



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**  
**AT NAIROBI**  
**CAUSE NUMBER 1676 OF 2013**  
**BETWEEN**  
**MUGINI CEPHAS MANG'ERA.....CLAIMANT**  
**VERSUS**  
**NATIONAL CONCRETE COMPANY LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Namada & Company Advocates, for the Claimant*

*George Masese Advocate, instructed by the Federation of Kenya Employers for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 16<sup>th</sup> October 2013. He avers that he was employed by the Respondent on 4<sup>th</sup> March 2009 as a Security Guard. He earned a daily wage of Kshs. 460.
2. He was required by the Respondent in April 2013 to sign a certain form, and move out of the company-provided residence. He asked the Respondent, to assign him another residence before he could move out. When the Claimant reported for duty on 2<sup>nd</sup> May 2013, he was refused entry, and told by the Respondent, never to set foot at the workplace again. He was dismissed.
3. The Claimant prays the Court to declare that termination was unfair, and grant him the following orders against the Respondent:-
  - a) 1 month salary in lieu of notice at Kshs. 13,800.
  - b) Salary for 5 days worked in April 2013 at Kshs. 2,300.
  - c) Annual leave pay at Kshs. 55,200.
  - d) Service pay at Kshs. 33,120.
  - e) 12 months' salary in compensation for unfair termination at Kshs. 165,600.

f) Costs.

g) Interest.

4. The Respondent filed its Statement of Response on 20<sup>th</sup> June 2018. It is not clear why the Statement of Response was filed in 2018, while the Claim was initiated in 2013. Parties did not raise any issue with regard to what appears to be a late filing, when this matter came up for hearing during the Service Week, on 18<sup>th</sup> October 2018. The matter had been scheduled for hearing on various dates before 18<sup>th</sup> October 2018. There is no indication, that the issue of late filing of the Statement of Response was ever raised on any occasion. The Court shall treat the Statement of Response filed on 20<sup>th</sup> June 2018 as being properly filed and served.

5. The Respondent concedes to have employed the Claimant as a Security Guard on casual terms, in 2009. The Respondent decided to convert the Claimant's terms to regular employment, in accordance with the relevant CBA. The Claimant declined permanent terms, and left employment of his own volition. The Respondent prays the Court to dismiss the Claim with costs.

6. Parties agreed, on 18<sup>th</sup> October 2018, to have the Claim considered and determined, under Rule 21 of the Employment and Labour Relations Court [Procedure] Rules 2016.

**The Court Finds:-**

7. It is not contested that the Claimant was employed by the Respondent in 2009, as a Security Guard, on casual terms. It is agreed he left employment in 2013. There is no agreement on the circumstances of leaving. The Claimant states his contract was terminated after he was asked to move out of Respondent's house. He was told on 2<sup>nd</sup> May 2013, never to set foot at Respondent's workplace again. The Respondent's position is that the Claimant left employment of his own accord, having rejected an offer from the Respondent, to move him from casual to regular employment. The Claimant desired to go on working on casual terms, because it suited him better than regular employment.

8. He reported to the Labour Office Nairobi, that his contract was wrongfully terminated by the Respondent on 2<sup>nd</sup> May 2013.

9. The Respondent answered before the Labour Office, that the Claimant's contract was not terminated by the Respondent. The Claimant refused to convert from casual to regular employment. The Respondent stated the Claimant was free to continue working, but only on regular terms, in accordance with the governing CBA. The letter from the Labour Office, capturing this communication, is Respondent's annexure 1.

10. Coming out of the Labour Office, the Claimant engaged the Advocates currently on record for him. On 13<sup>th</sup> June 2013, the Claimant's Advocates wrote to the Respondent, alleging that the Claimant's contract was unfairly terminated by the Respondent. They demanded terminal benefits and compensation as computed under the Claim, at Kshs. 270,020. The letter of demand is exhibited by both Parties.

11. The Respondent replied through its Advocates on 18<sup>th</sup> December 2013, reiterating that the Respondent did not terminate Claimant's contract; the Claimant refused to convert to regular terms, and walked away.

12. The Claimant's Advocates wrote to the Respondent's on 21<sup>st</sup> August 2013. " *To confirm the position that your Clients have not terminated our Client's services, let them confirm with us on which date, our Client can report at their Offices to resume duties, even on permanent basis,*" the Claimant's Advocates demanded.

13. The Respondent's Advocates replied on 29<sup>th</sup> August 2013 that, "...your Client's services have not been terminated...he can report to work as early as from 1<sup>st</sup> September 2013, as per the terms and conditions of the CBA... please confirm in writing the acceptance of offer. "

14. There was no further correspondence. Instead, the Claimant filed this Claim on 16<sup>th</sup> October 2013.

15. Obviously, his contract was not terminated by the Respondent. The Respondent offered to the Claimant conversion from casual to regular terms, in accordance with the law and CBA. The Claimant rejected the offer because he felt that the long term casual arrangement, offered him better returns, than proposed in the conversion.

16. He was repeatedly asked to report back and to continue working on regular terms. This was a consistent position of the Respondent at the Labour Office, and in correspondence with Claimant's Advocates. The Claimant demanded to be given a specific date when he could resume work, 'even on permanent basis.' The Respondent obliged and gave a specific date in writing. The Claimant did not report back, instead opting to pursue this unlikely Claim. The Court is satisfied that the Claimant took his own decision, not to continue working. He has no reason to pursue the Respondent for compensation and terminal benefits. The Respondent did not terminate his contract of employment.

17. The Court does not normally give orders for costs against Employees. No Court wishes to discourage Employees from pursuing industrial justice against Employers. There are certain Claims filed by Employees however, which are way out of line. They ought to be discouraged. The Respondent acted all through, in accordance with the law and contract to which the Parties were subject, but has been compelled to respond to a frivolous Claim, and in doing so, has incurred costs and irreplaceable time-resources. Judicial resources, have likewise, been squandered by the Claimant. This Claim should never have been filed. The Claimant ought to have reported to work from 1<sup>st</sup> September 2013, as advised by the Respondent. If he was not ready, or willing to go back, he ought to have resigned or issued notice of termination upon the Respondent. The Parties would have then, clearly been released from mutuality of obligations. ***It is the view and order of the Court therefore, that this Claim is dismissed, with costs to the Respondent.***

Dated and signed at Mombasa this 5<sup>th</sup> day of December 2018.

James Rika

Judge

Dated and delivered at Mombasa this 18<sup>th</sup> day of January 2019.

Joram Nelson Abuodha

Judge