



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 118 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**HUMPHREY MUNYITHYA MUTEMI.....CLAIMANT**

**VERSUS**

**SOLUXE INTERNATIONAL GROUP OF HOTELS**

**AND LODGES LIMITED.....RESPONDENT**

**JUDGMENT**

Vide his statement of claim dated 28<sup>th</sup> January, 2015 and filed in Court on 2<sup>nd</sup> February, 2015, the claimant herein avers that his employment was unlawfully, wrongfully and unfairly terminated by the Respondent, a registered limited liability company.

His case is that he was employed by the respondent from the year 2012 in the position of a driver and earned a monthly salary of Kshs.20,000 with other benefits.

The Claimant contends that he worked diligently, faithfully and to the Respondent's satisfaction until 4<sup>th</sup> December, 2014 when his employment was illegally and unlawfully terminated by the Respondent on false grounds that the Respondent was only using two cars but with three drivers and therefore there was no need to continue with his employment, a fact that the Claimant disputed.

The Claimant maintained that his termination was illegal and unfair as he was not accorded a chance to make his representation prior to the termination, which is contrary to the provisions of the Employment Act, 2007 and the Constitution of Kenya, 2010.

Aggrieved by the decision to terminate his employment the Claimant filed the instant claim seeking the following reliefs:-

a) A declaration that the Claimant's dismissal was unlawful Kshs.384,920 comprising of the following:

i. Two months' salary in lieu of notice Kshs.40,000

ii. Damages for unfair termination Kshs.240,000

iii. Overtime worked from June 2013 to

December 2014 Kshs.104,920

**Total Kshs.384,920**

b) Costs and interest

c) Any other relief that the Court shall deem fit to grant in the circumstances.

The Respondent despite being served with the summons and the Memorandum of Claim failed to enter appearance or file its defence in this matter. The matter therefore proceeded as an undefended Claim on **29<sup>th</sup> January 2020** with the Claimant testifying on his own behalf.

## **Claimant's Case**

The Claimant adopted his witness statement dated 28<sup>th</sup> January 2015 and filed in Court on 2<sup>nd</sup> February 2015 as his evidence in chief. He further urged the Court to adopt the documents marked 1 to 5 as part of his evidence in chief.

In his statement the Claimant reiterated the averments made in his Memorandum of Claim. In brief the Claimant testified that he was employed by the Respondent in December 2012 but was never issued with any written contract of employment.

The claimant testified that he earned an agreed monthly salary of Kshs.20,000. He testified that the Respondent failed to pay him for overtime despite working overtime.

The claimant testified that his employment was terminated by the Respondent on 4<sup>th</sup> December 2014 and that at the time of separation he was paid for the days worked in November and December 2014 as well as one month's salary in lieu of notice. He confirmed having received Kshs.40,000 from the Respondent. He further confirmed having been issued with a certificate of service at the time of his separation.

The claimant maintained that his dismissal was unlawful and unfair as the Respondent failed to comply with the provisions of the Employment Act, 2007. He therefore urged the Court to allow his Claim in terms of the reliefs sought therein.

The Claimant opted not to file any submissions, choosing to rely entirely on his Statement of Claim and his oral evidence in Court.

## **Determination**

Having considered the pleadings, evidence, submissions and authorities cited by the Claimant, the following are the issues for determination:

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1. Whether an employment relationship existed between the Claimant and the Respondent.
2. Whether the termination of the Claimant's employment by the Respondent was wrongful, unfair and unlawful.
3. Whether the Claimant is entitled to the reliefs sought.

## **Whether an employee-employer relationship existed between the Claimant and the Respondent**

The Claimant in his pleadings and evidence averred that he was employed by the Respondent in the position of a driver from December 2012 earning a monthly salary of Kshs.20,000 and that he was never issued with any contract of employment by the Respondent. He however attached to his List of Documents a letter of termination of employment dated 4<sup>th</sup> December, 2014, Duty sign sheets (June 2013 to December 2014 and Overtime work sheets from June 2013 to December 2014 as proof of his employment with the Respondent.

In the case of *Monica Kanini Mutua v Al-Arafat Shopping Centre and Another [2018] eKLR*, the Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.

In the case of *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited (2014) eKLR* the Court considered letters placed on record by the Claimant and made the following findings:

*"There is abundant evidence showing the Claimant was, and the Court finds he was, an employee of the Respondent on the terms and conditions stated in the Statement of Claim."*

Further, in the case of *Herman Ilangarwa Shidakwa v Armati*

*Security Solutions Limited [2019] eKLR*, the court noted that where the respondent had failed to enter appearance or file a defence despite being served with summons, the claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent.

In the instant case which is an undefended claim, the Claimant has established existence of an employment relationship with the Respondent through copies of letter of termination of his employment as well as the Duty sign sheets and overtime work sheets for the period between June 2013 and December 2014 as well as the Certificate of Service issued by the Respondent.

## **Whether the termination of the Claimant's employment by the Respondents was wrongful, unfair and unlawful**

The Claimant avers that the Respondent did not adhere to due process while dismissing him from employment contending that he was not accorded a hearing before a disciplinary committee prior to the termination. There is no evidence tendered by the Respondent to controvert this assertion. There is no evidence in terms of minutes of a disciplinary hearing accorded to the Claimant. I thus agree with the Claimant's evidence that hearing and notification are mandatory under **Section 41 of the Employment Act, 2007**.

In the case of **Walter Ogal Anuro v 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 adopted by the employer to effect the termination.”*

For these reasons, I find that indeed the Claimant was unfairly and unlawfully dismissed from employment by the Respondent.

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

The Claimant prayed for the following:

**(i) Salary in lieu of notice for two months Kshs.40,000**

The Claimant in his pleadings and evidence admitted having been paid one month's salary in lieu of notice and was therefore claiming for the remainder of two (2) months' salary in lieu of notice.

In the absence of evidence to prove that the Claimant was entitled to notice for three (3) months, he is only entitled to one month's notice, which he admitted having been paid as provided in Section 36 of the Employment Act, 2007. This prayer therefore stands dismissed.

**(ii) Compensation for unfair termination Kshs.20,000 x 6 months total Kshs.120,000**

Having found that the Claimant's termination was unfair he is entitled to compensation under this head. Given the length of service and the fact that he did not contribute by his conduct to the termination and the fact that the reasons given in the letter of termination are grounds for redundancy, I award him six months' salary as compensation in the sum of **Kshs.120,000**.

**(iii) Overtime Worked between June 2013 and December 2014 Kshs.104,920**

The Claimant in his pleadings and evidence averred that he worked overtime and was not paid for the same. In the absence of any evidence from the Respondent to controvert this assertion I find that the Claimant is entitled to the same. In the case of **Meshack Kiio Ikulume v Prime Fuels Kenya Limited (2013) eKLR** the Court held that it is the employer's duty to keep certain records including hours of work and to produce the same in legal proceedings. In this case the claimant submitted the sign in sheets. I have noted from the sign in sheets that the claimant worked on average one hour per day which I award him for 12 months only, being a continuing injury, at 6 days a week. Since the amount claimed is lower than the amount due, I award the claimant the amount claimed at **Kshs.104,920**.

**The total award is Kshs.224,920**

**(iv) Costs and Interest**

The Claimant is awarded costs of the suit. Interest shall accrue at Court rates from the date of Judgment until payment in full.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF MAY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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 Civil 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.

**MAUREEN ONYANGO**

**JUDGE**