



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1697 OF 2015**

**CHARLES BOKEA MECHEO.....CLAIMANT**

**VERSUS**

**CHINA ROAD & BRIDGE CORPORATION.....RESPONDENT**

**JUDGMENT**

1. This Cause was heard on 29 October 2019.
2. An affidavit of service filed in Court on 12 June 2019 attested that the firm of Githinji & Associates Advocates on record for the Respondent was served and acknowledged a hearing notice on 7 June 2019.
3. Despite the service, the Respondent and its advocate did not attend the hearing.
4. Charles Bokea Mecheo (Claimant) testified and he filed his submissions on 7 November 2019.
5. The Court has considered the pleadings, evidence and submissions and adopted the Issues as set out in the submissions (the Claimant had initially proposed some 8 Issues as arising for the Court's determination, but condensed them into 3 in the submissions).

**Unfair termination of employment**

6. The Claimant testified that he was employed by the Respondent as a truck driver.
7. On the circumstances leading to separation, the Claimant asserted that upon arrival in the workplace on 7 June 2015, a supervisor called Mr Mao instructed him to go and see the Human Resources Manager who in turn informed him that his employment had been terminated due to reduced work.
8. He further testified that he was not afforded an opportunity to be heard before the termination of employment nor was he issued with a dismissal letter.
9. The Respondent did not controvert the Claimant's testimony given under oath or attend Court to prove that the Claimant was dismissed for turning up for work drunk as pleaded in the *Response*.
10. Section 41 of the Employment Act, 2007 requires an employer to afford an employee an opportunity to be heard if the ground for termination of employment is anchored on misconduct, poor performance or physical incapacity.
11. Sections 43 and 45 of the Act places a burden upon an employer to prove the reasons for dismissing an employee.
12. With only the Claimant's evidence on record, the Court finds that the termination of the Claimant's employment was on the ground of operational reasons and hence redundancy.
13. The Court also finds that the involuntary termination of the Claimant's employment was procedurally and substantively unfair for failure to comply with sections 40, 41, 43 and 45 of the Employment Act, 2007.

**Compensation**

14. The Claimant served the Respondent for about half a year, and in consideration of the length of service, the Court is of the view that the equivalent of 1-month salary as compensation would be fair.

**Pay in lieu of notice**

15. Since the Respondent did not issue a written notice, the Court holds that the Claimant is entitled to the equivalent of 1-month salary in lieu of notice.

**Severance pay**

16. Section 40(1) of the Employment Act, 2007 has set out *severance pay* at the rate of 15 days' pay for each completed year of service.

17. The Claimant served for about 6 months and would be entitled to severance pay equivalent to 7.5 days which the Court computes as equivalent to Kshs 14,136/- (monthly salary divided by 26 multiplied with 7.5 days).

**Breach of contract/statute**

**Salary for June 2015**

18. Earned wages is a statutory entitlement. The Claimant sought Kshs 52,506/- being wages for June 2015.

19. The Claimant worked for only 7 days and therefore is not eligible for a full months' salary.

20. The Court will allow the head of the claim for only 7 days in the sum of Kshs 14,136/-.

**Overtime**

21. The Claimant sought Kshs 102,339/- as overtime pay for 6 months, and he produced a copy of an agreement between the Respondent and Kenya Building, Construction, Timber and Furniture Industry Employees Union wherein it was agreed that work in excess of 8 hours in a day would be paid as overtime.

22. Without the Claimant's testimony being rebutted/controverted, the Court will allow the head of the claim.

**Certificate of Service**

23. A certificate of service is a statutory entitlement, and the Respondent should issue one to the Claimant within 21 days.

**Reinstatement**

24. More than 3 years have elapsed since the termination of the Claimant's employment. The Court holds that reinstatement is not appropriate in the circumstances.

**Conclusion and Orders**

25. The Court finds and declares that the Respondent unfairly terminated the Claimant's contract on account of redundancy and awards the Claimant

(i) Compensation Kshs 68,109/-

(ii) Pay in lieu of notice Kshs 61,650/-

(iii) Severance pay Kshs 14,136/-

(iv) Salary for June 2015 Kshs 14,136/-

(v) Overtime Kshs 102,339/-

**TOTAL Kshs 260,370/-**

26. Respondent to issue a certificate of service within 21 days.

27. Claimant to have costs on a half-scale.

**Delivered, dated and signed in Nairobi on this 17<sup>th</sup> day of January 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Musundi instructed by Magare Musundi & Co. Advocates

For Respondent Githinji & Associates Advocates (did not participate in hearing)

Court Assistant Fred