



**Apondi v Timberland Construction Company (Cause 583 of 2016)
[2023] KEELRC 1186 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1186 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 583 OF 2016**

**AK NZEI, J
MAY 18, 2023**

BETWEEN

SAMUEL OCHIENG APONDI CLAIMANT

AND

TIMBERLAND CONSTRUCTION COMPANY RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a Memorandum of Claim dated 2nd August 2016 and pleaded that he was employed by the Respondent as a helper on 6th January 2011, earning ksh. 500 per day. That the Respondent terminated the Claimant’s services verbally on 6th January 2016 2016 without notice and a fair hearing as required under the Employment Act 2007.
2. It was the Claimant’s further pleading that the Respondent did not give any reasons for the termination, and did not comply with section 41 of the Employment Act. That the Claimant served the Respondent diligently for four years.
3. The Claimant set out his claim against the Respondent as follows:-
 - a. Salary in lieu of noticeksh. 15,000
 - b. Leave pay for 4 yearsksh. 60,000
 - c. Gratuity for the 4 years workedksh. 27,000
 - d. Compensation for unfair termination.....ksh. 225,000

Total ksh. 327,000

 - e. Costs of the suit.
 - f. Certificate of service.



4. Other documents filed by the Claimant included a verifying affidavit, a written witness statement dated 2/8/2016, a further witness statement dated 29/5/2017 and a list of documents dated 2/8/2016, listing some three documents. The listed documents included a copy of a demand letter dated 6/6/2016, copies of the Claimant's NHIF Member Data Summary and NSSF statement.
5. The Respondent entered appearance on 2/9/2016 and filed a statement of defence on 11/10/2016. The Respondent admitted having employed the Claimant, but as a casual earning ksh. 500 per day depending on availability of work. The Respondent further pleaded that the Claimant was paid ksh. 3,000 in lieu of notice and was also paid in lieu of leave.
6. The Respondent further pleaded that the Claimant is not entitled to gratuity as he was a member of NSSF and contributions thereto were duly remitted by the Respondent. The Respondent denied the Claimants claim.
7. Other documents filed by the Respondent included a written witness statement of James Mwahui dated 26/4/2016 and Vinui Patel (Virji Ratna Karsan) dated 23/7/2018, and a list of documents dated 23/7/2018 listing some two documents, a certificate of registration and what is referred to in the Respondent's list of documents as a record of payment.
8. When the suit came up for hearing before me on 23/1/2013, a date fixed by the Court in the presence of Counsel for both parties, the Respondent did not attend Court. The Claimant testified and adopted his two witness statements dated 2/8/2016 and 29/5/2017 respectively, and produced in evidence the documents referred to in paragraph 4 of this judgment. The Claimant further testified that he worked for five years and was earning ksh. 500 per day, and that payment was being made to him at the end of the month, ksh. 15,000 per month. That he was being paid in cash, was not being given payslips, and was not given a contract.
9. The Claimant further testified that his work included painting/applying furnish on furniture, and that after the 2015 December break, he went back to work on 6/1/2016 but was told that his employment had been terminated. It was the Claimant's further testimony that he was terminated verbally, was not subjected to any disciplinary proceedings and was not paid any terminal dues. The Claimant admitted having been a member of NSSF, denied having been employed on need basis, and testified that he worked continuously, from Monday to Saturday.
10. There being no attendance on the part of the Respondent, the Court closed the Respondents case and directed that written submissions be filed.
11. As already stated in this judgment, the Respondent did not attend Court on the date fixed for hearing. The Respondent's case was closed by the Court without any evidence being called by the Respondent. The evidence adduced by the Claimant was, therefore, neither controverted nor rebutted by the Respondent. The Claimant's evidence stands unchallenged.
12. It was held as follows in *Trust Bank Limited -vs- Paramount Universal Bank Limited & 2 Others*, Nairobi [Milimani] HCCC NO. 1243 OF 2021:-

“it is trite where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact. 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 unconverted and therefore unchallenged.”



13. Further, it was stated as follows in *Chrispine Otieno Caleb -vs- Attorney General* [2014] eKLR:-
- “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.”
14. Having considered the Claimant’s pleadings and the evidence adduced by him, issues that emerge for determination are as follows:-
- a. whether the Claimant was employed by the Respondent, and if so, whether his employment was terminated by the Respondent.
 - b. whether the Claimant is entitled to the reliefs sought.
15. On the first issue, the Claimant testified that he was employed by the Respondent in or about July 2011 and worked until December 2016. The Claimant produced in evidence copies of his NSSF statement and NHIF Member Data Summary. The NHIF Member Data Summary indicates that the Claimant was employed by the Respondent, and that the Respondent remitted the Claimant’s NHIF contributions during the years 2013, 2014 and 2015, while the NSSF statement shows that the Claimant’s NSSF contributions for the years 2013 (part of the year), 2014 and 2015 were remitted. The Claimant’s evidence that he was employed by the Respondent was neither controverted nor rebutted. I find and hold that the Claimant proved, on a balance of probability, that he was continuously employed by the Respondent.
16. On the twin issue of whether the Claimant’s employment was terminated by the Respondent, and whether such termination was unfair, the Claimant pleaded and testified that his employment was terminated verbally on 6/1/2016, without any reasons for the termination being given to him and without being subjected to any disciplinary proceedings, and that his terminal dues were not paid to him upon termination. The Claimant’s evidence stands unchallenged, and it is my finding that the Claimant’s employment was terminated by the Respondent and that the termination was unfair. The Respondent was not shown to have either complied with section 41 of the *Employment Act* or to have acted in accordance with justice and equity.
17. On the second issue, and having made a finding that termination of the Claimant’s employment was unfair, I award the Claimant the equivalent of nine months’ salary as compensation. The Claimant’s uncontroverted evidence is that he was earning ksh. 15,000 per month. The equivalent of nine months’ salary is ksh. 135,000.
18. The claim for one month salary in lieu of notice is allowed pursuant to section 35(1) (c) of the *Employment Act*. The claim for gratuity cannot be considered, and is disallowed in view of the fact that the Claimant was a member of NSSF. Section 35(6) (d) disqualifies the Claimant from claiming gratuity.
19. On the claim for leave payment for four years, the Claimant pleaded and testified that he worked for the Respondent for four years, during which period he did not take annual leave. Under Section 28 (1) (a), the Claimant was entitled to a minimum of twenty one days’ leave with pay after every twelve consecutive months of service. I award him ksh. 42,000 being payment for unpaid leave days (15,000/30X21X4 = ksh. 42,000). The claim for issuance of a certificate of service is allowed.



20. Finally, and having considered the Claimant's written submissions, judgment is hereby entered for the Claimant against the Respondent for:-
- a. compensation for unfair termination of employment.....ksh. 135,000
 - b. one month salary in lieu of noticeksh. 15,000
 - c. unpaid leave days.....ksh. 42,000
- Total ksh. 192,000
21. The awarded sum is subject to statutory deductions pursuant to section 49(2) of the *Employment Act*.
22. The Respondent shall issue the Claimant with a Certificate of Service within thirty days of this judgment pursuant to Section 51 of the *Employment Act*.
23. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH MAY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling 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:

Mr. Weloba for Claimant

N/A for Respondent

