



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 527 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

KENNETH NDIGIRIGI GITAU..... CLAIMANT

VERSUS

TANGERINE INVESTMENTS LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant filed the instant suit against the Respondent alleging unfair termination of his employment. In the Memorandum of Claim dated 23rd March 2016 and filed on 1st April 2016, the Claimant seeks the following reliefs.

a. *Kshs.993,963/- as enumerated in below:*

i... *Salary in lieu of notice..... Kshs.50,389.40*

ii.. *Unpaid commission 10% x 390,914..... Kshs.39,091.40*

iii.. *House allowance*

15% x 50,389 x 33 months..... Kshs.249,426.00

iv.. *Maximum compensation for 12 months*

12 x 50,389..... Kshs.604,668.00

Total. Kshs.993,963.00

v.. *Certificate of service*

b. *Interest on (a) above at court rates until payment in full.*

c. *Costs and incidental to this suit.*

2. The Respondent filed a Memorandum of Defence dated 23rd February 2018 in which it admits that it employed the Claimant on or about 1st June 2013 at a salary of Kshs.22,278/- and that at the time of termination of employment the Claimant was earning Kshs.50,389/- gross salary per month. The suit came up for hearing on 25th September 2018 but the parties agreed to dispense with the hearing and instead dispose of the suit by written submissions on the basis of the pleadings and supporting documentary evidence filed.

3. The Respondent denies that the Claimant undertook his duties and responsibilities with zeal and dedication as alleged in the Memorandum of Claim, or that it unlawfully terminated the Claimant's employment.

4. The Respondent asserts that it paid the Claimant all his terminal dues. It however states that the Claimant failed to collect his Certificate of Service and further avers that the Claimant persistently ignored the Respondent's calls to handover company property so that he could be paid any outstanding dues.

5. The Respondent prays that the suit be dismissed with costs for being incompetent, frivolous, vexatious and an abuse of court process.
6. Although the Claimant applied and was granted leave to amend the Memorandum of Claim, the court record does not contain any copy of the Amended Memorandum of Claim.
7. The claim herein was fixed for hearing on 28th July 2021. Although the Respondent was properly served with hearing notice, there was no appearance for the Respondent on the hearing date and the Respondent's case was closed for non-attendance after the Claimant testified and closed his case.
8. The Claimant adopted his witness statement dated 23rd March 2016, further witness statement dated 20th January 2020 filed in the portal on 9th February 2020 and bundle of documents dated 23rd March 2016. He prayed for judgment as prayed in his Amended Memorandum of Claim dated 30th February 2020. The Claimant further filed written submissions dated 12th November 2021.

Determination

9. *In view of the failure of the Respondent to attend court for the hearing of the suit, the facts as pleaded by the Claimant in his two witness statements which he adopted at the hearing are not contested.*
10. *It is the Claimant's case that he was employed by the Respondent on 1st June 2013 and worked until 27th November 2015 when he received a letter of termination from the Respondent. He avers that he was not accorded an opportunity to defend himself against the allegations in the letter of termination, in violation of the provisions of **Section 41** of the Employment Act. The reason given for the termination of the Claimant's employment was failure to perform to the expected levels.*
11. *The Claimant's letter of termination which was filed as Document 2 in the bundle of documents filed with the Memorandum of Claim reads as follows:*

"Our Ref: TIL/TANG/2015/11

27th November 2015

Kenneth Gitau

Nairobi, Kenya.

Dear Kenneth,

RE: TERMINATION OF YOUR EMPLOYMENT

We are regretful to notify you that your services have been terminated from Tangerine Investments Limited for non-performance, effective immediately.

You are dismissed because you have not been performing up to the level that is been expected, despite the Managing Director having raised performance complaints verbally previously. As a Site Acquisition Manager you were put In charge of sourcing for new sites on behalf of Tangerine which unfortunately you have not done to date. You were also expected to liaise with the KPLC to ensure our Billboard structures are lit and this has also not been effected as well which in turn has instigated a lot of complaints from our clients who are latening cancellations.

We have also noted with great concern that you have shown no improvement for last 3 months despite being issued a warning letter on the 7th of September 2015 being offered resources and additional support. Thus, your services are being terminated.

You will receive your final pay check for November 2015 once you collect all your outstanding amounts from your clients.

Please remember to turn in any company belongings before you leave so we can account for all company owned items.

Kindly sign and return a duplicate of this letter for our records."

12. *It is clear from the letter that the Claimant was never subjected to a disciplinary hearing as envisaged under **Section 41** of the **Employment Act**.*
13. Under **Section 45(2)** of the **Employment Act**, a termination without either fair procedure or valid reason as set out in **Sections 41** and **43** of the Act is an unfair termination. I therefore find that the termination of the Claimant's employment was unfair.
14. The Claimant prayed for remedies as set out herein below.

(i) Salary of November 2015

15. The Respondent having pleaded that it did not deny paragraphs 4 and 5 of the claim wherein the Claimant pleaded that his last salary was Kshs.50,389 gross, I award him the same as prayed. The Respondent having stated at paragraph 9 of the Memorandum of Defence that the Claimant was never paid outstanding dues, I award him **Kshs.50,389/-**.

(ii) One month's salary in lieu of notice

16. Having been terminated unfairly, the Claimant is entitled to one month's salary in lieu of notice as provided under **Section 36 and 49 (i)** of the **Employment Act**. I award him **Kshs. 50,389/-** under this head.

(iii) Salary for December 2015

17. The Claimant did not prove that he worked for December 2015 to justify the award of this head, as this is after the date of the termination of his employment.

(iv) House Allowance

18. The Claimant did not prove that his salary was not consolidated with house allowance. His letter of appointment refers to total gross salary and does not refer to house allowance. The Claimant further did not adduce evidence to the effect that he ever sought payment of house allowance during the period he was employed.

19. I find that the Claimant has not proved that his salary was not consolidated with house allowance. The claim therefore fails.

(v) Unpaid Leave

20. The Claimant prayed for annual leave for 3 years. In the letter of appointment, the Respondent states that the Claimant is entitled to Annual leave of 21 days. In the demand letter the Claimant demanded for unpaid leave in the sum of Kshs.50,000/-. Also, in the letter dated 15th February 2016 (Document 4 of Claimant's bundle) the Respondent states that the Claimant's terminal dues of Kshs.62,317 was inclusive of prorated leave to November 2015. In the email correspondence sent in December, 2015, the Claimant demanded payment of 25 days leave. I award the Claimant 25 days' leave in the sum of Kshs.(x 25) = **Kshs.48,451/-**

(vi) Commission

21. There is no proof that the Claimant was entitled to Commission as his letter of appointment does not refer to the same. Further, the Claimant has not given a breakdown of the Commission claimed which is not supported by any evidence on record. The claim is **declined** as it has not been proved.

(vii) Compensation

22. The Claimant worked for the Respondent from 1st June 2013 to 27th November 2015, a period of about 2.5 years. Having been unfairly terminated he is entitled to compensation under **Section 49(1)** of the **Employment Act**. Taking into account the factors set out under **Section 49(4)** of the Act, especially the length of service, the manner in which his employment was terminated and the fact that his terminal dues were withheld by the Respondent, I award him 6 months' salary as compensation in the sum of Kshs.(50,389 x 6) = **Kshs.302,334/-**.

23. The Respondent shall pay the Claimant's costs of this suit and interest shall accrue on the decretal sum from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B** 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.

MAUREEN ONYANGO

JUDGE