



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1090 OF 2016**

**(Before Hon. Justice Dr. Jacob Gakeri)**

**OKUMU AZIZ RAMADHAN.....CLAIMANT**

**VERSUS**

**CHINA ROADS AND BRIDGE CORPORATION (KENYA).....RESPONDENT**

**JUDGMENT**

1. By a statement of claim dated 18<sup>th</sup> April 2016, filed on 9<sup>th</sup> June 2016, the Claimant sued the Respondent alleging that he was unlawfully terminated on 15<sup>th</sup> November 2016. He alleges that he had served the Respondent diligently earning Kshs.142 per hour as a plumber translating to Kshs.45,134.10 per month but was not afforded the opportunity to be heard nor be notified of the reasons for termination. He prays for –

- a. One month’s salary in lieu of notice..... Kshs.45,134.10
  - b. Leave not taken for 3 years/unpaid leave allowance..... Kshs.135,402.30
  - c. 12 months’ salary for unfair dismissal..... Kshs.541,609.20
  - d. Salary for three years in respect of breach of contract..... Kshs.1,624,827.60
  - e. Severance pay for three years..... Kshs.1,624,827.60
  - f. Exemplary damages..... Kshs.1,000,000.00
  - g. Damages for loss of salaries and allowances from 15<sup>th</sup> November 2015 to date until determination of the claim herein at Claimant’s gross salary of..... Kshs.45,134.10
- Total..... Kshs.4,971,800.80**

2. The Respondent entered appearance on 29<sup>th</sup> June 2016 but did not file a response to the statement of claim service notwithstanding. Service of notice of the hearing scheduled for 16<sup>th</sup> September 2021 was effected on 24<sup>th</sup> August 2021 and affidavit of service filed.

**Claimant’s Evidence**

3. The Claimant was engaged by the Respondent as a plumber on 8<sup>th</sup> March 2016 at Kshs.45,134.10 per month and he carried on his duties diligently. He did not provide any contract of service but attached the payslip for October 2015 and an employment card from the

Respondent. He testified that on 15<sup>th</sup> November 2016, he was summoned by the Supervisor Mr. Wang who informed him that his hourly rate of compensation would be reduced from Kshs.142.30 to 100.

4. That he was unhappy with proposal and informed Mr. Wang that the reduction would be contrary to the terms of the contract between them. He testified that his refusal to accept the proposed reduction of the hourly rate led to his termination. Mr. Wang told him to go home but gave him a certificate of service dated 15<sup>th</sup> November 2016. He testified that he was not accorded an opportunity to defend himself and prays to the Court to award the reliefs catalogued in the statement of claim.

### Submissions

5. The Claimant submits that he has by the evidence on record proved the particulars of malice and/or breach of contract/statutory duty care, loss and damage. Specifically, the Respondent's proposal to reduce the Claimant's hourly payment from Kshs.142.30 to Kshs.100 and subsequent termination, as well as not being subjected to a disciplinary hearing. The particulars include failing to issue warning letter or conduct disciplinary hearing or invitation to a disciplinary hearing or payment of terminal dues as per the contract of employment.

6. Particulars of loss and damages included, the Claimant's family suffered emotionally and economically, the Claimant was not given a certificate of service, was not informed the reason for dismissal and was not paid terminal dues.

7. On damages for unfair and unlawful termination, the Claimant relied on **Menginya Salim Murgani v Kenya Revenue Authority [2008] eKLR** where Ojwang J. (as he then was) held that –

The principles of law, at common law, governing compensatory awards for torts and contract, are well stated in the work by A.S. Burrows, entitled Remedies for Torts and Breach of Contract (London: Butterworths, 1987). The author (p. 16) quotes the relevant passage in Robinson v. Harman (1948) 1 Exch. 850 (at p. 855):

“The rule of common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect of damages as if the contract had been performed.”

8. On exemplary damages the Claimant relies on the words of Justice Allan Mendonca of Trinidad & Tobago in **Aron Torres v Point Lisas Industrial Port Development Corporation Ltd, Civil Appeal No. 840 of 2005** where the Judge stated that –

“Exemplary damages are of course awarded in the law of torts. Damages in the usual sense of the time are awarded to compensate the victim of the wrong. The object of exemplary damages however is to punish and includes notions of condemnation or denunciation and deference (See **Rookes v Barnard [1964] 1 All ER 367 407**).”

9. Finally, the Claimant relied on the decision in **Chirau Ali Makwere v Royal Media Services Limited [2005] eKLR**, where the Court awarded Kshs.1,000,000 as exemplary damages.

10. The Claimant further submitted that he lost salary and allowances from 15<sup>th</sup> November 2015 to date until determination of the claim in the sum of Kshs.45,134.10 and relies on the awards made in **Menginya Salim Murgani v Kenya Revenue Authority (supra)** in support.

### Analysis and Determination

11. I have carefully considered the pleadings, evidence on record, submissions by Counsel and the law. The issues for determination are: -

- a. Whether the Claimants termination was fair;
- b. Whether the Respondent's conduct was malicious and/or breach of contract or statutory duty of care and loss ensuing;
- c. Whether the Claimants are entitled to 12 months as compensation for unlawful dismissal.

12. On whether the Claimant was an employee of the Respondent, the Claimant did not provide a written contract of service between himself and the Respondent.

