



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1158 OF 2017**

(Before Hon. Lady Justice Maureen Onyango)

**HENRY KINYIHA KAMAMI..... CLAIMANT**

**VERSUS**

**STAR BRILLIANT (EPZ) K LIMITED....RESPONDENT**

**JUDGMENT**

Vide his Memorandum of claim dated 20<sup>th</sup> June 2017 and filed in Court on 21<sup>st</sup> June 2017, the claimant herein avers that his employment with the Respondent was unlawfully, wrongfully and unfairly terminated by the Respondent, a registered limited liability company.

The Claimant maintains that he was employed by the respondent vide a contract of permanent employment signed on 16<sup>th</sup> October, 2016 in the position of Purchasing Manager (Stores) earning a monthly salary of Kshs.70,000/- and that the Contract was unlawfully, unfairly and un-procedurally terminated on 8<sup>th</sup> November, 2016 without proper notice contrary to the provisions of Paragraph (g) of his Employment Contract.

He further maintained that during the 1 month and seven days of service to the Respondent he worked with loyalty, dedication and due diligence and that his termination was without valid reason and/or prior notice.

Aggrieved by the decision to terminate his employment the Claimant filed the instant claim seeking the following reliefs:-

- i. A declaration that the Claimant's termination was unlawful.
- ii. A declaration that the termination of his contract was without cogent grounds and a violation of the Claimant's rights under Section 41 of the Employment Act.
- iii. Two months' salary of Kshs.140,000/- in lieu of notice.
- iv. Un-utilized leave (21 days) per annum.
- v. Compensation for unlawful termination.
- vi. Interest in (iii), (iv) and (v) above at the Court rate.
- vii. Cost of this suit.
- viii. Compensation for loss of earning
- ix. Any other relief that the Court may deem fit
- x. Cost of the suit

The Respondent despite being served with the Summons and the Memorandum of Claim failed to enter appearance or to file its defence in the claim. The matter therefore proceeded as an undefended claim by way of the Claimant filing his witness affidavit and written

submissions.

### **Claimant's Case**

In his statement the Claimant reiterated the averments made in his Memorandum of Claim. In brief the Claimant maintained that he was employed by the Respondent in October 2016. That he worked for the Respondent for a duration of 1 (one) month and 7 (Seven) days prior to the Respondent unfairly, unlawfully terminating his employment without any notice or disciplinary hearing contrary to the provisions of Section 41 of the Employment Act, 2007 and his employment contract.

He contended that his termination was unlawful and unfair and therefore urged this Court to allow his Claim in terms of the reliefs sought therein.

### **Claimant's Submissions**

In his submissions the Claimant maintained that his termination was unfair and unlawful as it was contrary to the provisions of Section 43 and 45 of the Employment Act, 2007. To buttress this argument the Claimant relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd, Industrial Cause No. 64 of 2012** where the Court emphasised on the need to comply with the provisions of Sections 43 and 45 of the Employment Act, 2007 whilst terminating an employee.

He further submitted that given that he was not accorded a fair hearing prior to his termination the same was in gross violation of the provisions of Section 41 of the Employment Act, 2007 and was unlawful and un-procedural. For emphasis the Claimant relied on the findings in the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR**.

The Claimant argued that he is entitled to the reliefs as sought in his Memorandum of Claim and therefore urged this Court to allow the same as prayed.

### **Determination**

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

1. Whether an employee-employer relationship existed between the Claimant and the Respondent herein.
2. Whether the termination of the Claimant's employment by the Respondents was wrongful, unfair and unlawful.
3. Whether the Claimant is entitled to the reliefs sought.

### **Whether an employee-employer relationship existed between the Claimant and the Respondent herein**

The determination of the heads of Claim as advanced by the Claimant will depend on whether the Court finds that there was an employment relationship in existence between the Claimant and the Respondent herein as contended by the Claimant. This is because the claim is undefended.

