



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO.205 OF 2017**

**RICHARD MAMBO OKARI.....PLAINTIFF**

**VERSUS**

**HWANSUNG INDUSTRIES (K) LIMITED.....DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

1. In his Statement of Claim filed on 07.02.2017, the Claimant is suing the Respondent for unfair, unlawful and wrongful termination of his services and non-payment of his terminal benefits. He avers that the Respondent employed him as a Glass Mason in August 2015 and that at the time of termination of his employment his monthly salary was Kshs.28,263.00/=. That he was however not provided with a written contract of service upon employment which contract was made orally and by conduct.

**CLAIMANT'S CASE**

2. It is the Claimant's averment that the Respondent unjustifiably and unduly dismissed him on 17.05.2016 after alleging that his services were no longer required due to misconduct. That the Respondent did not issue him with a notice to show cause or afford him an opportunity to be heard. Further, it did not give him notice or pay him in lieu thereof and the dismissal was without lawful cause or justification.

3. The claimant also says he was not given the requisite annual leave for the entire period he worked for the Respondent nor was he paid in lieu thereof and that the Respondent has subsequently unfairly withheld his employment benefits including: salary for the month of May 2016; one month notice pay; service pay; payment in lieu of untaken leave for 10 months of service; and compensation for unfair termination.

4. He also seeks general damages for breach of contract, punitive damages for victimization, Certificate of Service, and costs and interest in the suit. The Claimant avers that the Respondent also refused to settle the dispute through the trade union and Ministry and that this Court ought to pass judgment against it as prayed in the Statement of Claim.

**RESPONDENT'S CASE**

5. The Respondent filed a Reply to Statement of Claim dated 30<sup>th</sup> April 2017 denying that the Claimant was its employee and averring that the documents produced by the Claimant purported to have been issued by it are a forgery. It avers that the entire Claimant's claim against it thus has no merit and does not disclose any reasonable cause of action against the Respondent. It prays the same be dismissed with costs.

6. The Respondent also filed a witness statement made by Wonkil Kim who asserts that the Respondent Company would always issue official documents affixed with its stamp. That the Respondent had engaged the Claimant on temporary basis to work for it in a project in Westlands Nairobi and that the engagement was not contractual.

7. That when the Respondent later found out that the Claimant had stolen some blankets from the work site it reported the matter to the Parklands Police Station under OB No. 59/2017. The Claimant responded to the Reply asserting her averments.

**CLAIMANT'S SUBMISSIONS**

8. The Claimant submits that to prove his employment by the Respondent he attached payslips to his List of Documents as annexure '**RM01**' and that salary deductions for PAYE, NSSF and NHIF are only deductible to an employee who is due to receive a monthly salary

and not to a contractor. It is the Claimant's submission that the fact the Respondent did not appear at the hearing to prove its case demonstrates the Claimant's innocence.

9. On the claim of unfair, unlawful and wrongful termination, the Claimant relies on the case of **David Kipkosgei Muttai v Green Palms Academy [2014] eKLR** wherein the Court stated that unfair termination occurs where employment is terminated without a valid and fair reason and without following a fair procedure; and that dismissal is wrongful when the terminating party fails to give notice.

10. That in the instant case, he has pleaded that the Respondent neither gave him a valid and fair reason for termination nor did he follow a fair procedure in the termination and did not also give him notice. That his testimony of having been summarily dismissed is also uncontroverted.

11. The Claimant further submits that he is thus entitled to a declaration that his dismissal was unfair, unlawful and wrongful and that he is entitled to compensation for unfair termination by dint of **Section 15(c) of the Labour Institutions Act** and **Section 49(1) (c) of the Employment Act**. That **Section 51 of the Employment Act** mandates the employer to issue an employee with a certificate of service at termination and that the Respondent herein has not controverted his position of having not been issued with one.

12. The Respondents did not participate in the court's proceedings and did not also file submissions.

13. The Claimant's case was that the Respondent called him on 17<sup>th</sup> May, 2016 while at work and informed him that his services were no longer required. He says he was not issued with notice, and neither was he given a notice to show cause. He says he was not given an opportunity to be heard.

