



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1741 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**PETER MWANGI.....CLAIMANT**

*VERSUS*

**KIU CONSTRUCTION COMPANY LTD.....RESPONDENT**

**JUDGMENT**

On 29<sup>th</sup> September 2015, the Claimant filed his Memorandum of Claim dated 17<sup>th</sup> September 2015 suing the Respondent for unjustified, wrongful and illegal termination of employment. The Claimant seeks the following reliefs:

- a. Kshs.3,961,749.00
  - i.... 1 months’ salary in lieu of notice.....Kshs.28,750
  - ii... Unpaid leave for 6 years.....Kshs.172,500
  - iii.. Damages for unlawful dismissal.....Kshs.345,000
  - iv.. Service/gratuity for every completed year for 6 years..... Kshs.103,500
  - v... Unpaid overtime (3456 hours)..... Kshs.3,961,999
- b. Interest on (a) above at court rates from 6<sup>th</sup> April 2015 until payment in full.
- c. Costs of the claim.
- d. Any other relief this court may deem fit to grant.

It is not contested that the Respondent employed the Claimant as a clerk.

The Claimant avers that he earned a basic salary of KShs. 28,750.00. He performed his duties with due diligence and to the Respondent’s satisfaction.

The claimant avers that it was a term of the employment contract that the Claimant’s employment could only be terminated by either party upon giving one month’s notice or payment of one month’s salary in lieu of notice. However, the Respondent dismissed the Claimant from employment without a justifiable cause or notice and refused to pay him his terminal dues.

The Claimant avers that he was not issued with a certificate of service.

During trial CW1, the Claimant in this case, testified that he worked for the Respondent for 5 and a half years. It was his testimony that he was dismissed because he failed to report for work on Saturday, 11<sup>th</sup> April 2015. He elaborated that he worked on the tender for KERA for three days which resulted in fatigue so he did not report to work on Saturday. When he reported to work on Monday, the HR gave him a 2 weeks suspension letter. The suspension was extended for another week. Prior to this, he had never received any disciplinary letter or notice.

During cross examination, it was his testimony that he informed the MD that he would not work on Saturday and his request was allowed. It was also his testimony that he worked overtime and without payment. According to him, the payments made to him were for taxi.

The Claimant contended that the vouchers annexed in the Respondent's further list of documents dated 25<sup>th</sup> April 2014 do not show that the payment made was for overtime.

The Claimant testified that he was not issued with a suspension letter. He admitted to receiving several warnings for coming late.

Upon re-examination, the Claimant testified that he could recall being issued with a warning letter from Beth the HR Manager.

The Respondent opposes the Claim in its Response dated 29<sup>th</sup> October 2015 and filed on even date. The Respondent avers that this cause is incurably defective for being an abuse of the court process as the Claimant is non-suited and the memorandum of claim does not disclose any reasonable cause of action.

It is the Respondent's case that the Claimant absconded duty on several occasions, used abusive language at work, and refused to take instructions from his supervisors despite several warnings. As such, his employment was lawfully terminated.

The Respondent avers that the Claimant was issued with one months' notice and thereafter paid 1 months' salary in lieu of notice. In addition, the Claimant was paid all his dues less the statutory deductions. He was also issued with a certificate of service. The Respondent avers that it does not owe the Claimant overtime or leave.

The Claimant filed his Reply to Defence dated 8<sup>th</sup> November 2015, refuting the allegations of absconding, insubordination and using abusive language at work. He reiterated the contents of his Memorandum of Claim and especially that he was not paid any terminal dues, given any notice or paid any salary in lieu of notice.

RW1, **Elizabeth Wangui Munyu**, the HR Manager of the Respondent, testified that the Claimant's employment was terminated because he absconded duties on 6<sup>th</sup> May 2015. It was also her testimony that the Respondent's policies on tenders provided that when one worked in the night or evening, he would be paid and given the next day off. In the Claimant's case, there was a tender on Thursday so his off day was Friday but he failed to report to work on Saturday.

