



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1703 OF 2015**

**REUBEN OWINO OBONYO.....CLAIMANT**

**VERSUS**

**CHINA AERO TECHNOLOGY INTERNATIONAL ENGINEERING  
CORPORATION..... RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The claimant through a memorandum of claim herein filed on 24<sup>th</sup> September 2015, sued the respondent seeking for the following reliefs;
  - a. The sum of Kenya Shillings six hundred and thirteen thousand four hundred and thirty-one, (613,431) being, salary in lieu of notice, house allowance, service pay, and a twelve months salary compensation pursuant to the provisions of section 49(1) (c) of the Employment act.
  - b. Interest and costs incidental to this suit.
  - c. Certificate of service.
  - d. Any such other or further relief as this Honourable Court may deem fit and just to grant.
2. The respondent, upon being served with summons to enter appearance, did enter appearance and file a response to the memorandum of claim. The response was filed on the 29<sup>th</sup> August 2016.
3. At the close of pleadings, there was a joinder of issues and the matter got destined for hearing interpartes on merit. On the 21<sup>st</sup> July 2021, the matter being ripe for hearing, the parties appeared before the Deputy Registrar and fixed the same for hearing, for the 12<sup>th</sup> August 2021 by consent.
4. The matter came up before me for hearing on the above stated date, the respondent and its counsel were not in attendance of Court. The date having been taken by consent, and their absence, absent of any reason to Court, I allowed the claimant to proceed with his claim.

**THE CLAIMANT'S CASE**

5. The claimant moved the Court to adopt his witness statement dated 8<sup>th</sup> June 2018, as his evidence in chief, and the documents that he filed contemporaneously with his statement of claim as his exhibits. The documents that were filed and adopted as exhibits were, a statement of account from Equity Bank, a provisional statement of account (NSSF) and a demand letter.
6. The claimant stated that he came into the employment of the respondent in the month of October 2013, as a mason at a monthly salary of Kshs. 38,220. That he performed his duties with diligence, reliability, honesty and with a high degree of responsibility.
7. He was first deployed to a site in Upper Hill, where the respondent was undertaking a construction, UAP Towers, and latter at Kenya Power and Lighting estate in Karen. He stated that sometimes in February 2015 in the course of his duties at the cite, while on the roof of the first floor, the ladder he was standing on collapsed throwing him to the ground. He consequently got unconscious. He was rushed to

Mbaghati District Hospital for treatment. The doctors recommended 2 weeks sick off, and upon resuming duty, the claimant be given light duties. When he resumed duty, he was not allocated any duty on the first day. This situation repeated itself on the second day. On the 3<sup>rd</sup> day he was accosted by his supervisor one Mr. Chang and a security officer who forcefully removed him from the site. This happened on 28<sup>th</sup> March 2015.

8. He contends that on or about 28<sup>th</sup> March 2015, the respondent by its directors and/or its agents unlawfully terminated his employment. He further contended that the termination was against the provisions of section 41 of the Employment Act.

9. He stated that the respondent did not orally or in writing and in a language he understands explain to him, the reasons for which he was contemplating termination of the employment by way of summary dismissal. He was not given a chance to appear before the respondent to make a representation on any of those grounds that the respondent was intending to use as a basis for the termination. Lastly that the respondent did not have any reason to dismiss him from employment.

10. The termination being unlawful, the claimant claimed against the respondent;

- a. Salary in lieu of 1 month notice – Kshs. 38,220.
- b. House allowance (15/0 x 38,220) – 97,461.
- c. Service pay (1/2 x 38,220) – Kshs. 19,110.
- d. Twelve months' salary based on monthly salary – Kshs. 458,640.
- e. Costs of the suit.

11. I am of a considered view that the following issues emerge as the issues for determination, from the pleadings filed herein by the parties;

- a. Whether the claimant was an employee of the respondent.
- b. If the answer in (a) above is in the affirmative, whether his dismissal from employment was lawful and fair.
- c. What reliefs are available, if any to the claimant in the circumstances of this matter?
- d. Who should bear the costs of the claim?