14. The Respondent's defence is that the Claimant was not its employer.

The Respondent witness WONIKIL actually says the documents produced by the Claimant are forged.

15. He says Claimant worked for the Respondent on temporary basis on a project in Westlands. He is shy to state how long the Claimant worked for them.

16. The responsibility to keep employee's records is upon the employer Section 74 of the Employment Act has set out a list of records the employer must keep on behalf of the employee. In the absence of such records the court is at a disadvantage to know how long Claimant worked for the Respondent or even what kind of a contract the Claimant had with the Respondent.

17. The Respondent also claims that the documents produced by the Claimant including payslips are forged.

The same way the Respondent claim they reported loss of their documents to Parklands Police Station they should as well have reported a case of forgery to the police and especially as forgery is a serious offence.

Then of course unless they know these are their documents and were not forged.

18. As for whether the Claimant was employed by the Respondent at least he has produced payslips which shows he was receiving KShs.28,263/= and was being deducted statutory declarations including NSSF, PAYE and NHIF.

19. Going by the provisions of Section 37 of the Employment Act anybody who works for a period of a number of continuous working days which amount in the aggregate to the equivalent of not less than one month is regarded to be a contractual employee.

The Claimant claims he worked for the Respondent from August, 2015 to May, 2016. The payslip are for the months of January, 2016 and February, 2016.

The court is convinced the Claimant was lawfully employed by the Respondent as a service employee.

20. As for the termination of the Claimant by the Respondent it is the Respondent's testimony that the Claimant stole their blankets. He apparently lied to the Respondent's employee that he was taking them to their site in Nakuru.

However the law which is coached in mandatory terms and in particular Section 45 of the Employment Act provide that the employer must provide a valid reason while he is terminating the employee's employment.

If no valid reason is given then the termination is deemed to be unfair.

21. From the evidence in court the Respondent did not give a valid reason or even a reason as to why he terminated the Claimant from employment.

In the statement of the Respondent's witness it is mentioned that Claimant stole blankets. That claim does not appear anywhere in the evidence as the Respondent did not give evidence and did not call a witness.

22. The right procedure to terminate an employee according to Section 45 of the Employment Act is first to give the Claimant a valid reason.

23. Section 41 of the Employment Act provides the procedure which must be followed.

The employer must explain to the employee in a language the employee understands the reason for which the employer is considering termination and the employee is entitled to have another employee or a shop floor union representative present at the explanation. This is in the case where employee is accused of poor performance, gross misconduct or physical incapacity.

24. In the case of **DAVID KIPKOSGEI MUTAI VS GREEN PALMS ACADEMY (2014) eKLR and WALTER ANUR VS TEACHERS SERVICE COMMISSION CASE NO.955 OF** the court held that unfair termination occurs where employment is terminated without a valid reason and fair reason and **WITHOUT FOLLOWING A FAIR PROCEDURE**. Proof that a reason for termination is valid is a requirement under Section 43 and 45 of the Employment Act.

25. Section 43 (1) provides “in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

26. It is the court’s finding that the Respondent did not prove or controvert the claims for unlawful termination pleaded by the Claimant.

Having failed to give a reason for the said abrupt termination the Respondent failed the fairness test. He also failed to follow the procedure stipulated in Section 41 of the Employment Act.

In all fairness the court finds the Claimant was unlawfully terminated and so awards judgement in his favour.

## **25. REMEDIES AWARDED**

(i) Unpaid salary for May for 17 days Kshs.16,015/70.

(ii) One month salary in lieu of notice Kshs.28,263/=.

(iii) Service pay is declined as Claimant did not show that his pension dues were not at NSSF.

(iv) Untaken leave is allowed as the Respondent did not controvert the same Kshs.19,022/50.

(v) Compensation for unfair termination. I will award one month considering the period the Claimant had worked for the Respondent Kshs.28,263/=.

(vi) **Total award Kshs.91,564.20.**

26. Costs are awarded to the Claimant.

27. Interest is also provided at court rates from date the judgement till full payment.

28. Claimant is also to be issued with certificate of service with 30 days.

29. Orders accordingly.

**Delivered, dated and signed in Nairobi this 24<sup>th</sup> day of March, 2022.**

**ANNA NGIBUINI MWAURE**

**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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**