



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 453 OF 2018**

**SEONG GEUN SEO.....CLAIMANT**

**VS**

**AFRIKON LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. On 3<sup>rd</sup> April 2018, the Claimant filed a claim against the Respondent citing wrongful/unfair termination of employment and non-payment of final dues as issues in dispute.
2. The Respondent did not respond to the claim in spite of due service. On 25<sup>th</sup> March 2019, **O.N Makau J** gave directions that the matter proceeds as an undefended claim.
3. The matter came up for hearing before me on 30<sup>th</sup> September 2021, Counsel for the Claimant informed the Court that the Claimant was in South Korea and was not able to log into the virtual court. Counsel therefore asked the Court to determine the claim on the basis of the pleadings on record.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent as a Project Manager vide employment contract dated 16<sup>th</sup> June 2016.
5. The Claimant further states that as per the contract, he was to receive a monthly consolidated salary of 10,000,000 South Korean Won (KRW) and a monthly allowance of USD 800. In addition, the Claimant was entitled to a car, medical insurance, accommodation and two return tickets yearly to South Korea.
6. The Claimant avers that during the period of his employment, the Respondent never paid his monthly consolidated salary and only made part payment of the monthly allowance of USD 800.
7. The Claimant claims to have been promised several times that his pending salary would be paid once the Respondent received payment from its but clients but the promises were not honoured.
8. The Claimant pleads that in early September 2016, the Respondent's CEO, a Mr. Mike informed him that he would be dismissed.
9. The Claimant accuses the Respondent of terminating his employment on allegations of negligence of duty and/or poor performance, without following the due process of the law.
10. The Claimant avers that he was coerced into agreeing to the termination so as to get final payment amounting to KRW 31,007,710 as tabulated by the Respondent.
11. The Claimant further avers that he requested the Respondent to release his pending payments in full before the Claimant's departure from Kenya but he was promised that the payments would be remitted to his account in South Korea within one week.
12. Acting upon the promise, the Claimant states that he decided to go back to South Korea and await fir the payment which was not made hence this claim.

13. The Claimant therefore seeks the following:

- a) A declaration that his dismissal was unlawful and unfair
- b) Outstanding terminal dues amounting to KRW 31,007,710
- c) Compensation for unlawful and unfair dismissal
- d) Certificate of Service
- e) Costs plus interest

#### **Findings and Determination**

14. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

#### **Wrongful Dismissal?**

15. On 12<sup>th</sup> September 2016, the Respondent wrote to the Claimant as follows:

*“Dear Mr. Seo,*

**SUBJECT: TERMINATION NOTICE**

*We refer to the above matter.*

*We regret to inform you that the management has decided to terminate your employment effective 12<sup>th</sup> September 2016. Your last working days (sic) is 12<sup>th</sup> September 2016.*

*It was resolved that you be dismissed because of the following reason(s):*

**1. Failure to observe job description**

**2. The employee's performance is not satisfactory**

*As indicated on the employment contract you signed dated 16<sup>th</sup> June 2016,*

*13.4 The Employer is entitled to summarily dismiss the Employee in accordance with the law upon the occurrence of and not limited to the following matters:*

*13.4.3 If the Employee wilfully without reasonable cause neglects to perform any work which is his duty to perform or if he carelessly and improperly performs any work which from its nature is his duty to carefully and properly perform.*

*Thus, your final dues will be discussed to (sic) you to address the following:*

- 1. Days worked from the last paid payroll date to the last working date.*
- 2. If applicable, lieu notice pay as per contract*
- 3. Payment of for the leave days earned from hired date to last working date, if any*
- 4. Statutory deductions, whereas for P.A.Y.E, NSSF and for NHIF, if applicable.*
- 5. Refund for damaged property previously deducted, if any.*
- 6. If applicable, allowance for the days worked until the last working day.*

*You are hereby advised to do the handover and return any properties of the company that are under your custodianship on your last day of work.*

We thank you for the period you have served the company and wish you success in your future endeavors.

Yours sincerely,

(signed)

Jessica Delfin

Administration Manager

16. In his Memorandum of Claim, the Claimant complains of wrongful and unfair dismissal. It would appear however, that subsequent to the dismissal, the Claimant and the Respondent agreed to a settlement of the Claimant's claims in the sum of KRW 31,007,710.

17. is evidenced by letter dated 17<sup>th</sup> October 2016, which the Claimant duly acknowledged. The letter states as follows:

*"Dear Mr. Seo,*

***SUBJECT : Final Pay due to Employment Termination dated 12<sup>th</sup> September 2016***

*In consideration to the verbal discussions we had agreed in regard to your final pay due to employment termination dated 12<sup>th</sup> September 2016, this is to officially inform you that we would like to settle your claims upon receipt of payment from Government of Kenya. For your reference and confirmation as well, attached herewith is your final pay computation amounting to KRW 31,007,710.00 (Korean Won Thirty-One Million, Seven Thousand, Seven Hundred Ten Only), please send me back a signed copy along with a signed copy of this letter and all other termination documents given to you. Upon receipt of the signed copies of termination documents, we will proceed to process the settlement of your final dues not later than 24<sup>th</sup> October 2016.*

*On behalf of Afrikon Limited, I sincerely apologize for the inconvenienced (sic) caused and hoping for your kind understating concerning this matter.*

*Moreover, this is to notify you to observe clause 11 & 12 on your employment contract signed dated 16<sup>th</sup> June 2016. Should you have any dispute arising at any time, out of any aspect of this employment contract against Afrikon Limited, you may confer with our Management in good faith to resolve promptly such dispute. Written dispute letter is required to be submitted to Afrikon Limited, thereafter, a grace period of ten (10) working days will be given upon acknowledgement receipt of written dispute to discuss, negotiate and resolve the issue.*

*Sincerely,*

*(signed)*

*Jessica Joy Delfin*

*Administration Manager/Administration Department"*

18. Having acknowledged and signed this letter, the Claimants was bound by the settlement terms contained therein. No evidence was led to support the Claimant's allegations that he was coerced to accept the said terms. The Claimant's claim that his dismissal was wrongful is therefore an afterthought and is without basis. That dispenses with the prayer for compensation.

#### **Terminal Dues**

19. By its letter dated 17<sup>th</sup> October 2016, the Respondent admits owing the Claimant terminal dues in the sum of Korean Won Thirty-One Million, Seven Thousand, Seven Hundred Ten (KRW 31,007,710.00). This claim is therefore payable.

20. I therefore enter judgment in favour of the Claimant as against the Respondent in the sum of **KRW 31,007,710.00**.

21. This amount will attract interest at court rates from the date of judgment until payment in full.

22. The Claimant is also entitled to a Certificate of Service plus costs of the case.

23. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OCTOBER 2021**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kariuki for the Claimant

No appearance for the Respondent