



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1005 OF 2014**

**CHRISPUS WAMBUA MUTALI.....CLAIMANT**

**- VERSUS -**

**SEYANI BROTHERS AND COMPANY (K) LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> May, 2019)

**JUDGMENT**

The claimant, Chrispus Wambua Mutali, testified that the respondent employed him in October 2004 as a foreman at the respondent's construction site at Upperhill in Nairobi. The claimant's work included supervising other workers at the construction site until October 2013 when his immediate supervisor summoned him and told him to go away for a month and to resume duty thereafter. He was not recalled or allowed to resume duty and he was not paid his terminal dues. Despite an opportunity to call a witness, the respondent failed to avail the witness and the hearing closed without the respondent giving evidence.

The claimant filed the memorandum of claim on 17.06.2014 through O.N. Makau & Mulei Advocates. The claimant prayed for judgment against the respondent for:

1. The sum of Kshs. 539, 000.00 being one month pay in lieu of notice Kshs.18, 000.00; 8 years unpaid leave Kshs. 144,000.00; severance pay Kshs.162, 000.00; and 12 months compensation Kshs. 216, 000.00.
2. Costs of the suit.
3. Interest on 1 and 2 above at Court rates.
4. Any other or further relief as the Honourable Court may deem fit and just to grant.

The respondent entered appearance on 01.07.2014 through Kale Maina & Bundotich Advocates who filed the memorandum of response on 10.03.2015.

The respondent admitted in the response that it employed the claimant from October 2008 and the claimant had not been unfairly dismissed but that upon completion of the works at the World Bank building, the respondent told the claimant to go away to be recalled when the respondent obtained another construction project.

The Court has considered the pleadings, the evidence and the submissions filed for the claimant and makes findings as follows:

1. The evidence is clear that parties were in a contract of service. The claimant worked without a break from October 2004 as per voucher dated 16.10.2004 to October 2013 when he was told to go away to be recalled. His monthly pay was Kshs.18, 000.00 payable at Kshs.4, 500.00 per week. The Court returns that parties were in a contract of service.
2. The Court returns that the parties separated when the claimant was told to go away and to be recalled later. The termination amounted to unfair redundancy when the respondent failed to recall the claimant. The Court has considered the claimant's clean record of service, the 9 years of unbroken service and the abrupt termination. The Court balances justice for parties and returns that for unfair termination in breach of section 40 of the Employment Act, 2007, the claimant is awarded 12 months' salaries in compensation under section 49 of the Act making **Kshs.108,000.00**. The Court further awards the claimant one month salary **Kshs.18,000.00** in lieu of termination notice, severance pay at 15 days for each year served making Kshs.9,000.00 x 9 thus **Kshs.81,000.00**; and 8 years of unpaid leave as prayed for **Kshs. 144,000.00**. Thus in view of the prayers and under section 40 as read with section 49 of the Act, the respondent will pay the claimant a sum of **Kshs.351,000.00**.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. Payment of **Kshs. 351,000.00** by 01.08.2019 failing interest to be payable thereon at Court rates from the date of the judgment till full payment.
2. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 17<sup>th</sup> May, 2019.**

**BYRAM ONGAYA**

**JUDGE**