



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 778 OF 2017**  
**BETWEEN**  
**SAMUEL GITHINJI MWICHIGI.....CLAIMANT**  
**VERSUS**  
**CHINA ROAD & BRIDGE [KENYA] CO. LIMITED....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mburu Kariuki & Company Advocates for the Claimant*

*Waithera Ngige & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 4<sup>th</sup> October 2017. He avers he was employed by the Respondent Company as a Dumper Driver, in August 2015. He worked until 9<sup>th</sup> September 2016, when he alleges, the Respondent unfairly terminated his contract. His last salary was Kshs. 50,528 monthly. He seeks Judgment against the Respondent in the following terms:-

- a) Salary for August 2016 at Kshs. 50,528.
- b) 12 months' salary in compensation for unfair termination at Kshs. 606,340.
- c) 3 months' salary in lieu of notice at Kshs. 151,525.

**Total...Kshs. 808,393**

- d) Certificate of Service to issue.
- e) Costs.
- f) Interest.

2. The Respondent did not enter appearance and file its response within the period prescribed by the Employment and Labour Relations Court [Procedure] Rules 2016. The Claim was mentioned in Court on 23<sup>rd</sup> October 2018, and scheduled to be heard on formal proof on 18<sup>th</sup> February 2019.

3. There is on record a Notice of Appointment of Advocates, filed on 1<sup>st</sup> November 2018. On 10<sup>th</sup> January 2019, a few weeks to the scheduled formal proof hearing, the Respondent filed a Statement of Response.

4. This Statement of Response was filed way beyond the prescribed time, without the leave of the Court, when the matter had already been fixed for formal proof, and was clearly therefore, improperly placed on the record. ***The Statement of Response filed on 10<sup>th</sup> January 2019,***

*is expunged from the record.*

5. On the 18<sup>th</sup> February 2019, the Claimant testified on formal proof. He adopted his Witness Statement on record. He relied on list of documents filed on 4<sup>th</sup> October 2017, which includes pay slip and bank statements.

**The Court Finds:-**

6. The evidence on record is adequate to establish that the Claimant was employed by the Respondent as a Dumper Driver. He worked from August 2015 to 9<sup>th</sup> September 2016. His duties entailed ferrying of blocks and building materials from DK 19 Kokotoni, to DK 2 in Port Reitz, Mombasa, for construction of the Standard Gauge Railway. His salary was Kshs. 50,528 monthly.

7. The evidence shows he was undertaking such duty, when he was informed by the Respondent, by word of mouth, that his contract had been terminated. There was no notice. There were no accusations of any employment offence leveled against the Claimant. He was not heard on any allegation. Termination was not based on valid reason or reasons, and did not conform to fair procedure, under Sections 41, 43 and 45 of the Employment Act.

**8. There is no evidence adduced by the Respondent to contradict the Claimant on his prayer for August 2016 salary. It is allowed at Kshs. 50,528.**

9. The Claimant has not established that he was entitled to 3 months' salary in lieu of notice. No contract, wage instrument or legal provision has been brought to the attention of the Court, to back up this prayer. He was paid a monthly salary. **Under Section 35 and 36 of the Employment Act, he is entitled to 1 month salary in lieu of notice, which the Court grants at Kshs. 50,528.**

10. Termination as concluded above was unfair on account of both procedure and substance. The Claimant had worked for period of 1 year. He expected to work to the end of the SGR project. His contract was terminated before the end of the project. He however has no justification to demand for 12 months' salary in compensation for unfair termination, having worked in total for about the same period of 12 months. **He is granted equivalent of 4 months' salary in compensation for unfair termination at Kshs. 202,212.**

11. *Certificate of Service to issue.*

12. *Costs to the Claimant.*

13. *Interest allowed at 14% per annum from the date of Judgment till payment is made in full.*

IN SUM, IT IS ORDERED:-

**a) It is declared that termination was unfair.**

**b) The Respondent shall pay to the Claimant: salary for August 2016 at Kshs. 50,528; notice at Kshs. 50,528; and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 202,212- total Kshs. 303,268.**

**c) Certificate of Service to issue.**

**d) Costs to the Claimant.**

**e) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.**

Dated and delivered at Mombasa this 14<sup>th</sup> day of June 2019.

James Rika

Judge