



**Dume v Quality Home Care Services (Cause 208 of 2017)
[2023] KEELRC 348 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 348 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 208 OF 2017
AK NZEI, J
FEBRUARY 9, 2023**

BETWEEN

CHISAMBO DUME CLAIMANT

AND

QUALITY HOME CARE SERVICES RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent vide a statement of claim dated 16th March 2017 and pleaded:-
 - a. that the Claimant was employed by the Respondent as a gardener on 1st May 2016, earning a monthly wage or salary of ksh. 9,400.
 - b. that on 16th June 2016 the Respondent, without any lawful cause and/or justification, wrongfully and unlawfully terminated the Claimant's employment on account of purported negligence.
 - c. that the Respondent failed to follow due process of law in terminating the Claimant's employment as stipulated in labour laws and in the appointment letter. That the termination was unlawful, unfair and unprocedural.
2. The Claimant set out his claim against the Respondent as follows:
 - a. One month salary in lieu of notice.....ksh. 9,400
 - b. Earned leave.....ksh. 7,592
 - c. Severance pay.....ksh. 5,423
 - d. Twelve months gross pay.....ksh. 112,800



Total ksh.135,215

3. On 29th August 2017, the Respondent filed a response to the Claimant's claim and denied the same. The Respondent further pleaded that the Claimant's contract of service was terminated by effluxion of time, and prayed that the claim herein be dismissed.
4. When the suit came up for hearing on 21st September 2022, the Respondent did not attend Court, though shown to have been served. The Claimant adopted his filed witness statement dated 16th March 2017 as his testimony, and produced in evidence some six documents listed on his list of documents dated 16th March 2017, all of them copies of correspondence exchanged between Counsel for the parties herein.
5. The Claimant further testified that he was employed by the Respondent on 1st May 2015 and was terminated on 15th June 2016. That he reported on duty as usual on 15th June 2016 and was told that there was no work for him. That he worked for one year. He prayed that judgment be entered for him as prayed in the statement of claim.
6. In view of the Respondent's failure to adduce evidence in defence of the Claimant's claim, the Claimant's evidence stands unchallenged, and the Respondent's statement of response and witness statement filed herein remain mere unsubstantiated statements of fact. In *Chrispine Otieno Caleb -vs- Attorney General [2014] eKLR*, the Court stated as follows:-

“ Although the defendant has denied liability, in an amended defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”
7. Further, in *Trust Bank Limited -vs Paramount Universal Bank Limited & 2 Others, Nairobi [milimani] HCCC NO. 1243 OF 2021*, the Court stated as follows:-

“ it is trite that where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact since in so doing, the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”
8. In the present case, the Claimant pleaded and testified that termination of his employment was unfair. That has not been controverted. The Claimant told the Court that he went to work on 15th June 2016 as usual, but was told that he had been terminated. This does not accord with the provisions of Section 35(1) (c) and 41 of the *Employment Act*. The termination was, indeed, unfair.
9. Issues for determination in this case, in my view, are as follows:-
 - a. whether the Claimant is entitled to complain that he was unfairly terminated.
 - b. whether the Claimant is entitled to the reliefs sought.
10. On the first issue, Section 45(3) of the *Employment Act* provides:-

“ an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”



11. The Claimant pleaded that he was employed on 1st May 2015 and was terminated on 15th June 2016, that he worked for one year. In my view, the provision of the foregoing statute, Section 45(3) of the Employment Act, disqualifies him from claiming compensation for unfair termination, as he had not been continuously employed by his employer for thirteen months immediately before the date of termination.
12. On the second issue, and in view of the foregoing, the claim for twelve months compensation is declined. The claim for ksh. 9,400 being one month salary in lieu of notice is allowed. The claim for unpaid leave is allowed, and I award the Claimant ksh. 7,592 as prayed. The claim for severance pay is declined as termination of the Claimant's employment was not on account of redundancy.
13. Judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a. One month salary in lieu of notice.....ksh. 9,400
 - b. Unpaid leaveksh. 7,592Total ksh. 16,992
14. The Claimant is awarded costs of the suit and interest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH FEBRUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant

..... for Respondent

