



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 829 OF 2016**

**SHABAN NYASI ZUMA.....CLAIMANT**

**VERSUS**

**READY CONSTULTANCY COMPANY LIMITED.....RESPONDENT**

**J U D G M E N T**

1. The Claimant herein sued the Respondent vide a Statement of Claim dated 10<sup>th</sup> August 2016 and pleaded, *inter-alia*:-

- a. that the Claimant was employed by the Respondent as a general labourer from November 2003 until May 2015 when his employment was irregularly, unlawfully, unjustly and unfairly terminated by the respondent.
- b. that on 1<sup>st</sup> April 2015, the Respondent unlawfully, irregularly and/or wrongfully purported convert the Claimant’s employment into an employment for a fixed renewable term of six (6) months without payment of terminal dues.
- c. that on 19<sup>TH</sup> May 2015, the Respondent served the Claimant with a Notice to Show Cause letter requiring him to show cause why he was absent from work on some specific days and that the Claimant duly complied and responded to the same.
- d. that the Claimant was told by the Respondent’s Manager, one IBRAHIM BOCHA, not to report to work until he was summoned back, and that the Claimant was not summoned back to work and the decision arising from the disciplinary proceedings and /or show cause letter was not made known to the claimant and the Claimant was not invited to attend in person to answer and/or be examined on the disciplinary issues raised against him.
- e. that the Respondent has implication and/or conduct terminated the Claimant’s services.
- f. that the conversion by the Respondent of the Claimant’s terms of service from casual to a fixed term of six months and failure to disclose the true facts of this termination and failure to follow the laid down procedure and/or settle the Claimant’s terminal dues were in bad faith, wrongful, without due regard to process and was based on illegal and unfair grounds; and was in breach of the terms of employment set out in the Employment Act.
- g. that at the time of termination, the Claimant was earning a gross salary of ksh.14,070, which was paid monthly and in arrears.
- h. that the Claimant’s employment was effectively terminated unlawfully, irregularly and unfairly, and that the Claimant is entitled to the prayers (reliefs) sought.

2. The Claimant sought the following reliefs:-

- a. One month salary .....ksh.14,070
- b. Twelve(12) months basic salary as damages under Section 49 of the Employment Act .....ksh.168,840
- c. Service pay at the rate of one month’s salary for each of the thirteen (13) years successfully completed..... ksh.182,910

Total ksh.365.820

3. The Claimant also prayed for costs of the claim and interest. He also prayed that he be issued with a Certificate of Service.

4. The Claimant filed a witness statement by himself dated 10<sup>th</sup> August 2016 and a list of documents dated the said date, listing some twelve (12) documents but annexing only nine.

5. The suit was defended by the Respondent, which filed Response to the Claim dated 11<sup>th</sup> April 2017. The Respondent pleaded, *inter-alia*:-

**a. that on 19<sup>th</sup> May, the Claimant was served with a show cause letter, to which he replied and went back to work until 5<sup>th</sup> June when he absented himself from work till 9<sup>th</sup>.**

**b. that on 12<sup>th</sup> June 2015, the Claimant was served with a show cause letter to explain his absence on 5<sup>th</sup> -9<sup>th</sup> June 2015, to which he replied, dropped it (the reply) and left.**

**c. that the Claimant was never a contractual employee to the Respondent but was working as a general labourer, and that the Claimant's services were not terminated but the Claimant left employment at his own volition.**

6. The Respondent also filed a witness statement by one Ibrahim Bocha, dated 15<sup>th</sup> October 2021, and a list of documents dated 11<sup>th</sup> April 2017, listing and annexing Show Cause letters addressed by the Respondent to the Claimant, and dated 19<sup>th</sup> May 2015 and 12<sup>th</sup> June 2015 respectively.

7. When trial opened on 24<sup>th</sup> April 2021, the Claimant adopted his witness statement referred to at paragraph 4 of this Judgment, which basically replicated the averments made in his statement of claim filed herein, save for the addage that the Claimant on 12<sup>th</sup> June 2015 received a show cause letter dated 12<sup>th</sup> June 2015 requiring him to show cause why he was not on duty from 5<sup>th</sup>-9<sup>th</sup> June 2015; to which the Claimant responded on the same date but was told by the Respondent's Manager (Ibrahim Bocha) to go home until he was recalled back to work, but was never recalled.

8. The Claimant further testified:

a. that he was not given any reason for the termination and was not given an opportunity to defend himself prior to termination.

b. that there was a strike in May 2015, in which everybody else participated. That the Claimant was given a show cause letter, to which he responded and resumed work.

c. that he was given a show cause letter within two weeks past the strike, during which he was unwell, having sustained a burn on his hand while at work, upon which he went to hospital and was given five days off.

d. that on reporting back to work, he was told to write a letter explaining his absence, which he did, and was told to go home and would be called back.

e. that the Claimant was not called back, was not notified of any disciplinary hearing, and was not given a termination letter.

f. that in 2014, the Claimant had been given a six months contract but was not paid for previous years before that contract.

9. Under cross examination and re-examination, the Claimant told the Court:-

a. that he got two show cause letters, one dated 19/5/2015 and another one dated 12/6/2015. That he responded to the show cause letter dated 19/5/2015 and resumed work.

b. that he got burnt (at work) on 19/5/2015 at night and the doctor advised him to take a bed rest and was given a sick sheet dated 30/5/2015.

c. that he was issued with the show cause letter dated 12<sup>th</sup> June 2015, to which he responded and was told to go back home and wait to be called, but was not called.

d. that he was earning ksh.14,070 from 2003.

e. that he did not leave employment on his own.

