



**IN THE REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC. CAUSE NO. 1222 OF 2016**

**SWALEH DAVID.....CLAIMANT**

**VERSUS**

**PREMIER COOKIES LIMITED .....RESPONDENT**

**JUDGMENT**

1. The Claimant brought this suit on 22.6.2016 alleging that the Respondent had wrongfully dismissed him from employment. He sought the following reliefs:

- (i) **A declaration that termination of his employment was wrongful and unfair.**
- (ii) **That he be paid his dues as set out in paragraph 9 totalling to Kshs. 745,068.40.**
- (iii) **The Respondent be ordered to pay him for the remainder of the contract period.**
- (iv) **The Respondent be ordered to compensate him for wrongful dismissal at the equivalent of six (6) months gross salary.**
- (v) **The Honourable Court do issue such orders and give such direction as it may deem fit to meet the ends of justice.**
- (vi) **The Respondent to pay the costs of this claim.**
- (vii) **Interest on the above at Court rates.**
- (viii) **The Respondent be ordered to issue him with a Certificate of Service as required by the provisions of section 51 of the Employment Act, 2007.**

2. The Respondent never filed defence and as such the suit proceeded by formal proof on 17.5.2021 when the claimant testified as CW1.

3. He stated that the Respondent employed him as a Dispatch Clerk under 6 months contracts which were renewed every time upon expiry. The last contract was renewed in January 2016 and his salary was Kshs. 23,600 per month. He never went for his annual leave or public holidays and he was not paid in lieu. In total he worked for the Respondents for 9 years.

4. On 8.2.2016 he received a show cause letter from the Respondent accusing him of several acts of misconduct and gave him upto 12.2.2016 to respond. In the meanwhile the letter also suspend him from duty. He responded to the show cause letter on 9.2.2016 but thereafter he was never called back to work. In his view, his contract of service was wrongfully terminated by the employer without prior notice or lawful cause and without giving him an opportunity of being heard. Therefore, he prayed for judgment as set out in his claim.

5. After the hearing, the Claimant never filed submission and his counsel asked me to decide the matter on the basis of the evidence tendered.

6. Having considered the pleadings and evidence presented by the claimant and especially the show cause letter dated 8.2.2016, it is clear that the Claimant was employed by Respondent until 8.2.2016 when he was suspended due to alleged misconduct. There is further no dispute from the un rebutted evidence that the claimant was never called back to work until 22.6.2016 when he filed the suit. The issues for determination are:

- (a) **Whether the Claimant was wrongfully dismissed from employment.**

**(b) Whether he is entitled to the reliefs sought.**

**WRONGFUL DISMISSAL**

7. There is no dispute that the Claimant was suspended from work for an indefinite period from 8.2.2016 and he was never called back until he brought this suit. There is no evidence of payment of salary in the months that followed after the suspension letter. There was also no correspondence served by the Respondent. Consequently, the Claimant was entitled to deem that his contract had been terminated by the employer without a justifiable cause and without according him a chance to defend himself under section 41 of the Employment Act.

8. Under section 45 of the Employment Act, termination of an employee's contract of service is unfair and therefore unlawful if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operation requirements.

9. On the other hand, procedure is fair if the employer accords the employee a fair hearing in the presence of another employee of his choice and the representation made by the employee and his companion are considered before making the decision to terminate the contract

10. In this case the Respondent never filed any defence or tendered any evidence towards rebutting the Claimant's evidence and discharging the said burden of proof. Consequently, I find and hold that the termination of the Claimant's contract of service was constructively done by the Respondent through the indefinite suspension and that it was unlawful and unfair.

**RELIEFS**

11. In view of the foregoing conclusion, I make declaration that the termination of the Claimant's employment was wrongful and unfair as prayed. Flowing from the said declaration, I find that the Claimant is entitled to salary in lieu of notice plus compensation for unfair termination. I award him one month salary in lieu of notice being Kshs. 23,600 plus Kshs. 118,000 being 5 months' salary compensation for unfair termination considering that he had served the Respondent for eight (8) years continuously and also because, he only expected to serve under the contract for only five (5) months before the expiry.

12. The claim for leave has not been disproved by leave records and I therefore award the Claimant 21 days per year of service for 9 years being Kshs. 148,680.

13. The claim for severance pay is dismissed because the termination was not through redundancy. Finally, the claim for salary for the six (6) months contract period is dismissed because it lacks legal or contractual basis.

14. For the reasons, findings and observations set out herein above I enter judgment for the claimant in the sum of Kshs. 290,280 plus costs and interest. The award is subjected to statutory deductions. It is so ordered.

**Dated, signed and delivered in Nairobi this 3<sup>rd</sup> day of June, 2021.**

**ONESMUS N. MAKAU**

**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> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**