



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 716 OF 2016**

**TERESIA KOKI MUSYOKA.....CLAIMANT**

v

**EXCEL CHEMICALS LIMITED.....RESPONDENT**

**JUDGMENT**

1. Teresia Koki Musyoka (Claimant) was employed in October 2009 by Excel Chemicals Ltd (Respondent) and on 3 May 2016 she instituted these proceedings alleging unfair termination of employment, and breach of contract/statute.
2. The Respondent filed a *Response to the Memorandum of Claim* on 8 May 2017 prompting the Claimant to join Issue on 30 May 2017. The parties also filed documents while a *Statement of Agreed Issues* was filed on 30 July 2019.
3. On 22 November 2019, the Claimant caused the Cause to be scheduled for hearing on 24 February 2020.
4. According to an affidavit of service filed in Court on 3 December 2019, the Respondent's advocate on record was served with and acknowledged a hearing notice on 29 November 2019.
5. Despite the service of the hearing notice, the Respondent and its advocate on record did not attend the hearing (being satisfied with the service of the notice, the Court allowed the hearing to proceed).
6. The Claimant testified but did not file submissions by 20 March 2020 as agreed. The submissions were not on file by this morning.
7. The Court has considered the pleadings and evidence on record.

**Unfair termination of employment**

**Procedural fairness**

8. Section 35(1)(c) of the Employment Act, 2007 envisages *written notice of termination of employment* (unless it is a case of summary dismissal) while section 41 of the Act requires an employer to afford an employee an opportunity to be heard before a decision to terminate employment is taken.
9. The Claimant's case was that she was not subjected to a disciplinary hearing, and therefore the termination of her employment was unfair.
10. Although the Respondent did not call any witnesses to rebut the Claimant's testimony or subject it to cross-examination, part of the records filed in Court includes a pre-hearing notice to the Labour Office, minutes of the disciplinary hearing which indicate that the Claimant snubbed the opportunity to appear and make representations.
11. In the circumstances, the Court is unable to make a finding that the Claimant was not offered an opportunity to be heard.

**Substantive fairness**

12. Pursuant to sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of proving, and proving as valid and fair, the reasons for the termination of the Claimant's contract.

13. The minutes of the disciplinary hearing show that the sanction meted against the Claimant for fighting with a colleague was the requirement to tender an apology (the colleague apologised and was allowed to continue with work). The Claimant did not tender the apology.

14. On 3 August 2015, the Respondent wrote to the Labour Officer, Industrial Area to report that the Claimant had not resumed duty, and had thus been treated as having absconded duty.

15. Another letter to the same office dated 30 September 2015 informed the Labour Officer that the Claimant had resumed work on 23 February 2015 and worked until 8 September 2015 and did not resume.

16. Even without being formally introduced into evidence, the letters filed in Court by the Respondent were contradictory and without being subjected to interrogation, the Court cannot give them weight as to whether the Claimant repudiated the contract or was unfairly dismissed.

17. It was the duty of the Respondent to discharge the burden imposed on employers by sections 43 and 45 of the Employment Act, 2007, and since that burden was not discharged, the Court has no option but to conclude that the Claimant's employment was unfairly terminated.

#### **Compensation and Salary in lieu of notice**

18. In the circumstances of the case at hand, it is the view of the Court that compensation equivalent to 1-month salary as well as the equivalent of 1-month salary in lieu of notice would be appropriate (salary at the time of separation was Kshs 11,280/-).

#### **Severance pay**

19. This case was not one of redundancy and the Court, therefore, finds the plea for *severance pay* misplaced.

#### **Certificate of Service**

20. A certificate of service is a statutory entitlement of every employee and the Respondent should issue one to the Claimant.

#### **Conclusion and Orders**

21. The Court finds and declares that the Respondent failed to discharge the burden imposed on it by sections 43 and 45(1) & (2) of the Employment Act, 2007, rendering the termination of the Claimant's employment unfair.

22. The Claimant is awarded

(i) Compensation	Kshs 11,280/-
(ii) Salary in lieu of notice	Kshs 11,280/-
<b>TOTAL</b>	<b>Kshs 22,560/-</b>

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

24. The Claimant is denied costs for failing to file/serve submissions.

**Delivered through video, dated and signed in Nairobi on this 15<sup>th</sup> day of May 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Mutai instructed by Kipsang & Mutai Advocates

For Respondent Munene Wambugu & Kiplagat Advocates

Court Assistant Judy Maina