



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 680 OF 2016**

**PETER WABUCHERI WANJALA.....CLAIMANT**

**VERSUS**

**DIMAMU AGENCIES LIMITED..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit vide a statement of claim filed in court on the 22<sup>nd</sup> of April, 2016, through the Firm of Mwaure & Mwaure Waihiga Advocates.
2. The Claimant's case is that he was employed by the Respondent on the 6<sup>th</sup> of August, 2012, as a loader earning a daily wage of Kshs. 410/=.
3. It is his case that he was terminated on 30<sup>th</sup> July, 2015, without notice and without a hearing and instead, that the manager of the Respondent one Mr. Patrick Karanja only informed him verbally that his services were no longer required and that he should not report to work the following day, under unclear circumstances.
4. It is his case that he went to the Respondent's offices the following day to seek audience with management on the reasons for his termination and payment of his terminal dues, but that he was not allowed in by the guards manning the Respondent's gate.
5. It is his further case that he worked for 8 hours a day during his time in the service of the Respondent.
6. The Claimant further states that the Respondent maligned his name by calling him a thief, therefor making it difficult for him to secure alternative employment.
7. The Claimant further states that his rights and fundamental freedoms provided for under the *Employment Act, 2007*, particularly *Section 45(1) and (2)* were grossly violated.
8. It is his case that the Respondent in terminating his services, acted in breach of Articles 41 and 47 of the Constitution of Kenya and ILO Convention 158 on termination of employment, for having failed to proffer factual and genuine reasons for terminating his employment.
9. The Claimant seeks orders against the Respondent for:
  - i. A declaration that his termination was unfair and unjust
  - ii. Payment of his terminal dues (one-month salary in lieu of notice, unpaid leave, service pay, public holiday, off days and salary underpayment) amounting to Kshs. 356,644.00
  - iii. Costs and interests at court rate
  - iv. Any other relief the court may deem just and fit to grant

**The Respondent's case**

10. The Respondent filed a statement of response dated 3<sup>rd</sup> June, 2016, and filed in court on 6<sup>th</sup> June, 2016, through the Firm of King'oo & Associates Advocates, who were later replaced by the Firm of Kariuki Kuno & Co. Advocates, through a notice of change of Advocates dated 14<sup>th</sup> December, 2017, and filed on 25<sup>th</sup> June, 2017.

11. The Respondent denies that the Claimant's services were terminated and states that he was a casual employee who left employment voluntarily on 24<sup>th</sup> August, 2015, and has never returned to the Respondent's employment.
12. The Respondent further denies the particulars of terminal dues as listed in the Claimant's statement of claim.
13. It is the Respondent's assertion that the Claimant voluntarily left its employ upon disagreement with weigh bridge inspectors, over incidences of loading trucks with excess cement which amounted to an attempt to commit theft.
14. The Respondent states that the Claimant was a casual employee who took rest days whenever he wanted and that he never at all worked on public holidays.
15. The Respondent further states that it did not give notice to the Claimant because it did not terminate him, but that he voluntarily and willingly left its employment without any form of duress from the Respondent.
16. The Respondent states that it had issued warning letters to the Claimant for loading of excess bags of cement on trucks, a warning the Claimant never heeded.
17. The Respondent denies owing the Claimant any dues.
18. The Claimant testified in support of his case, while the Respondent attended the hearing through their advocates but did not present any of the two witnesses whose witness statements were filed in court.
19. Both parties filed submissions in the suit.

### **The Claimant's Submissions**

20. It is submitted for the Claimant that the Respondent in terminating the Claimant, did so contrary to the provisions of *Section 45 of the Employment Act, 2007*, which demands that an employee should not be terminated unfairly. To support this position, the Claimant relies on the court decisions in the cases of *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* and *Pamela Nelima Lutta v Mumias Sugar Co. Ltd (2017) eKLR* on fair procedure and provision of valid and fair reasons prior to termination.
21. It is further submitted for the Claimant, that the Respondent telling the Claimant not to report to work the following day and locking him out of his place of work, coupled with none provision of reasons for termination amount to unfair termination.
22. It is submitter that the Claimant is entitled to the reliefs sought and the Claimant relies on *Sections 36, 28, 35(5) and 10(3) of the Employment Act and the cases of Fancy Jeruto Cherop & Another v Hotel Cathy Limited (2018) eKLR and Elijar Kipkoros Tonui v. Ngari Opticians T/A Bright Eyes Limited (2014) eKLR* to support his prayer for relief.

### **The Respondent's Submissions**

23. It is submitted for the Respondent that the Claimant was issued with several warning letters, which he received and signed for.
24. It is further submitted that the warning letters concerned the Claimant's habit of loading excess cement on trucks.
25. It is further submitter for the Respondent that the warning letter dated 29<sup>th</sup> June, 2015, was the final warning and that the Claimant was terminated lawfully and procedurally.

