half day on Saturdays and an off on Sunday; at a*

remuneration **of Kshs.95,000/=** exclusive **of 5% service tax** fee to be withheld and remitted by the company to Kenya Revenue Authority.

(c) that the Claimant served the Respondent dedicatedly without any warning letter and/or disciplinary action being taken against him.

(d) that on **5th September, 2021**, the Claimant received a phone call from one of the Respondent's representatives notifying him that his services were terminated.

(e) that by the time that the Claimant received the call, the Respondent had, without notice, withheld payments for 4 months worked (May, June, July and August 2023), and that a further Kshs.30,000/= was owing from the month of April as the Claimant had only received part-payment.

(f) that the Claimant was not paid 1 month pay in lieu of notice.

(g) that the Respondent's actions were unfair as **no termination notice was given and no payment in lieu was made, proper procedure was not followed in terminating the**

Claimant's services; and a certificate of service was not issued.

3. Documents filed alongside the Statement of Claim included an affidavit in verification of the claim, the Claimant's written witness statement dated **31st October, 2023**, and an evenly dated list of documents; listing six documents. The listed documents included copies of the Claimant's National Identity Card, Service Level Agreement dated 23rd June, 2019, a demand letter dated 11th September, 2023, response to demand letter dated 15th September, 2023, a termination letter dated 20th August, 2023 **and signed on 15th September, 2023**, and an M-pesa statement for the months employed.
4. The Respondent filed a Reply to Statement of Claim dated 19th August, 2024, denying the Claimant's claim and stating that **termination was lawful and regular after the Claimant deserted duty.**
5. Other documents filed by the Respondent included a witness statement of **Martin Mutuku Kaindi** dated 12th February,

2025, and an evenly dated list of documents, listing three documents. The listed documents were a Service Level Agreement between the Claimant and the Respondent dated 23rd June, 2021, the Respondent's letter to the Claimant dated 15th September, 2023 and a Discharge of Service Level Agreement Letter dated 20th August, 2023.

6. Trial opened before me on 20th February, 2025. The Claimant adopted his filed witness statement as his testimony, and produced in evidence the documents referred to in paragraph 3 of this Judgment; and further testified:-

*(a) that he (the Claimant) was employed by the Respondent vide a contract **dated 23rd June, 2021**, that his salary was **Kshs.95,000/=** (subject to 5% which was to be withheld by the Respondent and remitted by it to KRA).*

(b) that working hours were 7.00 a.m to 6.00 p.m during week days and half day on Saturdays.

(c) that the Claimant was answerable to his immediate supervisor, and that no issues arose during his employment.

- (d) that in **April 2023**, the Claimant was paid his salary less **Kshs.30,000/=**, and that after that there was totally no pay.
- (e) that the Claimant's employment was terminated on **5th September, 2023** vide a phone call by one of his colleagues (a representative of the Respondent) who informed the Claimant that his employment had been terminated.
- (f) that this was despite the fact that there had been no prior problem between the Claimant and the Respondent, and that the Claimant had worked for 4 months without pay.
- (g) that the Claimant went to the Respondent's office to find out how a colleague could just call him over termination of his employment, and subsequently engaged a lawyer who issued a demand letter. That it was after this that the Claimant was issued with a letter **dated 20th August, 2023** terminating his employment, which the Claimant was persuaded to sign. **That a demand letter had been sent on 11th September, 2023.**

(h) that the Claimant did not receive any invitation to attend a disciplinary hearing.

7. Cross-examined, the Claimant testified:-

(a) that he received a telephone call from his colleague, the Site Engineer, who was the company's representative, telling him (the Claimant) that his employment had been terminated. That he was in the site working for the Respondent when he received the call. That he had not deserted duty; and did not desert duty at any given time.

(b) that the accusation of desertion was first raised in the letter dated 20th August, 2023.

(c) that the Claimant did not respond to the letter dated **20th August, 2023** because it was **backdated**, and was written **after the Claimant had left employment/work**.

