



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1291 OF 2014**

**JAMES MWATHI NDUNGU.....CLAIMANT**

**VERSUS**

**PINECHEM KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. This Cause was heard on 2 July 2018 when James Mwathi Ndungu (Claimant) testified and on 6 February 2019 when Pinechem Kenya Ltd (Respondent) produced its Director to testify.
2. The Claimant filed his submissions on 22 February 2019 while the Respondent filed its submissions on 13 March 2019.
3. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as
  - (i) Whether the termination of the Claimant's employment was unfair
  - (ii) Whether there was breach of contract and
  - (iii) Appropriate remedies/orders.

**Unfair termination of employment**

***Procedural fairness***

4. The Claimant testified that he was requested to apply for leave on 30 April 2014, and that when he resumed on 16 May 2014 he was instructed to continue with the leave and return on 30 May 2014.
5. He also testified that while still on the unsolicited leave, the Respondent's Human Resources Manager called him to go and pick a letter which he did on 31 May 2014 and found it was a termination of employment letter backdated to 30 April 2014.
6. The Claimant asserted that there was no *notice of termination of employment*, and therefore the termination of employment was unfair.
7. The Respondent's witness on the other hand maintained that *notice of termination* was given.
8. Section 35(1)(c) of the Employment Act, 2007 contemplates a *written notice of termination of employment* of at least 28 days.
9. Although asserting that a notice was given, the Respondent did not produce any notice issued to the Claimant at least 28 days before termination, in Court.
10. Further, section 41 of the Act envisages a hearing which can be triggered by a show cause/or the written notice provided for in section 35(1)(c) of the Act.
11. Since the Respondent did not demonstrate that a *written notice/show cause* was issued to the Claimant or that a hearing was held, the Court finds that the termination of the Claimant's employment was procedurally unfair.

***Substantive fairness***

12. Having failed the mandatory procedural fairness test, it is not necessary for the Court to examine whether the Respondent proved that it had valid and fair reasons to terminate the Claimant's contract as required by sections 43 and 45 of the Employment Act, 2007.

#### **Breach of contract**

##### **May 2014 salary**

13. The separation was communicated on 31 May 2014. The Claimant was entitled as of right to salary up to that date and the Respondent admitted in paragraph 9 of the Response that the Claimant was entitled to Kshs 20,000/- being salary for May 2014.

##### **Leave allowance**

14. The Claimant sought Kshs 20,000/- on account of leave allowance.

15. The Court has looked at the contract of employment. It did not provide for leave allowance but rather annual leave with pay.

16. The Claimant applied for and was granted 11 days leave and because he had not completed the whole year to qualify for the full leave, the Court will decline to find breach of contract for the balance of any leave days, if any.

##### **June 2014 salary**

17. The contract between the Claimant and Respondent having come to an end on 31 May 2014, the Claimant cannot validly claim salary for June 2014.

##### **Pay in lieu of notice**

18. The contract provided for 1 month notice or pay in lieu of notice, and because no notice was given by the Respondent, the Court concludes that the Claimant is entitled to the equivalent of 1 month pay in lieu of notice and not 3 months as sought.

##### **Service pay**

19. The Respondent admitted that the Claimant was entitled to Kshs 10,000/- as *severance pay* and the Court will allow the same based on the admission.

##### **Bonus**

20. The Claimant did not prove that he was entitled to a bonus as part of his contract.

##### **Certificate of Service**

21. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 10 days.

##### **Conclusion and Orders**

22. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(a) Pay in lieu of notice	Kshs 20,000/-
(b) May 2014 salary	Kshs 20,000/-
(c) Service pay	Kshs 10,000/-
<b>TOTAL</b>	<b>Kshs 50,000/-</b>

23. The Respondent to issue certificate of service to the Claimant within 10 days.

24. Claimant to have costs.

**Delivered, dated and signed in Nairobi on this 15<sup>th</sup> day of March 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Kahuthu instructed by Kahuthu & Kahuthu Advocates

For Respondent Mr. Kimani F.N. instructed by F.N. Kimani & Associates Advocates

Court Assistant Lindsey