RW1 testified that a tender was treated as a night shift and not as overtime. As such, the respondent paid Kshs.3,000 for taxi.

During cross examination, RW1 conceded that there was no evidence of the warnings issued. It was her testimony that the Claimant was required to submit tenders at 10.00 am and then take the day off. She further testified that the Claimant was never told to wait and witness the tendering process. She admitted that she did not have proof of payment of overtime. It was also her testimony that the Claimant was not paid overtime.

Upon re-examination, RW1 re-affirmed her evidence in chief.

RW2, **Martin Makau Ngendo**, a Petty Cashier for the Respondent, testified that he worked with the Claimant on 4<sup>th</sup> April 2015. He could not recall what time they finished work on that date but it was his testimony that they normally finished work around 10:00 or 11:00 am. According to him, the Claimant was given transport.

During cross examination, RW2 testified that it was the Respondent's policy that all the employees involved in the tendering process would be given Kshs.1,000 as fare and Kshs.2,000 as appreciation. However, if their fare cost more than Kshs.1,000, an employee could claim. It was his testimony that the money was paid in cash or M-pesa.

Upon re-examination, RW2 re-affirmed the position in his evidence in chief.

### **Submissions by the Parties**

The Claimant in his submissions dated 14<sup>th</sup> June 2018 and filed on 18<sup>th</sup> June 2018, submits on the following issues: whether the Claimant's employment was unfairly terminated, whether he was paid his dues, whether the Claimant is owed money in lieu of leave and whether he is entitled to the reliefs sought.

The Claimant submits that his termination was unfair and unlawful. No hearing was carried out and he was never given a chance to explain his side of the story. He relies on the cases of **Antony Mkala Chitavi vs. Malindi Water & Sewerage Co. Limited [2013] eKLR** and **Donald Odeke vs. Fidelity Security [2012] eKLR** where the respective Courts were of the opinion that an employee should be given adequate time to respond to any charges before any action is taken against them.

The Claimant submits that he was not issued with a notice which was contrary to section 35(1)(b)(c) of the Employment Act, nor paid salary in lieu of notice as required by section 36 of the Act. The Claimant further submits that the Respondent has not provided evidence to prove that the Claimant was paid its dues.

The Claimant submits that section 28 of the Employment Act 2007 provides that an employee is entitled to annual leave with respect to consecutive months of service. It is the Claimant's position that the Respondent has not proved that the Claimant was granted annual leave or that he was paid in lieu of leave. He relies on the case of **Andrew M. Meongela vs. Mbukoni Logistics Limited [2015] eKLR**.

The Claimant submits that the Respondent has failed to prove that overtime was paid and the documents annexed to its bundle of documents are aimed to mislead this Court that overtime was paid. The Claimant further submits that he worked for more than 15 hours a day, contrary to the Regulation of Wages (General) Order that requires a normal working week to be not more than 52 hours spread over 6 days of the week.

The Claimant submits that he is entitled to the 12-month salary compensation and relies on the case of **Paul Ngeno vs. Pyrethrum Board of Kenya [2013] eKLR**. He further submits that he is entitled to gratuity payment for the 6 years he completed service as provided for under section 17 (1) of the Employment Act 2007.

The Respondent in its written submissions dated 17<sup>th</sup> July 2018 and filed on 18<sup>th</sup> July 2018, submits that during the hearing the Claimant admitted to his gross misconduct which warranted dismissal from employment as provided for under the Act.

The Respondent submits that the Claimant was not entitled to payment of accrued leave days as he was given 28 leave days annually and in the month of December.

The Respondent submits that the Claimant failed to prove how he arrived at the overtime claimed since the hours claimed are not commensurate with the salary paid to him. It is the Respondent's submissions that under the Wages Order, the hours worked plus overtime should not exceed 116 hours in any period of 2 consecutive weeks. Therefore, a worker can work only for 6 hours of overtime in a week. However, the Claimant's calculation makes overtime an average of 10 hours per week. The Respondent submits that the Claimant has misled the court that he used to work an average of two tenders per week. The Claimant worked as a clerk and overtime of Kshs.2,000.00 was paid when he participated in the tender process.