(d) that the Claimant was not absent from duty on the dates stated in the said letter.

(e) that the Claimant was not invited to attend a disciplinary hearing.

(f) that the Claimant never received any official communication on why he was terminated, that the Respondent confirmed that the phone call terminating the Claimant's employment was their call, that the Claimant **never received any show cause on any wrong doing**, and that he (the Claimant) **refused** to sign a discharge because he was being forced to sign.

8. The Defendant called one witness, **Martin Mutuku Kaindi (RW-1)**, who adopted his filed witness statement as his testimony and produced in evidence the Respondent's three documents referred to in paragraph 5 of this Judgment. The witness **(RW-1)** further testified:-

(a) that the Respondent engaged the Claimant vide a Service Contract **dated 23rd June, 2021**, and that the Claimant was to manage all staff, evaluate all departmental issues touching on safety, prepare and submit reports on health and safety on daily basis, enforce safety measures by ensuring no accidents at the sites.

- (b) that no reports were submitted as per the contract, and that this affected day-to-day operations at the sites, and that the Claimant did not give an explanation for that.
- (c) that the Claimant was invited for a disciplinary meeting but did not attend or give any reason for not attending.
- (d) that the witness (**RW-1**) was not aware of any phone call telling the Claimant not to go to work; that all communication was done by email or by WhatsApp.
- (e) that **the Claimant should only be paid the three months' salary that the Respondent was supposed to pay him, being Kshs.339,516/=.**

9. Cross-examined, **RW-1** testified:-

- (a) that the Claimant's agreed salary was Kshs.95,000/=, and that he was to work from 7.00 a.m to 4.00 p.m; and that the employment was terminable by one month notice.

- (b) that the Claimant was not paid his salary for three months.
- (c) that the witness (**RW-1**) had **nothing** to show that the Claimant was paid his full salary for **April to August 2023; and that there was nothing to show that reasons for non-payment of the Claimant's salary were given.**
- (d) that there was nothing to show that the Claimant was invited for a disciplinary hearing.
- (e) that the letter dated **20th August, 2023 was the letter of termination of employment, and was not served on the Claimant because he was unavailable.**
- (f) that there was a form of violence on **27th September, 2023** when the Claimant went to ask for his salary; that a report was made to the police, but no arrest or prosecution was made.

10. Re-examined, **RW-1** testified that the Claimant was invited for a disciplinary hearing but when he went he became violent, that the Claimant became aware of the letter dated 20th August, 2023, **that the outstanding salary was for**

the months of June, July and August, and that the Claimant was eligible for a termination notice; but he deserted duty and became eligible for summary dismissal.

11. Having considered the pleadings filed herein and the evidence presented by both parties, issues that fall for determination, in my view, are as follows:-

(a) Whether termination of the Claimant's employment was unfair.

(b) Whether the reliefs sought are merited.

12. On the first issue, for a termination of employment to pass the fairness test, there must be both substantive justification for the termination and procedural fairness. Substantive justification has to do with establishment of a **valid reason** for the termination, while procedural fairness addresses the **procedure** adopted by the employer in effecting the termination. **(Walter Ogal Anuro - vs - Teachers Service Commission [2013] eKLR).**

13. According to the evidence presented in Court by the Respondent **(RW-1)**, the Claimant's employment was

terminated by the Respondent on account of alleged desertion of duty. The Respondent did not, however, present any evidence in Court demonstrating desertion and/or absconding of duty by the Claimant. The Claimant denied having deserted duty, and testified that he was at work in the Respondent's site when his work colleague (the Site Engineer) told him that the Respondent had called to say that the Claimant's employment had been terminated.

