



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1977 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**MUNYAO MUSEMBI .....CLAIMANT**

VERSUS

**CHINA ROAD AND BRIDGE  
CORPORATION (KENYA) LIMITED.....RESPONDENT**

**JUDGMENT**

1. Vide his statement of claim dated 30<sup>th</sup> October, 2015 and filed in Court on 4<sup>th</sup> November, 2015, the Claimant avers that his employment was unfairly and unlawfully terminated by the Respondent, a registered limited liability company.
2. He avers that he was employed by the Respondent in the month of September 2014 in the capacity of a foreman on a 6 months contract that was renewable and that his salary was agreed at an hourly rate of Kshs.70/-. He maintained that he performed his duties diligently and to the Respondent’s satisfaction.
3. The Claimant avers that on 11<sup>th</sup> February, 2015, his employment contract was renewed for a further period of 6 months. However, the said contract was unlawfully and illegally terminated prematurely by the Respondent sometime in March 2015 without prior notice.
4. Aggrieved by the Respondent’s decision to unceremoniously terminate his employment contract, the Claimant filed the instant claim seeking the following reliefs:

*a) The sum of Kshs.167,670/- plus costs and interest from the date of illegal and unlawful termination. The amount is itemised below:*

*i)... Illegal deduction of salary..... Kshs.23,680*

*ii).. Salary not paid for 248 hours*

*worked in March 2015..... Kshs.17,900*

*iii). Unpaid salary for the remainder of the contract period*

*being 5 months at an average of 360 hours per month .....Kshs.126,000*

**TOTAL.....Kshs.167,670**

*b) Costs and Interest of the Suit*

*c) Any other further relief the Court may deem fit to grant.*

5. In support of his claim the Claimant filed and relied upon his witness statement dated 30<sup>th</sup> October, 2015, his Employment Contract dated 11<sup>th</sup> February, 2015, Gate Pass dated 1<sup>st</sup> November, 2014, Job attendance form from September, 2014 to March 2015, certified copy of the employee job card and finally demand letters dated 13<sup>th</sup> April, 2015 and 7<sup>th</sup> July, 2015.

6. In response to the Claim the Respondent filed its response dated and filed in Court on 19<sup>th</sup> November, 2019.

7. The Respondent admits employing the Claimant but denied that the Claimant's employment was renewed on 11<sup>th</sup> February, 2015 for an additional six months as contended by the Claimant. It maintained that the Claimant's termination was lawful as his termination was on account of poor performance after being issued with several warnings with no improvement.

8. The Respondent contends that the Claim for unfair termination is without merit given that the termination was with notice and further that the Claim does not comply with the mandatory provisions of Section 45 (3) of the Employment Act, 2007.

9. In support of its case the Respondent relies on the witness statement of Veronica Ouko, the Assistant Human Resource Manager and the Claimant's termination letter dated 8<sup>th</sup> February 2015.

#### **Evidence**

10. The suit was fixed for hearing on 26<sup>th</sup> July 2021 when the parties agreed to dispose of the same by way of witness affidavits and submissions.

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

11. The Claimant submitted that the termination of his employment was unfair and unlawful as the Respondent failed to comply with the mandatory provisions of Section 41 and 43 of the Employment Act, 2007. To buttress this argument the Claimant cited and relied on the case of **George Okello Munyolo v Unilever Kenya Limited (2019) eKLR** where the Court adopted the findings in the case **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd Industrial Cause No. 66 of 2012** in which the Court emphasised on the need for an employer to comply with the provisions of Section 41 of the Employment Act prior to the employee's termination.

12. The Claimant further submitted that he had proved his case as required under Section 47 (5) of the Employment Act, 2007 and urged the Court to allow his Claim in terms of the reliefs sought.

#### **Respondent's Submissions**

13. The Respondent in its submissions conceded that it did not follow the due process in the manner in which it terminated the Claimant's employment on the ground of poor performance. It however maintained that award of remedies is discretionary and not automatic. For emphasis the Respondent cited the case of **Samson Buluma Mumia v DPL Festive Limited (2012) eKLR** where the Court held that grant of remedies set out in Section 49 (1) (a), (b) and (c) of the Employment Act are discretionary and not automatic. The Respondent therefore urged this Court to exercise its judicial discretion in dealing with the matter.

