



**REPUBLIC OF KENYA**

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

**CAUSE NO. 209 OF 2017**

**DAVID OCHIENG OKING.....CLAIMANT**

**VERSUS**

**FRESH AN JUICI LTD.....RESPONDENT**

**JUDGMENT**

1. This Cause was heard on 16 July 2018 and 22 March 2021, when David Ochieng Oking (the Claimant) and a Human Resource Officer with Fresh An Juici Ltd (the Respondent) testified.

2. The Claimant filed his submissions on 7 May 2021, while the Respondent filed its submissions on 22 June 2021.

3. The Court has considered the pleadings, evidence and submissions, and will adopt the Issues as set out in the submissions.

**Unfair termination of employment**

**Procedural fairness**

4. Section 35(1) of the Employment Act, 2007 envisages written notice of termination of employment, whilst section 41 of the Act calls upon the employer to afford the employee an opportunity to be heard before making the decision to terminate the employment contract.

5. The Respondent's case was that the Claimant deserted work, and therefore an unfair termination of employment had not occurred.

6. The Respondent's witness testified that the Claimant was notified of a transfer from Kakamega to head office in Limuru through a letter dated 24 August 2016, with a reporting date of 1 September 2016, but he never reported and attempts to reach him were futile.

7. The Claimant's case was that on or around 26 September 2016, he was called by one of his supervisors (Tracking Manager) and informed that he was no longer an employee and that when he reported to work the next day, the Branch Manager refused to allow him into the workplace.

8. The Claimant denied that he received the transfer letter or that he got calls from any of his supervisors on the transfer.

9. Failure to report to work without permission or lawful cause is misconduct warranting summary dismissal.

10. However, before making the decision, the employer should afford the employee an opportunity to be heard or make attempts to reach the employee to allow him the opportunity.

11. If indeed the Claimant deserted work, the Respondent was under an obligation to give him written notice of termination of employment/show-cause notice as demanded by section 35(1)(c) of the Employment Act, 2007.

12. The Respondent did not demonstrate that it issued such a notice.

13. The 2 supervisors who were named by the Claimant as having informed him of the termination of service were not called to rebut his testimony. The Respondent did not explain the failure to call them to testify.

14. The Court finds that the Respondent terminated the Claimant's employment without observing the requirements of procedural fairness.

### **Substantive fairness**

15. By dint of sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of proving that the Claimant deserted work.
16. The Respondent produced a copy of the transfer letter instructing the Claimant to report to Limuru on 1 September 2016.
17. The Claimant denied receiving the letter.
18. The Respondent did not disclose who delivered the letter to the Claimant. If the letter was delivered to the Claimant, the person who made the delivery was not called to testify.
19. Therefore, the Court can conclude that the Respondent failed to discharge the burden imposed on it. The termination of the Claimant's employment was not for valid or fair reasons.

### **Compensation**

20. The Claimant served the Respondent for about 10 years, and in consideration of the length of service, the Court is of the view that the equivalent of 6 months gross salary as compensation would be appropriate (gross salary in July 2016 was Kshs 25,200/-).

### **Salary in lieu of notice**

21. The Claimant's contract provided for 30-days' notice, and the Court will allow the equivalent of 1-month basic salary as pay in lieu of notice (Kshs 17,200/-).

### **Breach of contract**

#### **Overtime**

22. The Claimant sought Kshs 692,574/- as overtime pay.
23. The Respondent asserted that as a supervisor, the Claimant was getting standard overtime pay.
24. The copy of the Claimant's payslip produced in Court indicates that the Claimant was getting overtime pay. Relief is declined.

### **Underpayments**

25. On account of underpayments, the Claimant pleaded that he was underpaid from 2007 to 2016.
26. The Claimant did not disclose or produce in Court the Regulation of Wages Order, which applied in the sector the Respondent operated in to support this head of the claim and relief is declined.

### **Unpaid leave**

27. The Claimant contended that he was entitled to Kshs 40,000/- on account of 4-years leave.
28. The Claimant did not reveal during testimony the particular years in respect of this head of the claim.
29. Further, section 28(4) of the Employment Act, 2007 circumscribes the number of leave days that can be carried forward.
30. Without an evidential foundation, relief is declined.

### **Wages for September 2016**

31. The Claimant produced a timesheet to show that he worked until 20 September 2016. He is entitled as of right to the earned wages, and the Court will allow this head of the claim in the sum of Kshs 17,200/- as claimed.

### **Paternity leave**

32. The Claimant did not produce a birth notification to prove that he was entitled to paternity leave or allowance in lieu thereof, and relief is declined.

### **Unpaid holidays**

33. The Claimant did not give particulars of the holidays he worked without compensation or disclose the formula used to arrive at the sum of Kshs 39,512/- and relief is declined.

### **Service pay**

34. The Claimant was contributing to the National Social Security Fund, and by virtue of section 35(5) & (6) of the Employment Act, 2007 is not eligible for service pay.

### **Unremitted statutory dues**

35. The National Social Security Fund Act and the National Hospital Insurance Act have provisions for addressing contributions deducted from employees and not remitted to the Funds.

36. The Claimant did not demonstrate that he used those avenues, and the Court declined relief.

### **Certificate of service**

37. A certificate of service is a statutory entitlement, and the Respondent should issue one to the Claimant within 30-days if one was not issued.

### **Conclusion and Orders**

38. The Court finds and declares that the Respondent unfairly terminated the Claimant's employment, and the Claimant is awarded:

(i) Compensation	Kshs 151,200/-
(ii) Salary in lieu of notice	Kshs 17,200/-
(iii) Salary September 2016	Kshs 17,200/-
<b>TOTAL</b>	<b>Kshs 185,600/-</b>

39. Claimant to have costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF DECEMBER 2021.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**APPEARANCES**

**FOR CLAIMANT NYANGA & CO. ADVOCATES**

**FOR RESPONDENT THE FEDERATION OF KENYA EMPLOYERS**

**COURT ASSISTANT CHRISPO AURA**