



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

(ON Makau J on 30th April, 2026)

CAUSE NO. 1373 OF 2018

FREDRICK BYAKIKA.....
....CLAIMANT

-VERSUS-

CAS CONSULTANTS LIMITED.....1ST
RESPONDENT

EDON CONSULTANTS INTERNATIONAL
LIMITED.....2ND
RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 11th September 2018, the Claimant sued the Respondents for unfair termination of his employment and prayed for the following reliefs:-

a) A declaration that the termination of the Claimant's contract was wrongful and unfair.

b) Payment of the sum of Kshs. 5,296,000/= made up as follows:-

i. Damages for wrongful and unfair termination equivalent to 12 months salary - Kshs. 2,400,000/-

ii. Accommodation equivalent to 12 months - Kshs. 2,400,000/-

iii. Balance of the accommodation allowance wrongly deducted as VAT - Kshs. 96,000/-

iv. Two month's pay in lieu of notice- Kshs. 400,000/-

c) Costs.

d) Interest.

2. The Respondents filed Responses to the claim denying liability and prayed for the suit to be dismissed with costs.

Facts

3. The Claimant was employed by the 1st Respondent as the Resident Engineer for Barabara Plaza vide a contract letter

dated 8th May 2017. In the said project, the 1st Respondent was the structural and Civil Engineer while the 2nd Respondent was the head consultant.

4. The Claimant was employer for a term of 14 months from 10th May 2017 to 30th June 2018. His monthly salary was Kshs. 200000 in addition to transport and accommodation to be provided by the 2nd Respondent for the entire contract period as per the works contract. His working time was 08 am to 5 pm Monday to Friday, and 8 am to 1 pm on Saturdays. He was entitled to 21 working days annual leave. He was to work in other projects of the first Respondent on need basis. He was entitled to medical cover and Group personal accident insurance policy. Finally contract was terminable by a notice of two months or payment of two months salary in lieu of notice.
5. The Claimant worked until July 2017 when the 1st Respondent abruptly terminated his employment citing a letter dated 5th July 2017 whereby the 2nd Respondent had asked for the termination accusing him of conducting inspection and approving works that was incomplete or poorly done.
6. The Claimant averred that he did his work professionally and denied that the alleged approval of incomplete or poorly done work. He further faulted the employer for terminating his contract without the requisite notice and without any hearing as required under section 41 of the Employment Act. He also

faulted the 2nd Respondent for deducting from his accommodation pay Kshs. 96000 (VAT of 16%). Finally he accused the Respondents of subjecting him to unfair Labour practices contrary to Article 41 of the Constitution and unfairly terminating his employment contrary to section 45 of the Employment Act.

7. The 1st Respondent admitted that it employed the Claimant but denied the alleged unfair termination. It averred that the termination was through a mutual agreement between it and the Claimant after it received a letter from the 2nd Respondent. It further averred that the Claimant was paid his dues and accepted it as full and final settlement. It also averred that deduction of VAT to the Government was lawful therefore it termed the Claimant's claim as outrageous.
8. The 2nd Respondent averred that it is the Team Leader of a consortium of consultants who were providing service for the Design and Supervision of the Barabara Plaza project in Nairobi. It averred that the 1st Respondent was a member of the consortium and it employed the Claimant as the Resident Engineer on the site.
9. It further averred that the Claimant performed his work badly and it requested the 1st Respondent to replace him with another competent Resident Engineer. Thereafter it paid the Claimant accommodation allowance in accordance with a 3rd

party contract which was subject to taxation. Finally it averred that there was no employer-employee relationship with the Claimant and therefore its Joinder to the suit was wrongful and no reliefs are due from it to the Claimant.

Evidence

10. The Claimant testified as CW1 and adopted his written statement dated 11th September 2018 as his evidence in chief. He then produced six (6) documents in the bundle dated 11th September 2018 as exhibits. He maintained that his dismissal was unlawful and prayed for the reliefs sought.

11. On Cross examination he admitted that he was appointed Consultant Resident Engineer by the 1st Respondent's letter dated 8th May 2017. He admitted that he had no contract with the 2nd Respondent but the above letter mentioned the 2nd Respondent on page 2 about accommodation. He reiterated that his contract provided for termination by notice or payment of salary in lieu of notice. He faulted the 2nd Respondent for instructing the 1st Respondent to dismiss him for alleged works that were either incomplete or poorly done. He contended that the 2nd Respondent was also managing his contract by virtue of it being the Project Manager.

12. In re examination he clarified that the letter dated 5th July 2017 was not written to him but the 1st Respondent. He denied

the allegation that he approved incomplete or poorly done work.