13. Section 2 of the Employment Act provides that a contract of service means **“an agreement whether oral or in writing and whether expressed or implied to employer to serve as an employee for a period of time ...”**

14. The Claimant provided a payslip for October 2016 showing that his salary for that month was Kshs.36,561.45 net of tax and other statutory deductions. In addition, he provided a copy of this employment card which shows that he was hired as a Plumber and finally, he provided a copy of the certificate of employment issued by the Respondent on 15<sup>th</sup> November 2016.

15. Taking into account the definition of a contract of service in Section 2 of the Employment Act, 2007 and the documents provided by the Claimant, the Court is satisfied that the Claimant was an employee of the Respondent from 8<sup>th</sup> March 2015 to 15<sup>th</sup> November 2016.

16. On termination, there is substantial judicial authority for the proposition that for a termination to be fair, it must meet the threshold for

substantive and procedural fairness. (See **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**.)

17. Sections 35, 41, 43 and 45 of the Employment Act, 2007 provide for the substantive and procedural tenets to be complied with in effecting a fair termination from nice reason(s) for termination burden of proof, explanation to the employee to hearing and consideration of any presentations the employee makes in the process. The reason for termination must not only be valid and fair but so must be the procedure.

18. In this case, the Claimant testified that he was terminated on 15<sup>th</sup> November 2015 without being taken through a disciplinary process. That he was not afforded the opportunity to defend himself nor was he given a termination letter. Without a termination letter setting out the reasons for termination coupled with the absence of a disciplinary hearing, it does appear to the Court that the termination of the Claimant did not meet the threshold for substantive and procedural fairness and was therefore unfair and unlawful.

19. According to Maugham J. in **Balden v Shorter [1933] Ch. 427 at 430**, malice is “*improper motive*”. Montague Smith J. defines it as “*an intention to injure*” in **Steward v Young [1870] L.R. 5C.P. 122 at 127**.

20. On whether the Respondent’s conduct was malicious and/or amounted to breach of contract or statutory duty of care, the Claimant relied on particulars outlined above such as failure to issue a warning letter to the Claimant or subject him to a disciplinary process.

21. None of the particulars relied upon by the Claimant suggest improper motive or intention to injure the Claimant. It is the Court’s view that the Respondent failed to observe the relevant provisions of the Employment Act, 2007 and certain consequences ensue.

22. Regarding damages for unfair and unlawful dismissal, the Claimant relies on **Menginya Salim Murgani v Kenya Revenue Authority** as well as **Chirau Ali Makwere v Royal Media Services Limited**.

23. Both decisions were rendered before the Employment Act 2007 became operational on 2<sup>nd</sup> June 2008. Similarly, the Claimant did not demonstrate how the two decisions apply to the instant case in light of the overriding statutory provisions. A related finding is made in relation to the claim for exemplary damages at common law. The Claimant relied on the decision in **Aron Torres v Point Lisas Industrial Port Development Corporation Ltd**, which largely restates the common law position on exemplary damages.

24. Instructively, the quotation relied upon is emphatic that “*exemplary damages are of course awarded in the law of torts*” and are not compensatory but punitive. The principles that govern exemplary damages were formulated by the House of Lords in **Rookes v Barnard [1964] 1 All ER 367 407 at 1229 – 1230**.

25. The Claimant led no evidence to demonstrate that the Respondent committed any tortious act or omission to warrant the award of exemplary damages.

26. As to whether the Respondent’s conduct was malicious and/or amounted to breach of duty or breach of statutory duty of care, the Court finds that the Claimant has on a balance of probabilities not proved any malice or breach of contract or statutory duty of care on the part of the Respondent.

## **Reliefs**

27. The Claimant prays for several reliefs set out in the memorandum of claim –

### **a. One month’s salary in lieu of notice**

28. Having found that the Claimant was unfairly terminated, the Claimant is awarded **Kshs.45,134.10**

### **b. Leave for 3 years not taken and/unpaid leave allowance Kshs.135,402.30**

29. The Claimant led no evidence on his leave entitlement under the contract of service with the Respondent nor did he establish the length of the contract of service. The claim is declined.

### **c. 12 months’ salary for unfair dismissal Kshs.541,609.20**

30. From the evidence on record, the Claimant served the Respondent for 8 months only and expected to serve for three years. Since he did not contribute to the termination the equivalent of two months’ salary is fair. I award the sum of **Kshs.90,268.20**.

### **d. Salaries for 3 years in respect of Kshs.1,624,827.60**

31. The Claimant led no evidence to establish this claim. Similarly there is sufficient judicial authority for the proposition that anticipatory damages are not available in contracts of employment since they are terminable by either party by giving the requisite notice or payment in lieu of notice. The claim is declined.

### **e. Severance pay for 3 years Kshs.1,624,827.60**

32. Severance pay is only available in a redundancy as provided by Section 40(1)(g) of the Employment Act. It is not available in cases of

unfair termination or summary dismissal. The claim is declined.

**f. Damages for loss of salaries and allowances from 15<sup>th</sup> November 2015 to date**

33. The Claimant prayed for damages for loss of salaries and allowances from 15<sup>th</sup> November 2015 to date until determination of the claim herein at Claimant's gross salary of Kshs.45,134.10. This claim was not proved. It is declined.

**34. In conclusion, judgment is entered for the Claimant for the sum of Kshs.135,402.30.**

35. The Claimant is awarded costs of this suit.

36. Interest at court rates from the date of judgment till payment in full.

37. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF OCTOBER, 2021**

**DR. JACOB GAKERI**

**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.

**DR. JACOB GAKERI**

**JUDGE**