



In conclusion the Respondent urged the Court to dismiss the instant Claim with costs to the Respondent.

The claim was fixed for hearing on 2<sup>nd</sup> April, 2019 when the Claimant testifying on his own behalf. The Respondent failed to call any witnesses.

### **Claimant's Case**

In his evidence the Claimant reiterated the averments made in his Memorandum of Claim. He requested and was allowed to adopt his witness statement dated 28<sup>th</sup> August, 2015 and filed in Court on 1<sup>st</sup> September, 2015 as his evidence in chief. He testified that on 5<sup>th</sup> September, 2013 one of the Respondent's Managers accused him of losing a delivery note. That the said manager accused him of having stolen the goods and in turn resorted to hiding the delivery note. That the said Manager informed him that he was relieved of his duties with the Respondent

On cross examination, the claimant stated that at the time of termination he had a valid contract that was scheduled to expire on 9<sup>th</sup> September 2013. He further confirmed that he was terminated on 5<sup>th</sup> September 2013, 4 days to the expiry of his contract.

He stated that the delivery note that the Respondent accused him of losing was in July, 2013 and that he was not issued with any notice to show cause over the loss and no disciplinary hearing was conducted by the Respondent prior to his termination.

### **Submissions by the Parties**

The Claimant submitted that his termination was not in accordance with fair procedure as provided under Section 41, 43 and 45 of the Employment Act, 2007. The Claimant relied on decisions in *Gilbert Mariera Makori Vs Equity Bank Limited (2016) eKLR*, *Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLR* and *George Onyango Akuti Vs G4S Security Services Limited (2013) eKLR*.

The Claimant further submitted that he is entitled to the reliefs sought in his Memorandum of Claim and urged the Court to allow the same as drawn.

### **Respondent's Submissions**

The Respondent on the other hand submitted that the Claimant had failed to discharge the burden of proving that his services were unfairly terminated as required under the provisions of Section 47 of the Employment Act, 2007. The respondent relied on the provisions of Section 107 and 109 of the Evidence Act and the case of *Miller VS Minister of Pensions (1947) 2 ALL ER 372*.

The Respondent submitted that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim, the Claimant having absconded duty and that there was no time for the Respondent to initiate the disciplinary measures given that the claimant's contract was to lapse in 4 days. The Respondent further contends that it did not terminate the Claimant's services as alleged but rather that the Contract terminated by effluxion of time. The Respondent relied on the Court of Appeal decision in the case of *Amatsi Water Services Company Limited Vs Francis Shire Chachi (2018) eKLR*.

### **Analysis and Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited by the Parties, the following are the issues for determination:

1. Whether the claimant's employment was terminated or lapsed.
2. Whether the termination, if any, of the Claimant's employment was valid both procedurally and substantively.
3. Whether the Claimant is entitled to the reliefs sought.

Before dealing with the issues as set out herein, it is important to dispose of the issue whether the claimant's employment was on intermittent contracts as pleaded by the respondent. No evidence was adduced by the respondent to prove this fact. I will therefore hold that the claimant was on continuous employment even though he signed several fixed term contracts of 3 months' duration.

On the issue whether the claimant's contract was terminated or it lapsed, the evidence is that the contract terminated 4 days before the lapse date. This therefore means that the contract did not lapse as pleaded by the respondent.

On whether the termination was unfair, the statutory burden under Section 47(5) of the Employment Act is that –

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

The respondent having not called any evidence and having pleaded that the claimant's contract was terminated without him being subjected to the disciplinary process under Section 41 of the Act, I find that the termination was unfair.

**Whether the claimant is entitled to the reliefs sought**

Having found that the claimant's termination was unfair, he is entitled to pay in lieu of notice and compensation. I award him one month's salary in lieu of notice **Kshs.15,025**.

I further award him compensation equivalent to 10 months' salary taking into account his length of service of more than 7 years and the manner in which his employment was terminated without either hearing or notice. I have further considered that the respondent did not call any witness to controvert the averments by the claimant. I thus award him **Kshs.150,250**.

**Total Award is Kshs.165,275.00**

The respondent shall pay claimant's costs and interest shall accrue for date of judgment.

The Claimant is further entitled to costs of the Claim.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JANUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**