14. It was the Claimant's further testimony that after sending a demand letter to the Respondent on **11th September, 2023**, the Respondent purported to issue a purported termination letter "**dated 20th August, 2023**" and signed on **19th September, 2023**. That the Claimant had not previously been informed of the said allegations of desertion, and had not been invited to attend any disciplinary hearing.
15. The Respondent's witness **(RW-1)** testified that the termination was on account of desertion of duty, and that it was lawful and regular. The Respondent did not, however, present any evidence pointing at desertion on the part of the Claimant. No daily job/duty attendance register and/or

clock-in records were presented in evidence to show that the Claimant absented himself from duty on any particular day, either without lawful cause or at all. No show cause letter and/or warning letter was shown to have been issued to the Claimant on account of desertion and/or absconding duty; or at all.

16. Failure by the Respondent to prove the truth and/or **validity** of the alleged reason for termination made the Claimant's termination substantively unfair.

17. Section 45(2)(a) of the Employment Act provides that:-

“(2) A termination of employment by an employer is unfair if the employer fails to prove -

(a) That the reason for the termination is valid.”

18. The Respondent never denied, and indeed admitted, having terminated the Claimant's employment.

19. Although an employee's absence from the place appointed for the performance of his work, without leave or other

lawful cause, constitutes a gross misconduct on the part of the employee, the Respondent did not comply with **Section 41 of the Employment Act** as it was **mandatorily** required to do; and did not, therefore, give the Claimant an opportunity to be heard before terminating his employment. Section 41 of the Employment Act provides, in mandatory terms, as follows:-

“(1) Subject to Section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination, and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under

Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

20. Failure by the Respondent to comply with the foregoing mandatory procedure rendered the termination process procedurally unfair.
21. It is my finding that termination of the Claimant's employment by the Respondent was substantively and procedurally unfair, and I so declare.
22. On the second issue, and having made a finding that the Claimant's termination was unfair, I award the Claimant **the equivalent of five (5) months' salary as compensation for unfair termination of employment.** It was a common ground that the Claimant's gross monthly salary was **Kshs.95,000/=.** **The equivalent of five (5) months' salary is Kshs.475,000/=, which I award the Claimant.**

23. The claim for **Kshs.95,000/=** being one month salary in lieu of notice is allowed pursuant to **Section 35(1)(c) of the Employment Act** and provisions of the Claimant's contract of employment signed in June 2021.
24. The claim for **Kshs.30,000/=** being the balance of the Claimant's salary for the month of **April 2023** was not disputed and/or validly disputed by the Respondent. No proof of full payment of the aforesaid salary (for April 2023) was tendered by the employer (the Respondent). The claim is allowed.
25. The claim for **unpaid four (4) months' salary (May, June, July and August 2023)** was proved by the Claimant, on a balance of probabilities. The Respondent did not dispute this claim. **RW-1** admitted the same in evidence, but to the extent of three months, alluding to the Claimant's termination in the month of August 2023. The Claimant, however, demonstrated by evidence, both documentary and otherwise, that his employment was terminated on **5th September, 2023 but not on 20th August, 2023** as

alleged by the Respondent. I award the Claimant **Kshs.380,000/= being unpaid four months' salary (Kshs.95,000 x 4).**

26. The claim for general damages for unpaid dues and unfair termination is declined, in view of the award of compensation for unfair termination of employment made herein.

27. In sum, and having considered written submissions filed on behalf of both parties, Judgment is hereby entered for the Claimant against the Respondent as follows:-

(a) Compensation for unfair termination of employment Kshs.475,000/=.

(b) One month salary in lieu of notice Kshs.95,000/=.

(c) Balance of salary for the month of April 2023 Kshs.30,000/=.

(d) Unpaid four months' salary Kshs.380,000/=.

Total =Kshs.980,000/=.

28. The aforestated awarded sum shall be subject to **5% tax** as per the evidence presented, which the Respondent **shall** remit to the relevant authority, pursuant to **Section 49(2) of the Employment Act.**
29. The Claimant is awarded interest on the awarded sum, at Court rates from the date of this Judgment.
30. The Claimant is also awarded costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS
10TH DAY OF APRIL 2026**

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Wamukore for the Claimant

Mr. Omondi for the Respondent

ORIGINAL