



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

**AT MOMBASA**

**CAUSE NUMBER 26 OF 2017**

**BETWEEN**

**MAHAMED M. KIMENGI.....CLAIMANT**

**VERSUS**

**MEGA MARKETING LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*J.A. Abuodha & Company Advocates for the Claimant*

*Odongo B.O. & Company Advocates for the Respondent*

**JUDGMENT**

1. Through his Statement of Claim received at the Court's docket on 6<sup>th</sup> January 2017, the Claimant seeks against his former Employer, the Respondent herein, Judgment in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 13,702.
- b) Annual leave pay over a period of 1 year, 1 month, at Kshs. 13,702.
- c) House allowance at 15% of Kshs. 13,702, for 11 months, at Kshs. 13,702.
- d) Service pay at 15 days salary for 1 complete year of service at Kshs. 7,800.
- e) 12 months' salary in compensation for unfair termination at Kshs. 164,424.

Total... Kshs. 222,230

f) Costs.

g) Any other suitable relief.

2. He avers he was employed by the Respondent between 1<sup>st</sup> July 2015 and 7<sup>th</sup> September 2016, as a General Labourer. He did not have a written contract. His contract was terminated by the Respondent without just cause and/or notice.

3. The Respondent lodged its Statement of Response on 21<sup>st</sup> March 2017. It is conceded that the Claimant was an Employee of the Respondent. He was employed on casual terms. He abandoned his post in September 2016. The Respondent received information that the Claimant had secured another job. Later, the Respondent was called by the Claimant's Trade Union, Kenya Quarry Workers Union, for consultation on alleged unfair dismissal of the Claimant. The Respondent advised the Union that the Claimant was not dismissed by the Respondent, and was free to report back to work, with an explanation about his absence. The Claim has no merit. The Respondent asks the

Court to dismiss the Claim with costs.

4. The Claimant filed a Witness Statement simultaneous with the Statement of Claim. The Respondent filed a Witness Statement of its Chief Accountant, Benisters Issac Kamunzyu, on 19<sup>th</sup> September 2017.

5. Parties filed separate lists of issues, which seen together, identify the issues to be:-

- Whether the Claimant's contract was terminated by the Respondent, or by the Claimant through voluntary abandonment of work.
- Whether, if termination was at the instigation of the Respondent, it was fair in accordance with the law.
- Whether the Claimant merits the prayers sought.

6. On 25<sup>th</sup> September 2018, the Parties recorded a consent order, to the effect that the dispute is considered and determined, under Rule 21 of the Employment and Labour Relations Court [Procedure] Rules 2016. The dispute was last mentioned in Court on 21<sup>st</sup> November 2018 when the Claimant confirmed the filing of his Closing Submissions.

**The Court Finds:-**

7. There is no dispute that the Claimant was employed by the Respondent between 1<sup>st</sup> July 2015 and 7<sup>th</sup> September 2016. The Workers Daily Register exhibited by the Respondent, shows he left employment on 7<sup>th</sup> September 2015. The Claimant states his contract was terminated by the Respondent without just cause and /or notice. The Respondent states the Claimant left voluntarily, and opted to work for another Employer.

8. The material on record, in particular the Witness Statements and the Workers Registers, is not sufficient to enable the Court conclude whether the Claimant was pushed out or left voluntarily. All that the Parties have shown is, that the Claimant, left on 7<sup>th</sup> September 2015. All else is silent.

9. Section 47 [5] of the Employment Act 2007 places the burden of proving that unfair termination of employment or wrongful dismissal has occurred on the Employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal, shall rest on the Employer.

10. The Claimant has not discharged his evidential burden, warranting the Respondent to justify the grounds for termination.

11. In the circumstances the Court shall treat the Claimant's contract to have been terminated through the implied consent of the Parties. Notice pay is not payable or receivable either way. Compensation for unfair termination to the Claimant is not merited.

12. The Respondent ought however, to have paid to the Claimant his terminal dues, when a demand was made for the same. There is no employment record exhibited by the Respondent, to show that the salary paid to the Claimant included the housing element. There is no record on N.S.S.F registration, and active subscription, with regard to the Claimant. The Respondent did not have any annual leave record, showing the Claimant utilized his leave entitlement. He had completed at least 12 consecutive months in service, by the time of termination, meriting both annual leave and service pay under the Employment Act 2007.

13. Against this background, the Court grants the prayers for annual leave pay over a period of 1 year at the statutory minimum of 21 days, calculated at Kshs. 12,726; arrears of house allowance for 11 months, at Kshs. 22,608; and service pay of 15 days' salary for 1 complete year of service, at Kshs. 9,090. The applicable gross monthly salary, in arriving at these figures, is Kshs. 13,702 in basic salary, plus house allowance of Kshs. 2,055, amounting to a monthly salary of Kshs. 15,757.

14. No order on the costs.

IT IS ORDERED:-

***a) Termination was through implied consent of the Parties.***

***b) The Respondent shall pay to the Claimant annual leave at Kshs. 12,726; arrears of house allowance at Kshs. 22,608; and service pay at Kshs. 9,090- total Kshs. 44,424.***

***c) No order on the costs.***

**Dated and delivered at Mombasa this 8<sup>th</sup> day of February 2019.**

**James Rika**

**Judge**