The Respondent submits that the Claimant is not entitled to gratuity as he was in a NSSF scheme.

### **Determination**

After considering the pleadings filed by the parties, the evidence adduced and the submissions made, the following are the issues for determination:

- a. Whether the termination of the Claimant's employment was wrongful and illegal.
- b. Whether the Claimant is entitled to the reliefs sought.

### **Whether the termination of the Claimant's employment was wrongful and illegal**

The Claimant has submitted that the termination of his employment was unfair and unlawful. No hearing was carried out and he was never given a chance to explain his side of the story. On the other hand, the Respondent submits that the termination of the Claimant's employment was justified because he was guilty of gross misconduct.

It is indeed correct that during cross examination, the Claimant admitted to having been issued with warning letters. However, the question this Court should ask itself is whether that in itself is sufficient to arrive at the conclusion that the Claimant was accorded a fair hearing.

Section 41 of the Employment Act, 2007 is to the effect that an employer should accord its employee a hearing before summarily dismissing them on the ground of gross misconduct. In **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR**, the Court held that:

*"Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing ... The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets."*

There is no record of a disciplinary hearing conducted by the Respondent. No evidence was adduced to buttress the Respondent's assertion that the Claimant had been issued with several warnings. The only evidence on record that alludes to the issuance of the same is the Claimant's admittance, which in itself is not sufficient to reinforce the Respondent's assertion. The respondent does not deny that the claimant was not given a hearing before the termination of his employment.

Consequently, I find that the Claimant has proved, on a balance of probability, that the termination of his employment was unfair and unlawful.

### **Whether the Claimant is entitled to the reliefs sought**

Having established that the termination was unfair and unlawful, the next issue for determination is whether the Claimant is entitled to the prayers sought.

The Respondent has failed to prove the averments in its Response, that the Claimant was issued with one months' notice or paid 1 months' salary in lieu of notice. As such the Claimant is entitled to 1 months' salary in lieu of notice. The Respondent did not adduce evidence proving that the Claimant took leave days and as such, the Claimant is entitled to unpaid leave for 5 and half years, being the period he

testified to have served the Respondent.

The Claimant has proved that the termination of his employment was unfair. He is thus entitled to compensation for unlawful dismissal.

The Claimant is not entitled to gratuity since it was not an entitlement under his contract. Further, the Claimant was a member of NSSF scheme.

The Claimant has submitted that the Respondent failed to prove that overtime was paid. On the other hand, the Respondent submits that the Claimant failed to prove how he arrived at the overtime claimed since the hours claimed are not commensurate with the salary paid to him. It further submits that under the Wages Order a worker can work only for 6 hours of overtime in a week yet his calculation makes overtime an average of 10 hours per week. In addition to this, the Claimant worked as a clerk and overtime of Kshs.2,000 was paid to him.

The Respondent is required to maintain a muster roll with details of its employees' clocking time. No such record was produced in court. However, the Respondent produced petty cash vouchers as proof of overtime payment. Nevertheless, some vouchers were for payment of taxis, others for payment of overtime and others were illegible. Since the Claimant worked overtime when he was handling tenders, he ought to have specified the number of hours he was entitled to as overtime on verifiable dates to make it easy for the Court to ascertain whether he was paid overtime and at how much. In the absence of this, it is unclear whether the Claimant was paid all his overtime dues as and when they accrued or certain days or none at all.

As such, the Claimant has not proved his case for payment of overtime on a balance of probability hence not entitled to it.

### **Conclusion**

In conclusion I award the claimant the following –

1.... One month's salary in lieu of notice..... Kshs.28,750.00

2.... Leave for 5½ years..... Kshs.127,715.40

3.... Compensation 6 months' salary..... Kshs.172,500.00

**Total** **Kshs.328,965.40**

The respondent shall pay claimant's costs.

Interest shall accrue from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF MARCH 2019**

**MAUREEN ONYANGO**

**JUDGE**