13. He contended that he was appointed as a full time employee and his contract never provided for VAT. He admitted that his contract provided for withholding tax but maintained that he was an employee and not a contractor.
14. The 1st Respondent never called any witness but the 2nd Respondent called its Clerk of Works Mr. Samuel Lango who testified as RW1. He adopted his written statement dated 21st November 2018 as his evidence in chief. The evidence by RW1 echoed the facts summarized above.
15. On cross examination he confirmed that the 2nd Respondent wrote the letter dated 5th July 2017 to the 1st Respondent complaining against the Claimant which led to his dismissal. He confirmed that after the dismissal of the Claimants the 2nd Respondent paid him some money. He confirmed that the 2nd Respondent was the Lead Consultant but clarified that the Claimant was employed by the 1st Respondent. He further clarified that the 2nd Respondent was only involved in the Claimant's contract as Lead Consultant.
16. After the hearing both sides filed written submission. Having carefully considered the pleadings, evidence and submissions, it is clear that the Claimant was employed by the 1st Respondent under a contract of service. He was employed for

a monthly salary. He personally worked at the employers site, his time of work was fixed by the employer. He was entitled to annual leave, transport, accommodation, medical cover and group personal accident insurance cover. His contract was terminable by two months notice or payment of salary in lieu of notice. The issues for determination are:-

- a) Whether the termination of his contract of employment was unfair and unlawful.
- b) Whether he is entitled to the reliefs sought against the Respondents.

Unfair/unlawful termination

17. Section 45 (1) and (2) of the Employment Act provides that:-

“(1). No employer shall terminate the employment of an employee unfairly.

“(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;

b) That the reason for the termination is a fair reason-

(i) Related to the employees conduct, capacity or compatibility; or

- (ii) Based on the operational requirements of the employer; and**
- c) That the employment was terminated in accordance with fair procedure.”**

18. The above provision puts a burden of proof upon the employer prove by evidence that the reason for dismissal of an employee is valid and fair, and that fair procedure was followed. A reason is valid and fair if it relates to the employees conduct, capacity and compatibility or employers operational requirements. The procedure is fair if the employer explains the reason for the intended termination and accords him/her a hearing as provided under Section 41 of the Employment Act, thus:-

“(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 provision 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.”

19. The 1st Respondent pleaded that it dismissed the Claimant after it was asked by the 2nd Respondent to do so for the reason that he had conducted inspection and approved works that were either incomplete or poorly done. The 1st Respondent never tendered any evidence during the hearing and therefore it failed to discharge its burden of prove under Section 41,43 and 45 of the Employment Act which requires the employer to prove the reason for the termination and show that fair procedure was followed.

20. RW1, who represented the 2nd Respondent also never tendered any evidence to prove that the Claimant committed

the alleged misconduct of approving incomplete or poorly done works. Without proof of any valid and fair reason for the termination and that fair procedure was followed, I find that the termination was unfair within the meaning of Section 45 of the Employment Act.

21. I gather support from the case of **George Musamali v. G4S Security Services Kenya Limited [2016]eKLR** this Court stated that:-

“14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers’ human resource manual or as set out in the Employment Act or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter

whether the employee's guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial."

Reliefs

22. I have already found that the termination of the Claimants employment was unfair for want of proof of valid reason and fair procedure. The termination was also done without the required notice of two months or payment of salary in lieu of notice. The said breach rendered the termination wrongful. Consequently I find that the Claimant is entitled to declaration that the termination of his contract was wrongful and unfair.

23. In view of the foregoing conclusion the Claimant is entitled to payment of salary in lieu of notice under his contract plus compensation for unfair termination under section 49 (1) (c) of the Employment Act. I award him two months salary in lieu of notice being Kshs. 400,000. As regards compensation, the Claimant worked for a short time of three months out of the expected 14 months. Therefore I award him compensation of one month salary being Kshs. 200,000.

24. He further prayed for Kshs. 96,000 deducted from his accommodation pay as VAT by the 2nd Respondent. I have

already made a finding of fact that the Claimant was an employee and not a contract or and therefore his salary and allowances were not legally subject to VAT or withholding tax. As an employee, his earnings were only subject to income tax under the Income Tax Act. Consequently, I award him the prayer for Kshs. 96000 withheld as VAT when 2nd Respondent.

Conclusion

25. I have found that he Claimant was an employee of the 1st Respondent under a contract of service. I have further found that the 1st Respondent unfairly and wrongfully dismissed the Claimant from employment. I have also found that the Claimant is entitled to award of damages. Consequently, I enter judgment for the Claimant against the Respondent as follows:-

a) Declaration that the termination was unfair and wrongful

b) Payment of-

i Notice Kshs. 400,000/-

ii Compensation 200,000/-

iii Accommodation 96000

Total 696,000

c) The award is subject to statutory deductions.

d) Costs plus interest at court rate from the date of Judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN

COURT AT NAIROBI THIS 30TH DAY OF APRIL, 2026.

**ONESMUS MAKAU
JUDGE**

Appearance

Mwiti for Claimant

Makori for 1st Respondent

Wambula for 2nd Respondent