



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO 1052 OF 2016**

**DUNCAN NYAMBOGA AGENT.....CLAIMANT**

**VERSUS**

**TECHNO CONSTRUCT (K) LTD.....RESPONDENT**

**JUDGMENT**

1. This claim arises from an alleged termination of a contract of employment between the Respondent and the Claimant. It is premised on the Memorandum of Claims filed on 20<sup>th</sup> May 2016 and responded to through a Reply to Memorandum of Claim filed on 24<sup>th</sup> January 2017.

2. On 2<sup>nd</sup> of August 2021 when the matter came up for hearing, the Respondent's Advocates applied for its adjournment on the ground that they did not have instructions to prosecute the cause. However, the application was declined. Upon the court's rejection of the application, the Respondent's Advocates informed the court that they will no longer participate in the trial. The cause therefore proceeded minus their participation but with their full knowledge.

3. The Claimant testified as the sole witness in the cause. He identified his witness statement dated 17<sup>th</sup> April 2015 and adopted it as his evidence in chief. Further, the Claimant identified the list of documents dated 20<sup>th</sup> May 2016 and sought to rely on copies of the documents listed therein in support of his claim. He produced the documents as exhibits 1 to 4 in the order in which they appear in the list of documents.

4. In a nutshell, it was the Claimant's evidence that he was employed by the Respondent in February of 2013 as a general worker. The Job Card produced by the Claimant as exhibit 2 shows that it was issued by the Respondent to the Claimant on 1<sup>st</sup> of January 2014. It is therefore proof of the fact of existence of a contract of service between the parties at least from the date of its issue. Further, the Job Card clearly demonstrates that the Claimant was hired as a general worker.

5. Although the Respondent in its reply to the claim initially denied the fact of employment of the Claimant, it does exactly the opposite at paragraph 10 of the reply by admitting that the Claimant was its employee but as a casual and further averring that it is the Claimant who absconded duty in February 2015. The court therefore finds on a preponderance of probabilities that the Claimant was an employee of the Respondent at least from 1<sup>st</sup> January 2014 to February 2015.

6. The Claimant alleges that he was unfairly terminated from employment on 28<sup>th</sup> February 2015. In the witness statement which the Claimant adopted as part of his testimony in chief, he states that on this date, he reported to work in the morning but was not assigned any duties. Instead, the manager, a Mr. Islim informed the Claimant that his contract of service had been terminated.

7. In its reply to the memorandum of claim, the Respondent at paragraph 10 states that the Claimant's contract terminated on 28<sup>th</sup> February 2015. However, the Respondent pleads that the termination was on account of the Claimant absconding duty.

8. From the foregoing, it is clear on a balance of preponderances that the contract of service between the parties terminated on 28<sup>th</sup> February 2015 whatever the cause. Accordingly, I find that the employment contract between the Claimant and the Respondent terminated on 28<sup>th</sup> February 2015.

9. The crux of the matter is whether this termination was lawful or otherwise. In terms of the provisions of sections 43 and 45 of the Employment Act, once an employee demonstrates that a contract of service between the employee and the employer has been terminated and asserts that the termination was unlawful, the duty falls on the employer to justify termination.

10. The Claimant testified that the only reason advanced by the Respondent to justify termination of the parties' contract of service was redundancy. The law regulating declarations of redundancies at the work place in Kenya is now well settled. Under section 40 of the

Employment Act, the employer is required to do the following:-

- a) Issue a general redundancy notice to all employees drawing their attention to the impending redundancy.
- b) The notice must be for a minimum of 30 days prior to the selection process commencing.
- c) The notice must indicate the reasons for and extent of the proposed redundancy.
- d) The notice must, in addition, be served on the local labour office and the Trade Union to which the affected employees belong.
- e) The employer must then undertake a selection process for the employees to be terminated while paying attention to the requirements of seniority in time of employment, skill, ability and reliability of each employee of the particular class of employees affected by the redundancy.
- f) The employer must thereafter issue the employees identified for exit with a 30 days' termination notice or pay them salary in lieu of such notice.
- g) The employer must in addition pay such employees their terminal dues comprising of severance pay and salary and leave earned but not taken.