14. On the specific reliefs, the Respondent submitted that the Claimant failed to prove the alleged salary deduction totalling to Kshs.23,680/- and the details of the alleged underpayments.

15. The Respondent submitted that the Claimant's evidence is contradictory and referred to the job attendance card marked as annexure MM3 which clearly indicates that the Claimant was paid an hourly rate of Kshs.70/- and the number of hours worked in the months of September, October and November.

16. With regard to the claim for payment of Kshs.17,900/- for 218 hours worked in March 2015, the Respondent maintained that the Claim is exaggerated as the job attendance card shows that the Claimant only worked for 128 hours in March, 2015. The Respondent submitted that the Claimant is therefore entitled to compensation of Kshs.9,600/- under this head.

17. The Respondent further submitted that the Claim for payment of Kshs.126,000/- for the remainder of the contract period is baseless and not supported by any evidence. It is further the Respondent's contention that the figure claimed has not been broken down or authorities cited to justify grant of such a relief. The Respondent urged this Court to dismiss the prayer.

18. The Respondent further submitted that the Claimant is not entitled to the Claim for one month's salary in lieu of notice having failed to include this prayer in his Memorandum of Claim.

19. In conclusion the Respondent urged this Court to find that the instant Claim is devoid of merit and to dismiss it with costs to the Respondent save for the award of Kshs.9,600/- subject to statutory deduction being payment for days worked in March, 2015.

#### **Analysis and Determination**

20. Having considered the pleadings, evidence, submissions and authorities cited by the parties the following are the issues for determination:

- a) Whether the termination of the Claimant's employment was valid both procedurally and substantively;
- b) Whether the Claimant is entitled to the reliefs sought.

#### **Unfair termination**

21. Under Section 45(2) of the Employment Act termination of an employee's contract of service is unfair where the employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.

22. Section 47(5) of the Employment Act further provides that:

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

23. Section 41 of the Employment Act, 2007 provides as follows:

**An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

24. In the case of **Francis Mbugua Boro v Smartchip Dynamics Ltd (2017) eKLR** the Court held that: -

*"...It was mandatory for the Respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the Claimant was procedurally unfair."*

25. The Respondent has admitted in the submissions that it did not comply with fair procedure before terminating the employment of the Claimant. For this reason, the termination of the Claimant's employment was procedurally unfair.

#### **Whether the Claimant is entitled to the reliefs sought**

26. The Claimant in his Memorandum of Claim sought the following reliefs:

##### **(a) Illegal deduction of salary Kshs.23,680/-**

27. The Claimant in his pleadings and submissions maintained that he was underpaid in the months of September 2014, October, 2014 and November 2014 when he was paid at the rate of Kshs.65/-, Kshs.55/- and Kshs.60/- per hour instead of the agreed hourly rate of Kshs.70/-.

28. The Respondent denied any underpayments and maintained that the Claim by the Claimant was not supported by any evidence.

29. From the job attendance card it is clear that the Claimant was paid at an hourly rate of Kshs.70/- for the entire period he worked. This claim is therefore unfounded and is dismissed for want of proof.

##### **(b) Salary not paid for 248 hours worked in March 2015 Kshs.17,900/-**

30. The job attendance card attached to the Claimant's Memorandum of Claim shows that the Claimant worked for a total of 128 hours in the month of March, 2015 but was not paid. This is admitted by the Respondent in its submissions. I will therefore award the Claimant compensation under this head at **Kshs.9,600/-** as admitted by the Respondent.

##### **(c) Unpaid salary for the remainder of the contract period being 5 months at an average of 360 hours per month Kshs.126,000/-**

31. Compensation under this head is not provided for by law. The Claimant cannot be awarded remuneration for work not done. Awarding such relief would amount to unjust enrichment by the Claimant as was held in the cases of **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] eKLR** and **D.K. Njagi Marete v Teachers Service Commission [2013] eKLR**.

##### **(d) Costs and Interest of the Suit**

32. The Claimant is awarded costs of this suit and interest at Court rates.

**33. In conclusion judgment is entered in favour of the Claimant against the Respondent for salary not paid for 128 hours worked in March, 2015 in the sum of Kshs.9,600/-.**

34. The Respondent shall pay Claimant's costs for the suit.

35. Interest shall accrue from date of filing suit until settlement in full in view of the fact that the unpaid salary was due on the date of termination of employment.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**