



**Cheteri v China National Aero Technology International Engineering Corporation Ltd
(Cause 1726 of 2016) [2022] KEELRC 4037 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4037 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1726 OF 2016
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN

DANIEL OMUKANAMBO CHETERI CLAIMANT

AND

**CHINA NATIONAL AERO TECHNOLOGY INTERNATIONAL
ENGINEERING CORPORATION LTD RESPONDENT**

JUDGMENT

1. The claimant's position, expressed in his statement of claim filed on August 28, 2016, is that he was employed by the respondent as a carpenter, in January 2014 to December 10, 2015. He was advised by the foreman on the latter date, that the respondent was reducing its workforce, and that his services were no longer needed. His position was taken by another carpenter. He worked for 2 years. His record was clean.
2. He prays for 1-month salary in lieu of notice at Kshs 22,500; annual leave of 2 years at Kshs 31,500; off-duty days over the period of 2 years at Kshs 144,000; service at Kshs 22,500; and 12 months' salary in compensation for unfair termination at Kshs 270,000 – total Kshs 490,500.
3. He prays for declarations that termination was unfair and unlawful; and that he is entitled to the sum prayed. He seeks costs and interest.
4. The respondent concedes in its statement of response dated February 26, 2021 that it employed the claimant, and terminated his contract as his service were no longer needed. Termination was inevitable. The claim has no merit and should be dismissed with costs.
5. The claimant testified and rested his claim, on January 21, 2022. The respondent did not give evidence. The claimant adopted his witness statement and documents on record. He was not issued a letter of employment. He was paid his salary in cash. He signed some document on receiving his salary, which was retained by the respondent. He never went on annual leave. He was not issued notice of



termination. He was not issued pay slips. He was paid nothing on termination. He was told that work had diminished. He did not agree with this. He worked on Sundays without compensation. He told the court that he no longer wishes to claim the prayer for unpaid off-duty days.

6. Cross-examined, he confirmed that he was not pursuing overtime for work performed on Sundays. He did not have a gate pass. It was repossessed by the respondent. He earned Kshs 22,500 in monthly pay. He signed a document which was retained by the respondent, upon receiving his salary. He did not name any person who was employed after he left.
7. The claimant submits that the respondent did not call any Witness or produce any employment records. Section 74 of the *Employment Act* obligates an employer to retain employment records. The claimant's evidence, in the absence of any evidence from the respondent, is uncontested.
8. The respondent submits that the claimant did not produce employment records to support his prayers. He did not establish that another person took over his job. He did not establish unfair termination, under section 47[5] of the *Employment Act*. He has not shown that he suffered damage, as required by section 107 of the *Evidence Act*, Cap 80 the Laws of Kenya. The respondent states that in event the court finds the claimant's contract was unlawfully terminated, he is entitled to no more than Kshs 22,000, being his alleged gross monthly salary, in compensation for unfair termination.

The Court Finds: -

9. The claimant was employed by the respondent as a carpenter, between January 2014, and December 10, 2015. He worked for 2 years.
10. He states, and there was no evidence from the respondent to counter this, that he was told by the respondent that there was no more work, and the respondent was reducing its staff, the claimant among them.
11. Section 43 of the *Employment Act* requires the Employer to establish the reason, or reasons justifying termination. The claimant does not say that he left employment voluntarily, so there ought to have been a reason or reasons advanced by the respondent, to show why the claimant's contract was terminated on December 10, 2015.
12. In the absence of any reason or reasons advanced by the respondent, the court would conclude that the claimant was told by the respondent that there was diminished work, and that his services were no longer required. The respondent did not however, establish that it was restructuring its business, and that the claimant's role had become superfluous. It was not necessary for the claimant to give details of the person who he states, was employed by the respondent in his place; it was for the respondent to justify termination on redundancy, or indeed, any other reason.
13. Without any reason or reasons from the respondent, and without discounting the reason stated by the claimant, the court can only conclude that the claimant has shown that termination was unfair. He was not taken through a fair redundancy procedure, and was paid nothing on termination.
14. On his monthly rate of pay, the respondent disputes the amount of Kshs 22,500 advanced by the claimant. But the respondent does not disclose to the court an alternative rate. Instead, the respondent told the court that in case the court found in favour of the claimant, it should award him a month's salary in compensation for unfair termination, which the respondent states to be Kshs 22,000. It was the responsibility of the respondent to issue the claimant with a monthly pay statement; issue a written contract with all the essentialia negotii, which include the monthly salary; and to retain all employment records of the claimant, as envisaged by section 74 of the *Employment Act*.



15. In the absence of a written contract or pay statement from the respondent, showing any other monthly salary, other than that pleaded by the claimant, the court upholds the amount of Kshs 22,500 as the claimant's monthly salary, guided by section 10[7] of the *Employment Act 2007*.
16. The respondent likewise disputes the claimant's prayer for annual leave, without exhibiting the claimant's annual leave profile, from his employment file. Section 74[1] [f] of the *Employment Act* requires the employer to keep the employee's annual leave record. Where an employee makes an assertion on leave entitlement by word of mouth, which is disputed by the employer, all that the employer would be required to do, is to go back to the record, and supply the court with the employee's annual leave profile. In default, the court must uphold the evidence of the employee.
17. The claimant has withdrawn his prayer for unpaid off-days. He has not established his prayer for gratuity at the rate of 15 days' salary for each complete year of service. He worked for 2 years, and his prayer for 12 months' salary in compensation for unfair termination, is disproportionate to his period of service.

He is awarded: -

- a. Declaration that termination was unfair.
- b. Compensation equivalent of 2 months' salary for unfair termination, at Kshs 45,000; annual leave as prayed at Kshs 31,500; and notice of 1 month at Kshs 22,500 – total Kshs 99,000.
- c. Costs.
- d. Interest at court rates from the date of Judgment, till decree is satisfied in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 29TH DAY OF SEPTEMBER 2022

JAMES RIKA

JUDGE