11. The Claimant in his testimony states that the Respondent did not issue him with a notice to terminate the contract of service prior to terminating it. The Claimant further states that the procedure for laying an employee off was not followed in his case. According to the Claimant, what the Respondent did was to merely decline to assign the Claimant duties on account of redundancy.

12. The Respondent did not provide evidence to justify the termination either on account of redundancy or gross misconduct as pleaded in its memorandum of reply. It is noteworthy that apart from filing the memorandum of reply, the Respondent neither filed witness statements nor had any witness testifying in support of its claims in the said reply.

13. The Respondent did not provide any evidence to demonstrate that the reason for the termination of the Claimant related to the Claimant's conduct, capacity or compatibility or was based on the operational requirements of the Respondent. And neither did the Respondent provide evidence to show that the Claimant's employment was terminated in accordance with fair procedure in terms of sections 43 and 45 of the Employment Act. Accordingly, the court holds that the Claimant's termination was, in the circumstances, unlawful.

14. Having found the termination to have been unfair in terms of both substantive and procedural fairness, the court must then address the question of what remedies are available to the Claimant if at all. This shall be undertaken with reference to section 49 of the Employment Act.

15. The law entitles an employee who is unfairly dismissed to, among others, the following:-

- a) Pay equivalent to salary for the notice period the employee would have been entitled to if notice to terminate had been served on the employee.
- b) Salary on pro-rata basis equivalent to the duration of time the employee has worked but not received pay in the month when the termination occurred.
- c) Compensation for any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice to terminate that ought to have been issued.
- d) Damages not exceeding twelve months gross pay of the dismissed employee.

16. The Claimant prayed for the following:-

- a) A declaration that his termination was unfair and unlawful;
- b) A declaration that the claimant is entitled to damages pleaded to wit:-
  - Salary in lieu of notice;
  - Unpaid leave for two years;
  - Overtime pay for one and half hours of every day worked for two years.
  - Pay for the rest days he was otherwise at work;
  - Gross pay for twelve months;

c) An order for the Respondent to pay the damages of Ksh568,700/=;

d) Interest on the sum of Ksh 568,700/= from the date of institution of the proceedings; and

e) Costs of the suit.

17. The court has already declared the Claimant's termination unlawful. With respect to payment of damages, the court found that the evidence tendered demonstrated that the Claimant's contract as a general worker is proved but from 1.1.2014 as shown in the Job Card produced by the Claimant. Therefore, the court can only award damages to cover the period from 1.1.2014 if at all.

18. Although the Claimant urges the court to award him monthly salary fixed at Ksh 21,000/=, he provided no evidence that he was receiving this amount as monthly salary. The Claimant only indicates, without more, that he used to be paid a daily wage of Ksh. 700/=. The court is therefore left to speculate on the actual monthly salary received by the Claimant.

19. Absent proof of actual monthly salary, the court can only resort to the Minimum Wage Order in force during the period the Claimant was in employment to assess his monthly salary. For this purpose, the relevant Wage Order in force in 2014 was that issued under Legal Notice No. 197 dated 30<sup>th</sup> July 2013 under which monthly salary for general workers in Nairobi and its environs was fixed at Ksh. 9,780.95 exclusive of house allowance. This Order remained in force until May 2015 when the replacement Order issued. The court will therefore rely on this Wage Order to hold that the Claimant's basic monthly salary was Ksh. 9,780.95.

20. As part of salary, section 31 of the Employment Act entitles employees to receive reasonable amounts of money towards house rent in the form of an allowance where the employer has not provided physical housing for them. The Claimant is therefore entitled to this allowance in addition to the monthly sum of 9,780.95 above as his consolidated salary.