In his pleadings and evidence, the Claimant averred that he was employed by the Respondent in the position of Purchasing Manager (Stores) in the month of October, 2016 earning a monthly salary of Kshs.70,000/-.

As proof of his employment with the Respondent, the Claimant attached to his List of Documents dated 20<sup>th</sup> June, 2017 and filed in Court on 21<sup>st</sup> June, 2017 a Copy of his employment Contract dated 16<sup>th</sup> October, 2016, a copy of his pay slip for the month of October, 2016 and the Respondent's termination letter dated 8<sup>th</sup> November, 2016.

In the case of **Monica Kanini Mutua v Al-Arafat Shopping Centre & another [2018] eKLR**, the Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.

Further, in the case of **Herman Ilangarwa Shidakwa v Armati Security Solutions Limited [2019] eKLR**, the court, after noting that the respondent had failed to enter appearance or file a defence despite being served with summons, held that the claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent. The Court also held that the claimant had been unfairly terminated.

In the case of **Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited (2014) eKLR** the Court considered letters placed on record by the Claimant and made the following findings:

“There is abundant evidence showing the Claimant was, and the Court finds he was, an employee of the Respondent on the terms and conditions stated in the Statement of Claim.”

In the instant case which is an undefended claim, I find that the Claimant has indeed established existence of an employment relationship with the Respondent through copies of his employment contract, his pay slip and the letter of termination of his employment all issued by the Respondent herein.

## **Whether the termination of the Claimant's employment by the Respondent was wrongful, unfair and unlawful**

The Claimant has submitted that the Respondent did not adhere to due process while dismissing him from its employment contending that he was neither accorded a hearing before a disciplinary committee nor was he issued with any notice prior to his termination. There is no evidence tendered by the Respondent to controvert this assertion in terms of minutes of a disciplinary hearing accorded to the Claimant. I agree with the Claimant's submission that hearing and notification are mandatory under **Section 41 of the Employment Act, 2007**.

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

In that regard, I find that indeed the Claimant was unfairly and unlawfully dismissed from employment by the Respondent.

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

The Claimant prayed for to the following reliefs:

### **i. Declaration that his termination was unlawful**

Having found that the Claimant's termination violated the provisions of Sections 41 of the Employment Act, 2007 he is entitled to the declaration that his termination was unlawful as the same was done in gross violation to the mandatory provisions of Section 41 of the Employment Act, 2007.

### **ii. Notice Period for two months Kshs.140,000/-**

The Claimant in his pleadings and submissions maintained that he worked for the Respondent for a period of one (1) month and Seven (7) days before the Respondent unlawfully and unfairly terminated his employment.

I have examined the Claimant's employment contract dated 16<sup>th</sup> October, 2016 which clearly stipulates his terms of service. The contract provides for notice of termination of two months. I will therefore award the Claimant notice as provided in his contract being 2 months' notice or pay of two months' salary in lieu of notice. I accordingly award him **Kshs.140,000/-** as prayed.

### **iii. Compensation for unfair termination**

Having found that the Claimant's termination was unfair, he is entitled to compensation. Given the length of service and the fact that he did not contribute to his termination, I award him two (2) months' salary as compensation in the sum of **Kshs.140,000/-**

### **iv. Leave**

Having established that the Claimant had worked for the Respondent for only one (1) month and seven (7) days he is not entitled to leave. Reference is made to the provisions of Section 28 of the Employment Act, 2007 which provides that annual leave shall accrue after a minimum service duration of two months.

## **Conclusion**

In conclusion, Judgment is entered in favour of the Claimant as against the Respondent in the following terms:

a. 2 months' salary in lieu of notice..... Kshs.140,000.00

b. Compensation for unlawful termination..... Kshs.140,000.00

**Total Kshs.280,000.00**

c. The Claimant is awarded costs and interest at Court rates from the date of Judgment until settlement in full.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF APRIL 2021**

**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**