



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 149 OF 2018**

**BETWEEN**

**RASHID KHAMIS MWINYI.....CLAIMANT**

**VERSUS**

**SENECA ENTERPRISES LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Andrew Mwabanga*

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*M.A. Mwinyi, Advocate for the Claimant*

*Moses Mwakisha & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 20<sup>th</sup> March 2018. He avers, he was employed by the Respondent as a Mechanic, on 2<sup>nd</sup> August 1999. His contract was terminated by the Respondent without notice and/ or justification, in December 2016. He was not heard. His last salary was Kshs. 30,000, paid monthly. He was not paid his terminal benefits. He expected to continue working until retirement. He prays for Judgment against the Respondent as follows: -

a. Severance pay at Kshs. 255,000.

b. 12 months' salary in compensation for unfair termination at Kshs. 360,000.

c. Off- days at Kshs. 510,000.

d. Notice at Kshs. 30,000.

Total... Kshs. 1,155,000.

e. Costs.

f. Declaration that failure to issue the Claimant with a Certificate of Service attracts penal consequences under Section 51 of the Employment Act.

g. Declaration that dismissal of the Claimant was unfair, unjust and unconstitutional.

h. Any other suitable order.

2. The Respondent filed its Statement of Response on 8<sup>th</sup> June 2018. The Respondent states, the Claimant was an Employee of a 3<sup>rd</sup> Party, Yara E.A. Limited. He worked under the control of Yara's Representative, Robert Jessop. At no time was the Claimant an Employee of the

Respondent. The Respondent did not terminate Claimant's contract. It is the Respondent's position that the Claimant is non-suited against the Respondent. The Respondent pleads that it would seek to have the 3<sup>rd</sup> Party, Yara, joined to the proceedings.

3. Hearing opened and closed on 26<sup>th</sup> February 2020. The Claimant, and former Managing Director of the Respondent George Ernest Chuli, gave evidence for the respective Parties.

4. The Claimant adopted as his oral evidence, the contents of his Statements of Claim and Witness on record. He denied that he was employed by a 3<sup>rd</sup> Party, Yara Limited. Cross-examined, he told the Court that he was employed by the Respondent in 1999. Before this, he was working for another Company, at the same premises. George found the Claimant in employment. The letter of employment issued in the name of the Respondent. Respondent's Certificate of Incorporation shows the Respondent was registered on 5<sup>th</sup> May 2004. The Claimant's first salary was Kshs. 10,950. It was gradually increased. He negotiated salary increment with Yara's Representative Robert Jessop. The Claimant and other Employees left employment in 2016. Other Employees continued working for another Company.

5. George Ernest Chuli told the Court, the Respondent business was incorporated in 2004. George was employed by Yara to supply diesel. By 1999, the Respondent had the business name, Seneca. He found the Claimant working for Yara. The Claimant's letter of employment issued upon instructions from Yara. Yara paid his salary. The Respondent did not issue the Claimant a contract, after Respondent's incorporation in 2004. Yara paid salaries through Jessop. Jessop managed day to day operations. Cross-examined, George told the Court, the letter of employment issued in the name of the Respondent. George signed the letter. By 2012, the Claimant's pay slip shows he was earning Kshs. 30,000. The pay slip was in the name of the Respondent.

**The Court Finds: -**

6. There is ample evidence to show that the Claimant was employed by the Respondent business, as a Mechanic, from 1999 to 2016. The most conclusive evidence of this, is the letter of employment dated 3<sup>rd</sup> August 1999. The Employer in the letter is identified as, Seneca Enterprises. The letter is signed by Managing Director, George Chuli, who gave evidence in this Claim, for the Respondent.

7. Other entities and/ or persons, alleged by the Respondent to have employed the Claimant, are not mentioned in the letter of employment. If the Respondent had such other arrangements, those arrangements were between the Respondent and those other entities and /or persons. The letter of employment does not mention Yara Limited or Robert Jessop.

8. The Respondent states that it was incorporated in 2004. This is not in doubt, a Certificate of Incorporation having been exhibited. The business however, was running prior to incorporation. George stated there was a business running in the name and style of Seneca Enterprises. The letter of employment issued in this name. Incorporation in 2004 was a decision made by the Respondent, which would not affect its position as Claimant's Employer, from 1999.

9. The Respondent has not justified termination, merely alluding to its business being taken over, without bringing evidence of takeover, and clarifying what became of existing employment contracts. Nothing was said about terms of re-engagement or dis-engagement with the Claimant, after he had served for 17 years. The Respondent did not discharge its obligations under Section 41, 43 and 45 of the Employment Act. **It is declared that termination was unfair.**

10. The Claimant served for 17 years. His record is not shown, to have had blemish. He expected to go on working until retirement. He did not say however, when retirement was expected. His contract did not have a clause on retirement. He does not share any blame, for termination of his contract. He described himself as being unemployed, at the time he gave evidence. He was paid nothing on termination. Termination was flawed both on substance and the manner of its execution. **He merits and is granted, equivalent of 12 months' salary in compensation for unfair termination at Kshs. 360,000.**

11. **He is granted notice pay at Kshs. 30,000.**

12. There is no evidence to support the prayer for severance pay. The Claimant did not leave under redundancy, to justify the prayer for severance pay, under Section 40 of the Employment Act. If he meant to pray for service pay, this is similarly not grantable, the Claimant having been actively subscribed to the N.S.S.F, as shown in the pay slips on record.

13. The bulk of his Claim is on off-days, at Kshs. 510,000. The Claimant did not give evidence about off-days. It is not in the Claimant's Witness Statement. It is a bare pleading, made without the slightest evidential support. It is rejected.

14. The Court sees no reason to declare that, failure to issue Certificate of Service, carries a penalty. Section 51 of the Employment Act is clearly worded. Declaratory orders are designed to resolve legal uncertainty. There is no controversy, and no legal uncertainty, which the Court would be resolving, by making a declaration about penal consequences, as prayed by the Claimant. Section 51 of the Employment Act is not uncertain. If the Claimant has not received his Certificate of Service, he ought to have asked the Court to order that the Respondent releases his Certificate of Service. The Court does not have to declare that failure to supply the Certificate, carries a penalty. If he wishes to pursue his Certificate of Service through criminal proceedings, under Section 51 [3] of the Employment Act, he can do so through the Labour Office, Mombasa County.

15. **Costs to the Claimant.**

**IN SUM, IT IS ORDERED: -**

**a. It is declared that termination was unfair.**

*b. The Respondent shall pay to the Claimant: equivalent of 12 months' salary in compensation for unfair termination at Kshs. 360,000; and notice at Kshs. 30,000 – total Kshs. 390,000.*

*c. Costs to the Claimant.*

**Dated and delivered at Mombasa, this 10<sup>th</sup> day of November, 2020**

**James Rika**

**Judge**