



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 223 OF 2013**

**HENRY KIMARU RUGUT.....CLAIMANT**

**v**

**AQUA DRILLING & CIVIL WORKS CO. LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant (Henry Kimaru Rugut) filed a Memorandum of Claim against Aqua Drilling & Civil Works Co. Ltd (Respondent) seeking
  - a) A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, he was not remunerated as required by law.
  - b) Payment of the sums of money claimed under paragraph 9 above.
  - c) Costs and Interests.
  - d) Any other relieve the Honourable may deem fit to grant.
2. The Memorandum of Claim was served upon the Respondent and it filed a Response on 17 September 2013, pleading that the Claimant was terminated for misconduct and failure to account for money he had been given.

**Claimant's case**

3. The Claimant pleaded that he was employed by the Respondent on 15 August 2007 as a wench operator and that he was unlawfully terminated on 12 August 2010. It was pleaded that the termination was contrary to section 40 of the Employment Act, 2007, in that his trade union was not informed, no notice was issued or pay in lieu of notice paid, no warning letter was issued, pay in lieu of leave was not paid, severance pay was not paid and certificate of service was not issued (an amendment was sought orally and was granted to anchor the claim on section 41 and not section 40 of the Employment Act, 2007).
4. The Claimant further pleaded that he was underpaid. The prayers sought were particularized at paragraph 9 of the Memorandum of Claim.
5. In testimony in Court, the Claimant more or less repeated what was pleaded. He stated that he joined the Respondent in 2007 and was dismissed on 12 August 2010 without being given reasons or notice, after being called to the office and being informed there was no work for him.

6. He also stated he did not go on leave for 3 years and that he worked overtime and during rest days.

### **Respondent's case**

7. The Respondent did not attend the hearing but its pleaded case is that after securing a Kenya Red Cross contract in Dadaab in 2010, it sent the Claimant to Dadaab to carry out logistics and survey on materials required and their prices. The Claimant was given Kshs 542,380/- over a period of time, including through mpesa and that on return to Nairobi, the Claimant could only account for Kshs 314,283/- through receipts, leaving Kshs 228,097/- unaccounted for.

8. The Respondent further pleaded that the Claimant was given one week to account for the Kshs 228,097/- but he could not, thus the termination.

9. The Respondent annexed to the Response mpesa transaction statements indicating monies were sent to the Claimant and salary vouchers from January 2008 to July 2010.

### **Issues for determination**

10. From the pleadings, documents and Claimant's written submissions filed in Court on 14 October 2014, two different types of issue arise for determination. These relate to the fairness of the termination and the contractual obligations relating to terms and conditions of employment.

### **Termination question**

11. The parties did not produce any contract governing the employment relationship. In this regard, the statutory framework providing for the irreducible minimums become directly implicated.

12. The statutory framework for termination is found in sections 35, 40, 41, 43, 45 and 47 of the Employment Act, 2007.

13. The point to start the discourse is section 47(5) of the Employment Act, 2007 which provide that

*For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

14. The above statutory provision lays a very low threshold of proof on an employee but in any case a threshold which an employee must meet in the first instance when complaining of unfair termination or wrongful dismissal before an employer is called upon to discharge the onerous burden placed on the employer by sections 40, 41, 43 and 45 of the Employment Act, 2007.

15. Paragraph 5 of the Memorandum of Claim was pleaded as follows

*the claimant avers that the respondent without compliance with section 40 of the Employment Act No. 11 of 2007 proceeded to purport to terminate his employment without justifiable cause.*

16. The Respondent on the other hand pleaded at paragraph 10 of the Response that

*THAT the Claimant was terminated from employment by the Respondent due to his misconduct as he could not account for the money which he had been given hence his claim is not awardable against the Respondent.*

17. The case for the Claimant, after the oral amendment was clearly hinged on non compliance with procedural fairness safeguards of section 41 of the Employment Act, 2007.

18. The Claimant's evidence was that he was not given notice. Section 35 of the Employment Act, 2007 requires the giving of the requisite notice. In the view of the Court, the Claimant has met the very low statutory threshold set at section 47(5) of the Act to demonstrate that there was unfair termination.

19. In this light, therefore the obligation shifted to the Respondent to show the termination was in compliance with the procedural fairness safeguards of section 41 of the Employment Act, 2007 and to further prove the reasons for the dismissal as required by section 43 of the Act, and to prove that the reasons for dismissal were valid and fair reasons pursuant to section 45 of the Act.

