



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2226 OF 2015

JAMES MWANGI.....CLAIMANT

V

MARULA POWER POST PLANT LTD.....RESPONDENT

JUDGMENT

1. James Mwangi (Claimant) was employed as a watchman on 9 February 2012 by Marula Power Post Plant Ltd (Respondent).
2. On 15 December 2015, the Claimant sued the Respondent alleging unfair termination of employment and breach of contract.
3. An affidavit of service filed in Court on 24 June 2016 attested to service of Summons upon the Respondent's Accountant called Muema Kithaka on 12 February 2016.
4. Despite the said Accountant accepting service and stamping in acknowledgement, the Respondent did not enter Appearance or file a Response.
5. On 19 September 2017, the Court directed that the Cause proceed undefended.
6. When the Cause came up for hearing on 3 December 2018, the Claimant and advocate were not in Court and the Court dismissed the Cause.
7. Upon application by the Claimant, the Court reinstated the Cause on 6 November 2019, and this paved the way for hearing on 10 December 2019.
8. Although the Respondent acknowledged service of hearing notice on 22 October 2019, it did not attend the hearing.
9. The Claimant gave sworn testimony and filed submissions on 16 January 2020.
10. The Court has considered the pleadings, evidence and the submissions on record.

Unfair termination of employment

11. The Claimant testified, without the testimony being rebutted or controverted that he fell ill on 26 June 2015 and was taken to Mwea Medical Centre and admitted (Discharge Summary produced).
12. Upon discharge on 5 July 2015, the Claimant testified that on reporting to the workplace, he was informed that his services were no longer required and that he was not issued with a dismissal letter. He stated that he was paid wages for June and July 2015.
13. According to the Claimant, his advocate sent a demand letter dated 21 October 2015 alleging unfair termination of employment but there was no response.
14. Section 35(1)(c) of the Employment Act, 2007 requires a *written notice of termination of employment* (unless it is a case of summary dismissal). Section 41 of the Act on its part envisage a hearing.
15. The Claimant's testimony that there was no notice, hearing or dismissal letter remained unchallenged, and the Court has no option but to

conclude that the verbal termination of the Claimant's employment was unfair.

16. If at all there were valid and fair reasons to terminate the Claimant's employment as contemplated by sections 43 and 45 of the Employment Act, 2007, the Respondent did not discharge the burden of proving the same.

Compensation and Pay in lieu of notice

17. Since the Respondent did not issue a notice of termination of employment to the Claimant, the Court finds that he is entitled to the equivalent of 1-month salary in lieu of notice (salary for June 2015 according to bank records was Kshs 11,800/-).

18. The Claimant served the Respondent for about 3 years, and in consideration of the length of service, the Court is of the view that the equivalent of 5 months gross salary would be fair.

Breach of contract

Leave

19. The Claimant sought Kshs 25,200/- on account of 21 days leave.

20. At least 21 days leave with full pay is a statutory entitlement to every employee and relying on section 10(3) & (7) of the Employment Act, 2007, the Court will allow this head of the claim for an equivalent of 1-month's salary.

Service pay

21. There was no evidence that the Claimant was a member of the National Social Security Fund or a pension and, therefore, by dint of section 35(5) & (6) of the Employment Act, 2007, the Claimant is eligible for service pay as part of the contract.

Certificate of Service

22. A certificate of service is a statutory entitlement. The Respondent should issue one within 21 days.

Conclusion and Orders

23. The Court finds and declares that the termination of the Claimant's employment was unfair, and further that the Respondent was in breach of contract.

24. The Claimant is awarded

i. Compensation	Kshs 59,000/-
ii. Salary in lieu of notice	Kshs 11,800/-
iii. Accrued leave	Kshs 11,800/-
iv. Service pay	Kshs 36,000/-
TOTAL	Kshs 118,600/-

25. Claimant to have costs on half scale.

Delivered, dated and signed in Nairobi on this 6th day of March 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Jaoko instructed by Achola Jaoko & Co. Advocates

Respondent did not participate

Court Assistant Judy Maina