#### **OF WHETHER THE CLAIMANT WAS AN EMPLOYEE OF THE RESPONDENT**

12. Section 2 of the Employment Act 2007 defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. Normally, it is a contract of service that births the employee-employer relationship. The Act defines contract of service as;

**“An agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include foreign contract of service to which part XI of the Act applies.”**

13. The claimant has tendered his bank statement of account. The statement shows salary payment into the account from the respondent. I am convinced that there was an employee-employer relationship between the claimant and the respondent. This by reason of the claimant's evidence, and absence of any rebuttal by way of evidence from the respondent. However, the question shall be how much was he earning? I will address this shortly.

#### **WAS THE DISMISSAL UNFAIR?**

14. An employee is supposed to prove that his employment got terminated by the employer. Then a duty sets in on the employer to prove the reasons for termination and that the reasons were valid and fair. This duty is what is contemplated in sections 43 and 45 of the Employment Act.

15. Section 43 provides;

**“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

And section 45 provides;

**“(1) No employer shall terminate the employment of an employee unfairly.**

**(2) A termination of employment by an employer is unfair if the employer fails to prove –**

**a. That the reason for termination is a fair reason –**

**i. Related to the employee’s conduct, capacity or compatibility; or**

**ii. Based on the operational requirements of the employer; and**

**b. That the employment was terminated in accordance with fair procedure.**

16. The respondent did not put any witness before Court to testify. One can therefore have no challenge in concluding that the burden of proof that section 43 of the Employment Act places upon the employers in matters related to termination under the Act or a contract of service, was not discharged by the respondent.

17. The conclusion therefore is, that the dismissal was neither procedurally nor substantively fair.

**(c) OF THE RELIEFS**

18. Before I delve into making awards on all or part of the heads brought out in the claimant’s pleadings, it is imperative to first determine how much the claimant was earning at the time of dismissal. In his memorandum of claim, the claimant asserts that he was earning Kshs. 38,220. However, there is no document that was placed before Court to establish this. The only document that he placed before Court and from which one can discern the salary amount is the bank statement, Exhibit I. In the month of February 2015, what came in as salary in total amounted to Kshs. 17,335, and this is what the Court shall go by.

19. Section 49 of the employment Act, provides for reliefs that a Court that has found a termination of an employee to have been unfair, can avail to such an employee. Among those reliefs is a compensatory one. The Court may award a number of months’ gross salary, but the total number of months ought not exceed twelve. An award of the compensatory relief is discretionary, the extent of the award, and whether it should be granted, is discretionary and dependent on the circumstances of each case.

20. In this matter, considering that the respondent did not avail any reasons for the dismissal, and the length of the period of employment that the claimant was in the service of the respondent, I award the claimant Kshs. 86,675 being five (5) months’ gross salary.

21. As regards service pay, the Court shall award nothing under this head. Service pay is not awardable to employees who were in one of those schemes identified by section 35 (5) of the Employment Act. The claimant produced a statement of account of his NSSF contributions. He was a member of the National Social Security Fund, section 35 (5)[c] is instructive.

22. There is no demonstration that there was any notice that was issued to the claimant. Section 36 of the Act is instructive on notice pay. In absence of the demonstration from the respondent that a notice was issued to the claimant prior to the termination of his employment, I am persuaded to award Kshs. 17,335, being one month’s salary in lieu of notice, to him.

23. No material has been placed before this Court, that can form a justification for the award of the house allowance of Kshs. 97,461, sought by the claimant. I decline to make an award for this.

24. In the upshot, Judgment is hereby entered in favour of the claimant against the respondent for;

- a. A declaration that the dismissal was unfair.
- b. Compensation pursuant to section 49 (1) (c) of the Employment Act – Kshs. 86,675.
- c. Salary in lieu of notice – Kshs. 17,335.
- d. A certificate of service to issue to the claimant within 30 days of this Judgment.
- e. Interest on (b) and (c) at Court rates from date of filing this matter, till full payment.
- f. Costs.
- g. The sums above granted shall be subjected to relevant statutory deductions.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8<sup>TH</sup> DAY OF OCTOBER, 2021**

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of

Ms. Opiyo for the claimant.

No appearance for the respondent.