20. The Respondent despite being served with a hearing notice which was acknowledged by the stamp of G. Morara Omariba Advocate did not attend the hearing to discharge the obligation placed upon it by the aforecited statutory provisions.

21. The Claimant's case, therefore in terms of evidence remains uncontroverted and the Court finds the termination of the services of the Claimant unfair, the Respondent having failed to discharge the statutory burden placed upon it.

### **Contractual/Statutory entitlements claims/reliefs**

#### ***Rest days***

22. The Claimant sought Kshs 92,736/- on account of 4 rest days per month for 72 months.

23. The Respondent did not controvert the Claimant's claim for rest days. By dint of section 9 of the Employment Act, 2007, the Respondent was under a statutory duty to issue the Claimant with a written contract as he had served for more than 3 months. The written contract should have provided for the particulars indicated in section 10 of the Act. Section 27 of the Act on the other hand requires an employer to grant an employee one rest day per week.

24. Pursuant to section 10(7) of the Employment Act, 2007, the Court would find in favour of the Claimant in the sum claimed.

#### ***Leave days***

25. For similar reasons to those adumbrated to in the preceeding paragraphs and considering sections 28 and 74 of the Employment Act, 2007, the Court would award the Claimant the sum of Kshs 20,286/- on account of pay in lieu of leave.

#### ***Overtime***

26. This head of claim was not controverted and for similar reasons, the Court would award the Claimant Kshs 20,934/-.

#### ***Compensation***

27. The Court has found the termination unfair. One of the primary remedies for unfair termination is compensation of a sum not exceeding twelve months gross wages. The award however is discretionary and the Court is enjoined to consider any, some or all of the factors set out in section 49(4) of the Employment Act, 2007.

28. Being a discretionary remedy, the Court should not act arbitrarily or capriciously. A party wishing the Court to exercise the discretion in his favour should therefore indicate in evidence/submissions which of the factors set out in section 49(4) of the Employment Act should be considered.

29. The Claimant did not make any reference to the requisite factors. But it emerged in evidence that he served the Respondent for about 3 years. Considering the length of service the Court would award him

the equivalent of five months gross wages assessed at Kshs 40,000/- based on the Kshs 8,000/- he was earning as of May 2010.

### ***Underpayments***

30. The Claimant sought Kshs 263,520/- on account of underpayments. The salary vouchers annexed to the Response indicate that the Claimant was earning Kshs 4,500/- basic pay in January 2008 and this rose to Kshs 6,000/- in May 2008 and Kshs 8,000/- in March 2010.

31. From time to time, minimum wages are gazetted for different categories of employees and for different towns or areas. The Memorandum of Claim did not plead the locality where the Claimant was based. Even the filed witness statement did not disclose the place of work. The Claimant did also not disclose the relevant Wages Regulation Order for the sector/industry he was employed in.

32. The only material to indicate where the Claimant was based is the Response wherein it was pleaded that the Claimant was sent to Dadaab in Garissa in 2010. The Claimant had pleaded he was a wench operator.

33. The Court has looked at the Regulation of Wages (General) (Amendment) Orders from 2010 but has not seen a category of wench operator. The Claimant did not provide or lead evidence as to his day to day responsibilities or duties to enable a determination to be made as to his categorisation or occupation for purposes of minimum wages.

34. With the material placed before Court, the Court is unable to determine whether the Claimant was being paid wages below the gazetted minimums.

### ***Certificate of Service***

35. Although not pleaded, the Claimant sought a Certificate of Service. A Certificate of Service is a statutory right and the Respondent should issue one to the Claimant.

### **Conclusion and Orders**

36. From the foregoing discussion, the Court finds and holds that the termination of the Claimant was unfair, and further finds and holds that the Claimant is entitled to an award based on the prescribed minimum entitlements relating to terms and conditions of employment and the Court awards him and orders the Respondent to pay him

a. Rest days	Kshs 92,736/-
b. Pay in lieu of leave	Kshs 20,286/-
c. Overtime	Kshs 20,934/-
d. 5 months compensation	Kshs 40,000/-
e. TOTAL	<b>Kshs 173,956/-</b>

37. The Respondent to issue a Certificate of service to the Claimant.

38. The head of claim for underpayments is dismissed.

39. Claimant to have costs of the Cause.

**Delivered, dated and signed in open Court in Nakuru on this 24<sup>th</sup> day of October 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Bichana instructed by Chepkwony & Co. Advocates

For Respondent G. Morara Omariba & Co. Advocates (absent at hearing)