



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1049 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**FREDRICK OUMA OTIENO.....CLAIMANT**

**VERSUS**

**FALCON SIGNS LIMITED.....RESPONDENT**

**JUDGEMENT**

The suit is premised on the memorandum of claim dated 27<sup>th</sup> May, 2016 and filed on 2<sup>nd</sup> June, 2016 seeking declarations of unfair and unlawful termination of employment and terminal benefits to wit –

- i. A declaration that the Claimant’s dismissal from his employment was wrong, unfair and unlawful.
- ii. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages
- iii. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling KES 219, 296/=
- iv. Interest on (iii) above from the date of filing until payment thereof.
- v. Costs of this suit.
- vi. The Respondent to pay the Claimant’s costs with interest.

**Facts of the Case**

The Claimant was employed by the Respondent in September, 2013 as a carpenter. At the time of the termination of his employment, he earned KES 14,240/=. He avers that for the duration of his employment until the same was terminated in September, 2013, he never took his annual leave and that throughout his period of service, the Respondent deducted but never remitted his National Security Social Fund (NSSF) and National Hospital Insurance Fund (NHIF) dues.

The Claimant states that sometime in September, 2013, he reported to work as usual when one of the Respondent’s Directors informed him that his services were no longer required since the Respondent was in the process of downsizing its workforce and that he would be called back once work picks up. He avers that to date he has never been called back as promised and that his position was taken up by another carpenter who was in charge of the same assignment where he had been deployed.

The Claimant also averred that at the time of his dismissal from service, he had served the Respondent for a period of 2 years without blemish. He averred that the termination of his employment was thus unfair and unlawful.

The Respondent was served with the Memorandum of Claim but neither entered appearance nor filed a statement of defence. The Court record shows that the file came before Justice Abuodha on 1<sup>st</sup> November, 2017 who deemed the Respondent properly served and gave directions for the matter to proceed as an undefended cause on a date to be fixed at the registry.

I have had occasion to peruse the affidavit of service filed by the Claimant on 6<sup>th</sup> July, 2017. It was sworn by **JOSEPH RAMINO ADEDE** on 19<sup>th</sup> June, 2017. The deponent avers therein that he is a process server who having been instructed by the firm of Mwaura Kamau &

Company Advocates, the Advocates on record for the Claimant herein, served a Notice of Summons and the Memorandum of Claim upon the Respondent at its offices on 19<sup>th</sup> August, 2016 accompanied by the Claimant. He deponed that he met the Respondent's Human Resources Manager, a Mr. Wesonga who accepted service and affixed the Respondent's stamp on the face of the Notice of Summons which was produced in the Affidavit of Service.

The matter thus came up before this Court for formal proof on 19<sup>th</sup> December, 2019 where the Claimant testified on oath in support of the particulars of his claim.

The Claimant testified that on or about 30<sup>th</sup> September 2013, when he reported to work as usual, he was told by his "boss" a Director of the Respondent, that they were terminating his services since the workload had reduced and they no longer required his services.

He testified that he was not paid notice and had never taken leave for the 2 years he worked for the Respondent. He also did not receive a Certificate of Service. Further, he did not think the work had reduced since the Respondent went ahead and employed other persons in the same position.

The Claimant in conclusion prayed for the Court to adopt the documents annexed to his Memorandum of Claim as his evidence and grant him compensation for unfair termination as well as his terminal dues and costs.

The Claimant filed written submissions dated 10<sup>th</sup> January, 2020 on 15<sup>th</sup> January, 2020 reiterating the contents of the Memorandum of Claim and his testimony which I need not reproduce. In essence, the Claimant submitted that he had proved his claim on a balance of probabilities which was not rebutted or controverted by the Respondent in any way and prayed for the Court to grant the orders as sought.

### **Determination**

I have considered at the Memorandum of Claim, the claimant's Witness Statement and the documents in the List of Documents dated 27<sup>th</sup> May 2016, which the Claimant adopted and produced as his evidence. The pay slips and job identity card produced by the claimant are sufficient proof of existence of an employment relationship between the claimant and the respondent.

The evidence of the Claimant having been uncontroverted I find that the claimant was unfairly terminated within the stipulations of **Section 45** of the Employment Act, 2007, (the **Act**) as he was verbally terminated, without notice or being subjected to a hearing. Further, there was no proof provided by the respondent of the reasons the claimant was terminated as required by **Section 43** of the Act. In light of this finding, I will now proceed to consider the reliefs sought by the claimant.

The Claimant claims one month's salary in lieu of notice which is accordingly awarded at **KES 14,240/=**.

The claimant has prayed for payment in lieu of leave not taken. According to Sections 10 and 74 of the Act, an employer is required to keep records of employees containing among other details, "**an employee's annual leave entitlement, days taken and days due as specified in Section 28**". According to Section 10(7) of the Act, in any legal proceedings where an employer fails to produce such records, it will be the burden of the employer to prove or disprove an alleged term of employment. In the absence of any proof by way of leave records from the respondent, I also award the claimant payment in lieu of leave not taken for the period of 2 years worked in the sum of **KES 19,936/=**.

The Claimant has claimed service gratuity as NSSF was deducted from his salary but not remitted. I have perused the payslip that shows NHIF and NSSF payments were deducted from his dues, however, the Claimant did not provide any statements to prove that the same were not remitted to the relevant bodies. It was incumbent on the Claimant to provide the same. If indeed the sums were never remitted, the Claimant still has the right to pursue the same with NSSF and NHIF who have the necessary statutory mechanism to provide him recourse including penalising the Respondent accordingly. For this reason, the claim for payment of service gratuity and unremitted dues fails.

Having found that the claimant was unfairly terminated he is entitled to compensation. I have taken into account the circumstances under which the claimant's employment was terminated and the factors set out in **Section 49** of the Act, specifically, that he worked for 2 years for the respondent earning a fairly meagre salary. I thus find that compensation equivalent to 6 month's salary amounting to **KES 86,520/=** would be reasonable in the circumstance.

### **Conclusion**

**In conclusion I enter Judgment in favour of the Claimant for the sum of KES 120,696/= with costs and interest from the date of judgment until payment in full.**

The Respondent shall also forthwith issue the Claimant with his Certificate of Service.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF JUNE 2020**

**MAUREEN ONYANGO**

**JUDGE**

## **ORDER**

In view of the declaration of measures restricting court 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, the 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 the 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**