21. Although the Employment Act provides for payment of house allowance, it does not set out the mechanisms of fixing the quantum of this allowance where the parties have not agreed on it. However, the practice of the court has been to work with a fixed percentage of the basic pay, usually 15% thereof (*see Eliud Kiplagat v Chepkinoyo Agro Supplier [2021] eKLR*). In this case, this works out to Ksh. 1467.15. I therefore hold that the Claimant's consolidated monthly salary inclusive of the house allowance was Ksh. 11, 248.10.

22. In terms of section 35 of the Employment Act, the Claimant was entitled to notice of at least 28 days prior to termination of his contract. The Respondent's pleadings aver that the Claimant absconded duty. This position by the Respondent is consistent with the fact that the Respondent issued no notice to terminate the contract of service herein. The court therefore holds that the Respondent did not issue the notice to terminate the contract of service in terms of section 35 of the Employment Act. The court therefore awards the Claimant Ksh. 11, 248.10 in lieu of notice.

23. The Claimant has claimed overtime pay and pay for rest days he used to work. However, there was no evidence, on a balance of probabilities, to establish that the Claimant was subjected to overtime work without pay or that he indeed used to work on his rest days. The court therefore declines these claims.

24. With respect to annual leave, the court has observed that the Claimant has proved employment but from 1.1.2014. Under section 28 of the Employment Act, an employee is entitled to annual leave of twenty one working days with full pay once he clears one year of continuous service to the employer. If the Claimant was employed at least from 1.1.2014 as appears from the evidence on record, he completed one year of service with the Respondent on 1.1.2015. His annual leave was therefore due from 2.1.2015, the period around which he was terminated. In fact, the Respondent indicates in its pleadings that the Claimant who had been on duty around this time absconded duty at the close of February 2015. The Respondent does not allude to the Claimant having taken leave just before he was terminated. On a preponderance of probabilities therefore, the court finds that the Claimant was due for his annual leave for the period between January 2014 and January 2015 when he was terminated. Accordingly, the court awards him one month's salary in lieu of leave at Ksh. 11, 248.10.

25. In relation to the claim for compensation equivalent to twelve months pay for the traumatic termination, the court is alive to the fact that it is within its discretion to award a maximum twelve months. However, this discretion must be exercised judiciously. Although the Claimant testified that he had not got a replacement job as at the time of testifying, he gave no evidence to demonstrate the efforts he had made to get re-employed. The court considers that a job of a general worker could easily be obtainable within reasonable time with some effort on the part of the Claimant. An award of seven months' salary will reasonably cover the period the Claimant would likely have spent seeking alternative employment. The court therefore awards the Claimant Ksh. 11, 248.10 x 7 = Ksh 78,736.70 under this head.

26. The court also awards the Claimant interest on the sums awarded above to be computed at court rates from the time of institution of these proceedings until payment in full.

27. Costs of the cause are awarded to the Claimant.

28. Summary of the award:-

**I. A declaration is hereby issued that the Claimant's termination by the Respondent was unlawful.**

**II. An order is hereby issued that the Respondent pays the Claimant one month's salary in lieu of notice fixed at Ksh. 11, 248.10.**

**III. An order is hereby issued that the Respondent pays the Claimant compensation for accrued leave for one year worked fixed at Ksh 11, 248.10.**

**IV. An order is hereby issued that the Respondent pays the Claimant compensation equivalent to 7 months gross salary of Ksh. 78,736.70.**

**V. An order is hereby issued that the Respondent pays the Claimant interest on items I, II, III and IV above at court rates from the date of institution of the claim till payment in full.**

**VI. An order is hereby issued that the Respondent pays the Claimant costs of the claim.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF AUGUST, 2021**

**B O M MANANI**

**JUDGE**

Non appearance for the Claimant

Non appearance for the Respondent

**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.**

**B O M MANANI**

**JUDGE**