10. The Respondent's witness, Ibrahim Bocha (RW-1), adopted his recorded and filed witness statement dated 15/10/2021 as his testimony and produced the Respondent's documents referred to at paragraph 6 of this judgment as exhibits. The documents produced by the witness are two show cause letters dated 19/5/2015 and 12/6/2015 respectively. The witness further testified, *inter-alia* :-

a. that the Claimant absconded duty from 5<sup>th</sup> to 9<sup>th</sup> June 2015, and was given a show cause letter dated 12<sup>th</sup> June 2015, and that the witness could not remember whether the Claimant had responded to that show cause letter.

b. that the Respondent did not terminated the Respondent's employment.

11. The witness (RW-1) appeared to contradict himself on whether or not the Claimant responded to the show cause letter dated 12<sup>th</sup> June 2015 when he told the Court, under cross examination, that the Claimant responded to the show cause letter dated 12<sup>th</sup> June 2015 on the same date and gave the response to the witness (RW-1); and that he (the witness) did not respond to the same.

12. RW-1 (Ibrahim Bocha) thus substantially corroborated the Claimant's evidence that he responded to the show cause letter dated 12<sup>th</sup> June 2015 and gave the response to RW-1 who then told him to go back home and would be called back, but was never called back to work.

13. The Respondent (RW-1) admitted that the Claimant was never called for a disciplinary hearing and that no letter was sent to him in that regard.

14. The Respondent (RW1) further told the Court that the Respondent had nothing to show that the Claimant had, indeed, been put on a six months contract because the document placed in Court in that regard was unsigned.

15. The Respondent (RW1) admitted having received a demand notice prior to institution of the claim herein, which was filed a year after the Claimant left employment, and not having called the Claimant back to work, and that he did not respond to the demand letter.

16. Upon considering the pleadings filed and evidence presented by both parties, issues that fall for determination are as follows:-

**a. whether the Respondent terminated the Claimant's employment.**

**b. whether termination of the Claimant's employment was unfair.**

**c. whether the Claimant is entitled to the reliefs sought.**

17. On the first issue, and as already stated in this judgment, the Respondent substantially corroborated the Claimant's evidence that he was, in June 2015, told by RW1 to go home and would be called back to work, but was never called. The Respondent's allegation that the Claimant absconded duty is not supported by any evidence and cannot hold.

18. Absconding of duty by an employee amounts to gross misconduct, for which an employee can be dismissed summarily under section 44 of the Employment Act. The Respondent did not demonstrate that it initiated any disciplinary proceedings against the Claimant for absconding duty by invoking Section 41 of the Employment Act. It is my finding that the Respondent terminated the Claimant's employment.

19. On the second issue, the Respondent did not demonstrate that it complied with the mandatory procedural provisions of Section 41 of the Employment Act, which provides, in mandatory terms:-

“(1) Subject to Section 42(1), 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.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

20. It is my finding that termination of the Claimant's employment was unfair; and that the Claimant, who had worked for the Respondent since the year 2003, is entitled to complain that his employment was unfairly terminated.

21. The Court of Appeal held in the case of JANET NYANDIKO –VS- KCB & 2 OTHERS as follows:-

**“that Section 45 of the Act makes provision, inter alia, that no employer shall terminate an employee unfairly. In terms of the said section, a termination of employment is deemed to be unfair if the employer fails to prove that the reason for the termination was valid, that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer acted in accordance with justice and equity. The parameters of determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to terminate the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee upto the date of termination, the extent to which the employer has complied with Section 41. Section 41 enjoins the employer, in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, to explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representation which the employee may advance in response to the allegations levelled against him by the employer.”**

22. On the third issue, the Respondent did not demonstrate that any payment in lieu of notice was made to the Claimant upon the unfair termination of his employment by the Respondent. The Claimant testified and pleaded that his monthly salary was ksh.14,070 from the date of employment upto the date of termination. The Respondent did not controvert this position in its evidence. I allow the claim for ksh.14,070 being one month salary in lieu of notice.

23. Regarding the claim for compensation for unfair termination, and having considered the circumstances and manner in which the Claimant's employment was terminated, I award the Claimant **ksh.126,630** being nine months' salary as compensation for unfair termination of employment.

24. On the claim for service pay, and as ably submitted by Counsel for the claimant, no evidence was tendered by the Respondent under Section 35(6) of the Employment Act to prove that the Claimant was a member or even a contributor to any registered pension scheme, a gratuity or service scheme established under a collective agreement or NSSF. The burden of such proof rested on the Respondent by dint of Section 74 as read with Sections 20 and 21 of the Employment Act. The claim for **ksh.182,910** being service pay computed at the rate of one month's salary for each completed year of service is allowed.

25. In sum, judgment is hereby entered for the Claimant for a total of **ksh.323,610**. The Claimant is also awarded costs of the claim and interest at Court rates.

26. The Respondent is directed to issue a Certificate of Service to the Claimant pursuant to Section 51(1) of the Employment Act. This should be done within thirty days of this judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF MARCH, 2022**

**AGNES KITIKU NZEI**

**JUDGE**

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Mr. Onyango for Claimant

Mr. Birir Respondent