



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO.727 OF 2016**  
**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**  
**JOHN MUTIA MBITHI.....CLAIMANT**  
**VERSUS**  
**CHINA ZHONGXING CO. LIMITED.....RESPONDENT**  
**JUDGMENT**

**INTRODUCTION**

1. The Claimant came to court via memorandum of claim dated 1<sup>st</sup> March, 2016.

The Respondent put up a defence dated 16<sup>th</sup> June, 2016.

**CLAIMANT'S EVIDENCE**

2. The Claimant states he was employed by the Respondent from 1<sup>st</sup> January, 2012 until 20<sup>th</sup> February, 2016 as a mansion and was earning a salary of Kshs.15,000/= per month.

3. The Claimant states that on 20<sup>th</sup> February, 2015 Mr. Young a supervisor of the Respondent came up to him while he was doing his regular work and he was told to stop working and leave the premises.

He says he was not given any reason for his dismissal and was not issued with a notice of termination of employment.

4. The Claimant says the termination of his employment was unlawful and unconstitutional. As a result of his unlawful dismissal from employment he is entitled to the benefits listed in his claim totaling Kshs.581,250/=.

5. He also prays to be issued with a certificate of service and to be awarded costs and interest till payment in full.

**RESPONDENT'S EVIDENCE**

6. The Respondent says the Claimant terminated his services on his own will on 20<sup>th</sup> February, 2015 as opposed to 20<sup>th</sup> February, 2016.

He says the averments by the Claimant in his claim are therefore not true and puts the Claimant to strict proof thereof.

7. He prays the Claimants claim therefore be dismissed with costs.

8. The problem in this case is that there is no documentation for court's guidance not from the Claimant nor from the Respondent.

Actually the only copy of the document filed is a card referred as salary card with a few entries of wages per day and has signatures but again it has not been indicated whose signatures they are.

9. The employer is mandated to keep records of his employees according to Section 9(2) of the Employment Act 2007.

Section 9(2) of the Employment Act provides that an employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract consented by the employee is accordance with subsection 3.

It is the mandate of the employer to cause the contract of service to be drawn.

Section 15 of the said Employment Act as well provide that an employer shall display a statement in the prescribed form of the employee's rights under this act in a conspicuous place accessible to the employee.

Section 16 (4) says that a person who fails to give an employee a statement as required in Section 10, 12, 13 and 20 commits an offence.

10. The Respondent failed to keep any records of the employee as required by the law and so that denied the court any documentary records that may have assisted the court in these deliberations. It is unfortunate there is no such records which was the mandate of the employer to maintain.

11. As it is, it is not even clear if the termination was summary dismissal or redundancy or whatever. The employer did not give the Respondent even a termination letter. As it is, it is not even clear how the termination happened.

Actually, the Respondent claimed the Claimant terminated his services at his own will in February, 2015.

Once again there is no evidence as to whether it is the Claimant who resigned and if it is there is no letter of resignation.

That makes it very difficult for the court to make a decision with absolutely no documents.

12. As it is the court can only depend on the evidence as per the pleadings and the Claimants submissions.

The Claimant's allegation that his employment was terminated unlawfully has not been contradicted by any proof by the Respondent. In his response all the Respondent states is that the Claimant resigned on his own free will. There is no evidence of such resignation or even acknowledgement by the Respondent.

In fact in the Claimant's documents there are several documents from the labour officer addressed to the Respondent but there is no evidence of any response.

13. The court is left with no choice but to conclude that in the absence of any evidence from the Respondent the court finds that the Claimant's employment was terminated without a valid reason.

Section 45(1) of the Employment Act provides that no employer will terminate the employment of an employee unfairly.

Section 45 (2) further provides that termination of employment is unfair if employer fails to prove the reason for termination is valid.

14. The Respondent in his failure to produce evidence of the employee's records has failed the test to show the method in which the Claimant left employment and whether it was unfair or not.

In that event the court finds the Respondent failed to prove the fairness test to terminate employment of the Claimant.

15. The case of **WALTER OGAL ANURO VS TEACHERS SERVICE COMMISSION (2013) eKLR** the court held that

“for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure fairness by the employer to effect termination. Section 43 of the Employment Act 2007 also provides that in any claim arising out of termination of a contract the employer shall be required to prove reason (s) for the termination and where employer fails to do so the termination shall be deemed to have been unfair within the meaning of Section of 45 of the Act.

16. The court finds the termination of Claimant's employment was unfair and against fair labour practices.

17. Having entered Judgment in favour of the Claimant, I then proceed to award him some of the reliefs prayed as follows:-

- i. One month salary in lieu of notice...Kshs.15,000/=
- ii. Unpaid for off days not taken – lacks particulars and so is declined.
- iii. Service gratuity when NSSF dues were not remitted Kshs.7,500/=
- iv. Unpaid/untaken public holidays Kshs.5,500/=
- v. Untaken leave days Kshs.7,500/=

vi. Overtime 2 hours daily at normal rates – not proved as Respondent said his staff worked normal hours – prayer is declined.

vii. Damages for wrongful termination allowed 4 months Kshs.60,000/=

### **CONCLUSION**

Having declared the Claimant employment was wrongfully terminated, I award him a total of Kshs.95,500/=.

He will also be paid costs and interest will accrue till payment.

The Respondent is to give him certificate of service with immediate effect.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER, 2021**

**ANNA NGIBUINI MWAURE**

**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 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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**