



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1755 OF 2016**

**ERICK OCHIENG ODHIAMBO..... CLAIMANT**

**VERSUS**

**FISH PROCESSORS [2000] LIMITED.....RESPONDENT**

**JUDGMENT**

1. The suit was filed by the claimant on 30<sup>th</sup> August, 2016 praying for the following reliefs: -

(a) A declaration that Claimant's termination of employment was unlawful and unfair.

(b) The Claimant be paid his terminal dues as set out herein below:-

(a) Full payment of one month's salary in

lieu of notice ..... Kshs8000.00

(b) Full payment of Days worked in April..... Kshs 2,133.00

(c) Compensation for unfair loss of job..... Kshs 131,456.40

(d) Unremitted NSSF pay.....Kshs 800.00

(e) Underpayment arrears..... Kshs425,476.80

**TOTAL: Kshs 567,866.20**

(c) This Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

(d) The Respondent to pay the costs of this claim.

(e) Interest on the above at Court rates.

(f) The Respondent to issue the claimant with Certificate of Service in accordance with Section 51 of the Employment Act, 2007.

2. C.W.1 testified that he was employed by the respondent on 1<sup>st</sup> April, 2003 as a General worker earning Kshs 8,000 per month. That he worked until 8<sup>th</sup> April, 2016. That on 11<sup>th</sup> August, 2014, the claimant got injured while on duty at the respondent's premises. That the claimant lodged a claim for compensation in Civil Suit No. 1254 of 2015 as against the respondent. The respondent was served with summons to enter appearance on 7<sup>th</sup> April, 2016. On 8<sup>th</sup> April, 2016, the respondent's directors called the claimant and told him to choose between his job and the Court case.

2. The claimant was then verbally dismissed from employment on the same day and was told never to return to the premises again. The claimant prays to be awarded as prayed.

3. The respondent called Joshua Ochieng Gilbert (R.W.1) to testify in support of the respondent's case. R.W.1 testified that he was Head of Administration and Human Resource of the respondent. That the claimant worked for the respondent from 4<sup>th</sup> April, 2003 as a General

Worker earning Kshs 8,000 per month. That the claimant served the respondent for a period of 13 years until 5<sup>th</sup> April, 2016 when he absconded duties and never returned to work.

4. That on 11<sup>th</sup> August, 2014, the claimant got injured in the course of duty and fractured his right hand and was admitted at St. Francis Community Hospital. That the respondent paid for all Hospital bills in the sum of Kshs 154,714. That after healing the claimant returned to work and was given light duties.

5. That on 5<sup>th</sup> April, 2016, the claimant absconded duties and has never gone back. That the claimant was not dismissed from employment and the claim is undefended and it be dismissed.

6. That the respondent cannot pay the claimant in lieu of notice since he absconded from work. That the claimant only worked for 4 days in April and so cannot claim a whole month's salary. That the claimant is not entitled to any compensation. That the claimant was registered with National Social Security Fund and National Hospital Insurance Fund and all the dues were paid. That the suit be dismissed with costs.

7. The parties filed written submission which the Court has duly considered together with the testimony of the parties. The Court has also considered the documents produced by the parties.

8. The issues for determination are: -

**(a) Whether the claimant was unlawfully dismissed from employment or he absconded work.**

**(b) Whether the claimant was entitled to the reliefs sought.**

9. The testimony by the claimant is that he was summarily dismissed from work on account of having sued the respondent for compensation with regard to injuries sustained in the course of duty. That he was summoned by the directors of the respondent once they received the Court summons and put the claimant on terms as to whether to withdraw the suit and or leave the employment. C.W.1 stated that he was summarily dismissed on the spot without notice, notice to show cause and or any hearing. That the reason for the dismissal was unlawful. That the Court hold that the dismissal was not for a valid reason and that the respondent did not follow a fair procedure in dismissing the claimant.

10. R.W.1 in his testimony avoided to answer the testimony by C.W.1 regarding the Civil Suit the claimant filed against the respondent and the issue of the claimant being summoned and put to terms by the directors of the respondent to choose between the case and his employment.

11. The testimony by the claimant is credible and believable. The narrative by R.W.1 that the claimant simply decided to abscond work for no reason is incredible in the circumstances of this case.

12. R.W.1 was not present when C.W.1 was confronted by the directors of the respondent and summarily dismissed and nothing would have been easier than for those directors or one of them to come to Court and contradict the testimony by the claimant.

13. The Court finds that the respondent summarily dismissed the claimant from his employment, verbally, for no valid reason, without notice, and or any notice to show cause. The respondent violated Section 36, 41, 43 and 45 of the Employment Act and the dismissal was wrongful and unfair. The Court so holds.

14. The claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the Act.

15. In this regard, the claimant had diligently served the respondent for a continuous period of 13 years. The claimant had no bad record at work and therefore did not contribute to the summary dismissal. The claimant suffered injuries in the course of duty and has not yet been compensated for it. This is an aggravating circumstance in this case. The claimant lost means of livelihood abruptly and has suffered loss and damage. The claimant had not obtained alternative employment. The claimant was not paid any terminal benefits upon dismissal.

16. We refer to a similar case of **Lokitala Kawae & Another –vs- Colours Crops Limited – ELRC Cause Nos. 27 and 26 of 2018 eKLR** - where the claimants were terminated without being given due process as contemplated under Section 41 of the employment Act, 2007. The Court awarded 10 month's compensation.

17. The Court awards the claimant as follows: -

**(a) The equivalent of 10 months' salary in compensation for the wrongful and unfair dismissal from employment in the sum of Kshs 8,000 x 10) 80,000.**

**(b) The Court further awards one month's salary in lieu of notice in the sum of Kshs. 8,000.**

**(c) The Court also awards the claimant unpaid salary in the month of April, 2015 in the sum of Kshs 2,133,00.**

**(d) The Court also awards the claimant Kshs 800 being unremitted National Social Security Fund dues.**

**Total Awards Kshs 82,933.00**

(e) Interest at court rates from date of judgment till payment in full.

(f) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 24TH DAY OF FEBRUARY, 2022.

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**Appearance**

M/s Mideva for Respondent

Baraka for Respondent

Ekale: Court Assistant.