



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyamweyazeberio v China Railways No. 10 Engineering Group Co. Limited  
(Cause 141 of 2018) [2023] KEELRC 306 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 306 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 141 OF 2018  
HS WASILWA, J  
FEBRUARY 9, 2023**

**BETWEEN**

**SAMUEL NYAMWEYAZEBERIO ..... CLAIMANT**

**AND**

**CHINA RAILWAYS NO. 10 ENGINEERING GROUP CO.  
LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By an amended memorandum of claim filed on the February 21, 2019, the Claimant sued the Respondent claiming to have been unfairly terminated and seeking to be compensation for the alleged termination and for alleged underpayments. He sought for the following reliefs; -
  - a. A declaration that his termination was unfair and unlawful.
  - b. Compensation as provided for under section 49 of the *Employment Act*.
  - c. A sum of Kshs 241,384 for underpayments.
  - d. Unpaid leave days of Kshs 42,016.
  - e. Gratuity in the sum of Kshs 12,300.
  - f. Costs of this Suit.

**Claimant's Case.**

2. The Claimant avers that he was employed by the Respondent as a store keeper with effect from February 26, 2016, at a daily wage of Kshs 410 which was paid at the end of each month.



3. Sometimes on March 16, 2018 when the Claimant returned from his 4 days leave, he was fired by the Respondent without any explanation. He maintained that the termination was unfair because it was not preceded by a notice or disciplinary hearing as provided under the *Employment Act*.
4. It is the Claimant's case that the payment made to him was irregular and below the gazetted minimum wages legal notices number 116 of June 26, 2015 and legal notice number 112 of May 1, 2017 which set the minimum wage of a store keeper at Kshs 741.90 and 875. 45 respectively. Thus the cumulative underpayment stands at Kshs 241,384.
5. The Claimant stated further that he was only granted 2 unpaid off days per month but that he was never given leave or paid in lieu. He stated further that he was a registered NSSF member but the monthly deductions were never remitted.
6. During hearing the Claimant testified as CW-1 and adopted his statement of claim dated May 9, 2018 and further amended statement of May 19, 2015.
7. On cross examination, he testified that he sought for permission to attend to his sick wife which was granted by the Respondent. He avers that upon his return he was informed that there was less work to be done and therefore his services were no longer required. It was his case that he was an NSSF and NHIF member but that his NSSF was not remitted to the statutory body.
8. He testified that he worked 6 days in a week and was paid 410 daily which was remitted through his bank account on a monthly basis. He admitted that he was paid Kshs 4624 per week which translate to Kshs 771 per day. He also stated that he worked an accumulative of 25 months but was not given leave or paid in lieu despite requesting for the said leave.

#### **Respondent's Case.**

9. The Respondent opposed the claim and filed a response to claim dated October 17, 2022 denying the entire claim but admitted to employing the Claimant. The Respondent stated that the Claimant left the Respondent's employ on his volition and was not dismissed as pleaded. He added that attempts to reach out to the Claimant were futile.
10. The Respondent maintained that it never violated any section of the statute and the *Constitution* because the termination was instigated by the Claimant and not the Respondent.
11. The Respondent relied on their pleadings and documents without calling any witnesses to argue their case.

#### **Claimant's Submissions.**

12. It was submitted for the Claimant that the termination was unfair for failing to follow procedural and substantive requirements of termination provided for under sections 41, 43 and 45 of the *Employment Act*. It was argued that the Claimant was terminated abruptly without notice or disciplinary hearing. Further that the explanation by the Respondent that the Claimant absconded duty was not backed up with any evidence in support leaving the explanation by the Claimant as the only plausible reason for termination. To support this argument, the Claimant relied on the case of *Amalgamated Union of Kenya Metal Workers v Power Protection Ltd* [2022] eKLR.
13. On the reliefs sought, it was submitted that the Claimant was underpaid as he was paid Kshs 410 daily instead of Kshs. 741.90 as provided for under regulation number 116 of 2015, that covered the period between February 26, 2016 to April 30, 2017 then Kshs 874.45 as per legal notice number 112 of



2017 which cover the period between May 1, 2017 till termination on March 16, 2018, therefore the cumulative underpayment is Kshs 241,384.

14. The Claimant also claimed unpaid leave and submitted that he worked for the Respondent for 2 years and a half a month and ought to have been granted two annual leave. On this head, the Claimant prayed for leave pay for the two years amount to Kshs 43, 039.40.
15. The Claimant also claimed gratuity and based it claim on the fact that the Respondent did not remit his NSSF deductions. Additionally, that since the Claimant was abruptly terminated, he should be paid notice pay and compensation for the unfair termination.
16. In conclusion, the Claimant submitted that even though the Respondent cross-examined the Claimant on the contents of its annexure 2 in the bid to establish that the Claimant was paid more than 410 per day, the Respondent being the employer should have exhibited employment records with proper details of the Claimant employment records including wages, in line with section 10 of the Employment Act. It was argued that since no evidence was tabled by the Respondent to the contrary the Claimant's case stands as pleaded and the Court should allow the claim as pleaded.
17. The Respondent did not file any submissions at the time of writing this Judgement.
18. I have examined all evidence and submissions of the parties herein. The Respondent though entering appearance and filing their defence and documents, failed to call any witnesses.
19. The pleadings filed by the Respondent remained as such and since pleadings are not evidence, it is my position that no evidence was offered by the Respondent and so the Claimants case stands uncontroverted.
20. In the evidence of the Claimant he contends that he was terminated without any hearing. There is no any other evidence submitted to show that the Claimant was subjected to any hearing.
21. He also contended that he was underpaid and didn't go on leave.
22. Having considered these averments of the claimant, I find for claimant and I enter judgment for him as follows;-
  1. 8 months salary for the unlawful and unfair termination  
=  $8 \times 22,750 = 182,000/=$
  2. Leave not taken for the last year  
= 22,750/=
  3. 1 months salary in lieu of notice  
= 22,750/=
  4. Underpayment of wages as pleaded = 241,384/=

Total = 481,084/=

Less statutory deductions

  5. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HON LADY JUSTICE HELLEN WASILWA**



**JUDGE**

In the presence of:

Bosibori holding brief for Ndubi for Claimant – present

Respondent – absent

Court Assistant – Fred

