



**Otieno v Kisumu Concrete Products Ltd (Cause 208 of 2017)  
[2022] KEELRC 1704 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1704 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 208 OF 2017**

**S RADIDO, J  
MAY 18, 2022**

**BETWEEN**

**DAVID ODHIAMBO OTIENO ..... CLAIMANT**

**AND**

**KISUMU CONCRETE PRODUCTS LTD ..... RESPONDENT**

**JUDGMENT**

1. The court is called upon to determine whether Kisumu Concrete Products Ltd (the respondent) unfairly terminated the employment of David Odhiambo Otieno (the claimant), and whether it was in breach of contract.
2. The cause was heard on January 27, 2022 and March 7, 2022. The claimant and the chairman of the respondent testified.
3. Pursuant to court directions, the claimant filed his submissions on March 30, 2022 and the respondent on May 5, 2022.
4. The court has considered the material placed before it.

**Unfair termination of employment**

5. Section 47(5) of the *Employment Act*, 2007 requires the employee to prove at the first instance that an unfair termination of employment occurred before the employer is called upon to justify the decision to terminate.
6. The claimant's case was that the respondent unfairly terminated his employment in March 2016.
7. On the circumstances leading to the separation the claimant testified that in February 2016, he was transferred to Nairobi from Kisumu on the understanding that he would be in Nairobi for only 2



months but during the third month and running out of cash to sustain himself and family, he requested a named manager to pay him promised allowances.

8. According to the claimant, the said manager assaulted him, and he sought medical attention and upon returning to work the next morning, the guards told him the manager had instructed them not to allow him into the workplace.
9. The claimant further testified that attempts to have the chairman intervene failed and therefore he travelled to Kisumu to see the chairman without success.
10. The respondent's chairman filed a witness statement wherein he stated that the claimant absconded from work in March 2016 and attempts to reach him were futile. The statement was adopted as part of respondent's evidence.
11. However, during oral testimony, the witness altered his story and stated that the claimant left voluntarily upon securing alternative employment in March 2016.
12. With the inconsistent evidence presented on the part of the respondent, the court can only but give more weight to the testimony of the claimant that his employment was terminated verbally by a named manager and that attempts to have the chairman to intervene did not bear fruit.
13. Section 35(1) of the *Employment Act*, 2007 contemplates written notice of termination of employment. The respondent did not demonstrate that it issued any to the claimant, even on the alleged ground of desertion.
14. At the same time, section 41 of the *Act* requires the employer to allow the employee an opportunity to make representations. The respondent did not show that it afforded the claimant an opportunity to be heard.
15. The court finds that the Respondent unfairly terminated the claimant's contract.

### **Compensation and pay in lieu of notice**

16. The claimant served the respondent for about 13 years but with breaks.
17. Considering the period and the breaks, the court is of the view that the equivalent of 6-months gross wages as compensation (gross wage in March 2016 was kshs 28,111/-), and 1-month basic salary (kshs 22,733/-) as pay in lieu of notice would be appropriate.

### **Breach of contract**

#### **Underpayments**

18. The claimant pleaded kshs 61,404/- as underpayments for 21 years. The claimant did not place any evidence on the prescribed minimum wages during the period.
19. Considering the general nature of the claim and that some aspects may have been caught by the law of limitations, relief is declined.

### **Leave allowance**

20. On account of leave allowance, the claimant prayed for kshs 519,099/-.
21. The *Employment Act*, 2007 does not provide for the payment of leave allowances, and the claimant did not disclose any contractual or legal anchor to the head of claim.



22. Relief is declined.

### **House allowance**

23. Copies of pay slips produced in court show that the claimant's pay included house allowance. Relief is declined.

### **Gratuity**

24. The claimant did not place before the court any contractual or legal basis for this relief, and it is declined.

### **Counterclaim**

25. The respondent counterclaimed for kshs 600,000/- stated to have been the expenses incurred over 10 days when the claimant did not report for duty.

26. Regrettably, the respondent did not place before the court any records of whatever nature to support the contention that it suffered a loss. Further, this alleged loss was in the nature of special damages. It was not proved to the requisite standard.

### **Conclusion and Orders**

27. The court finds and declares that the respondent unfairly terminated the claimant's employment and awards him:

- i. Compensation kshs 168,666/-
  - ii. Pay in lieu of notice kshs 22,733/-
- TOTAL kshs 191,399/-

28. The award to attract interest at court rates from date of judgment till full payment.

29. The counterclaim is dismissed.

30. Claimant to have costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 18TH DAY OF MAY 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**APPEARANCES**

**For claimant Ben Aduol Nyanga & Co Advocates**

**For respondent Lumumba & Lumumba Advocates**

**Court assistant Chrispo Aura**

