



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.517 OF 2015**

**FRED OKEMWA .....CLAIMANT**

**VERSUS**

**YANG SHUN .....1<sup>ST</sup> RESPONDENT**

**CHINA NATIONAL AERO TECHNOLOGY INTERNATIONAL**

**ENGINEERING CORPORATION (Currently under CATIC TWO**

**RIVERS PROJECT RUARAKA).....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

On 1<sup>st</sup> April, 2015 the claimant filed the Memorandum of Claim and served summons and the claim upon the respondents. On 9<sup>th</sup> February, 2015 the respondents entered appearance but no defence was filed.

On 9<sup>th</sup> April, 2018 parties attended court for hearing but the respondent moved the court to be allowed for more time to file defence which was allowed but there was no compliance. The claimant has moved the court severally for a hearing but the respondent failed to comply. A hearing notice for the 2<sup>nd</sup> April, 2019 was served upon the respondent on 19<sup>th</sup> March, 2019 but on the due date there was no attendance. The claimant was heard on his case.

The claimant was employed by the respondent on 31<sup>st</sup> May, 2014 as a mason and paid Ksh.460.00 per day and Ksh.100.00 house allowance per day.

On 11<sup>th</sup> January, 2015 the claimant was terminated in his employment for no good cause, there was no notice or hearing. No reasons were given for the summary action of termination of employment. There was no effort to ensure natural justice or the provisions of section 41, 43 and 45 of the Employment Act.

The claimant made a report to the labour officer, Kiambu who summoned the respondent but there was no attendance.

The claims are for the following dues;

- a) Notice pay at Ksh.19,760.00;
- b) Pro-rata leave of 7 months Ksh.11,400.00;
- c) Service gratuity Ksh.4,940.00;compensation;
- d) Certificate of service.

The claimant testified in support of his case and outlined the claims made on the basis that his employment was terminated unfairly and compensation is due.

As set out above there was no defence filed or attendance at the hearing. The claims made shall be assessed based on the pleadings, the evidence of the claimant and the applicable law.

The failure by an employer to file defence or file the work records is a matter contrary to the objectives of the court. Section 3 of the Employment and Labour Relations Court Act, 2011 requires parties in employment and labour relations to assist the court in achieving its objectives in the administration of justice. Where the respondent as the employer entered apurtenance but failed to file defence or attend at the hearing, the only material left for the use by the court is that from the claimant.

At the close of the hearing, the claims made were not challenged.

Notice is due to an employee under section 35 of the Employment Act, 2007 (the Act) before employment can terminate. Even where such notice is issued, section 41, 43 and 45 of the act requires the employer to notify the employee on the reasons leading to termination of employment and to allow the employee give a defence. Without taking such procedures, the resulting termination of employment is unfair.

In this case, without any defence or attendance for the respondent to give reason(s) leading to termination of employment, there being no notice issued and without reason(s), the same is hereby found unfair and notice pay is due together with compensation for unfair termination of employment as required under section 49 of the Act. Notice pay is hereby awarded at Ksh.11, 760.00 being the wage due for one month.

Compensation is also awarded at ksh.11, 760.00 being an equivalent of one month wage.

Section 28 of the Act also requires payment of due leave days not taken during the course of employment. Without any work records in terms of section 10(6) of the Act to confirm the claimant went on leave or was paid in lieu thereof, the payment due is in accordance with section 28(1)(b) at 1.75 days per month for the 7 months of service all being ksh.5,635.00.

Service pay is due in accordance with section 35 of the Act as there are no work records to confirm statutory deductions and r remittance. For the 7 months worked the claimant is entitled to Ksh.4, 940. As claimed.

In this regard, upon termination of employment, a certificate of Service in accordance with section 51 of the Act should unconditionally issue to the claimant.

**Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;**

- (a) A declaration that the claimant was unfair terminated in his employment by the respondent;**
- (b) Compensation awarded at ksh.11,760.00;**
- (c) Notice pay Ksh11,760.00;**
- (d) Leave pay ksh.5,635.00;**
- (e) Service pay Ksh.4,940.00;**
- (f) Certificate of service to issue in accordance with section 51 of the Employment Act, 2007; and**
- (g) Costs of the suit.**

Delivered at Nairobi this 5<sup>th</sup> day of April, 2019.

**M. MBARU JUDGE**

in the presence of: .....

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