### **Issues for Determination**

26. Upon hearing the witness (Claimant), the Claimant's claim, statement and bundle of documents, together with issues raised by the Respondent's counsel at cross-examination, the Respondent's response to the claim, and the parties' submissions, the court identified issues for determination as follows:

- i. Whether the Claimant was unfairly and unjustly terminated; and
- ii. Whether the Claimant deserves the remedies sought

### **Whether the Claimant was unfairly and unjustifiably terminated**

27. The Claimant's case is that he was employed by the Respondent on the 6<sup>th</sup> of August, 2012. Although the Respondent in its statement of response disputed this being the Claimant's date of employment, it did not give the actual date it employed the Claimant.
28. It is the employer's obligation to keep records of its employees and for reason that the Claimant's date of employment is uncontroverted, the court concludes that the Claimant was in the service of the Respondent from 6<sup>th</sup> August, 2012 to 30<sup>th</sup> July, 2015.
29. The Claimant stated in his testimony before court that he was earning a daily wage of Kshs. 410.00 per day.

30. Payment of daily wages according to the Employment Act, 2007, connotes a casual service as was stated by the Respondent. The Employment Act, 2007, defines casual service to mean:

***“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time”.***

31. The Claimant’s evidence is that he earned a daily wage during his service with the Respondent. He however was in the service of the Respondent for close to four years. From the definition of a casual service and the evidence adduced, it is clear that the Claimant worked longer than 24 hours at a time and was thus not a casual employee. In the case of ***Kenya Union of Commercial Food & Allied Workers vs Hebatulla Brothers Limited (2002) eKLR***, the court held that for an employee to qualify as a casual, he must be paid at the end of each day, and that he should not be employed for a longer period than one day at a time”.

32. The court finds and holds that the Claimant was not a casual employee of the Respondent and the Respondent was bound to adhere to the provisions of Sections 41, 43 and 45 of the Employment Act, 2007 prior to terminating his services. In the case of ***Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR Radido J. Held as follows as regards fair process:***

***“Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.”***

33. The Respondent according to the evidence before this court did not take the Claimant through a disciplinary process and neither was he given an opportunity to make representation either orally or in writing or given reasons for his termination.

34. An employer has an obligation to demonstrate that the termination of employment meets the requirements of sections 41, 43 and 45 by proving an employee an opportunity to make representation, reasons for termination and that the reasons are valid and fair reasons. It is the employer’s obligation to demonstrate adherence to procedural requirements when terminating the services of an employee. This was reaffirmed by the court in the case of ***Loice Otieno V Kenya Commercial Bank Ltd [2013] eKLR***, where it stated that *section 41 of the Employment Act requires an employer to establish and demonstrate that there has been procedural fairness.*

35. The Claimant was neither given notice to show cause, a hearing nor reasons for termination. The termination process failed the fairness test. (*see Walter Ogal Anuro v Teachers Service Commission (2013) eKLR*). The court finds and holds that the termination of the Claimant was unfair, unlawful and unjustified for lack of procedural fairness.

#### **Whether the Claimant deserves the remedies sought**

36. The Claimant’s prayer to this court is that he is paid one-month salary in lieu of notice, unpaid leave, service pay, public holiday, off days and salary underpayment.

#### **One-Month Salary in Lieu of Notice**

37. The Claimant’s evidence is that he was terminated on 30<sup>th</sup> July, 2015, without notice and without a hearing. He states that the manager of the Respondent one Mr. Patrick Karanja, only informed him verbally that his services were no longer required and that he should not report to work the following day without giving him any reasons.

38. The court finds the claim for payment of a one month’s salary in lieu of notice merited and is hereby awarded.

#### **Unpaid Leave, Service Pay, Public Holiday, off days and Salary Underpayment.**

39. The Claimant has an obligation to prove his claim. In this matter, the Claimant has not adduced any evidence to prove that he is owed the claims under these heads. The claims therefor fail and are dismissed.

#### **Conclusion and Orders**

40. In conclusion, I do find and hold that the termination of the Claimant was substantively and procedurally unfair and make further orders as follows:

- (a) The Respondent to pay the Claimant 8 months’ salary in compensation for unfair termination in the sum of Kshs 98,400/-
- (b) one month’s salary in lieu of notice at Kshs. 12,500/= (410X30 days)
- (c) Costs of the suit.

41. Judgment accordingly.

42. The Deputy Registrar to transmit this file back to Nairobi after the delivery of this Judgment

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**CHRISTINE N. BAARI**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Waihiga for the Claimant

N/A for the Respondent

Christine – Court Assistant