



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1011 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 13th June, 2019)

NGUMBI NDUNYUCLAIMANT

VERSUS

BITO LIMITEDRESPONDENT

JUDGEMENT

1. The Claimant filed the instant Claim on 18th June, 2017, through the firm of S.K Opiyo & Company Advocates, seeking damages for wrongful and/or unlawful termination of the Claimant's employment by the Respondent on account of redundancy and refusal to pay terminal dues owed to the Claimant.
2. The Claimant states that he was employed by the Respondent on the 2nd February, 2009 as a turn boy earning a daily rate of Kshs. Three Hundred and Sixty Five Only (Kshs. 365/-). The Claimant further averred that the amount was increased over time to Kenya Shillings Four Hundred and Forty Six Only (Kshs. 446/-) payable at the end of every month.
3. The Claimant contends that the Respondent unlawfully terminated his contract of employment on 31st June, 2012 and failed to pay his terminal dues as required by the Employment Act, 2007.
4. The Claimant further contended that he demands from the Respondent the sum of Kenya Shillings Two Hundred and Twelve Thousand Two Hundred and Fifty Three Only (Kshs. 212, 253/-) tabulated as hereunder:

<i>a) One Month payment in lieu of notice</i>	<i>Kshs. 13,380/-</i>
<i>b) Severance Pay for three years</i>	<i>Kshs. 20,070/-</i>
<i>c) Unpaid Salary for days worked</i>	<i>Kshs. 4,863/-</i>
<i>d) Unpaid leave for 3years</i>	<i>Kshs. 34,788/-</i>
<i>e) 12 months salary for wrongful termination</i>	<i><u>Kshs. 139,152/-</u></i>

Total ***Kshs. 212,253/-***

5. It is the Claimant's assertion that his termination was unfair as it failed to conform to the mandatory provisions of the law and more specifically Section 40 (1) (a) (b), Section 45 and Section 4 (1) (2) of the Employment Act, 2007.
6. The Claimant avers that the Respondent refused/declined or failed to pay his terminal dues despite requisite demand being issued prompting the Claimant to file the instant Claim now pending before this Honourable Court.
7. In his Memorandum of Claim the Claimant prays for Judgment be entered against the Respondent for:-

1. Accrued sum of the terminal dues of Kenya Shillings Two Hundred and Twelve Thousand Two Hundred and Fifty Three (Kshs. 212,253/-).

2. General Damages for breach of contract and loss of employment.

3. Costs of this suit.

4. Interest in (1), (2) and (3) above.

5. Any other relief as the Court may deem just.

8. The Respondent despite being served with the summons as well as the Statement of Claim herein failed to enter Appearance or file an appropriate Response to the Claim. The matter was subsequently certified ready to proceed as an undefended Claim and the Claimant directed to fix the matter for hearing.

9. On the hearing date on 2nd April, 2019 the matter proceeded with the Claimant, CW1 testifying on his behalf.

10. The Claimant sought and was allowed to adopt his witness statement dated 20th November, 2017 as his evidence in chief. In his statement, the Claimant reiterates the averments made in his Statement of Claim.

11. CW1 further testified that his services were terminated by the Respondent unfairly after he was involved in an accident.

12. CW1 contended that he was not paid his dues at the time of separation with the Respondent.

13. The Claimant urged the Court to allow the Claim as drawn.

Claimant's Submissions.

14. It is submitted on behalf of the Claimant herein that he was an employee of the Respondent as evidenced by the certificate of service issued and annexed in the Claimant's Memorandum of Claim as Appendix 1. The Claimant urged the Court to find that he was indeed an employee of the Respondent earning a salary of Kshs. 13,380/- monthly.

15. It is further submitted that the Claimant's services were wrongfully and unlawfully terminated as the same was done without notice to show cause contrary to the provisions of Sections 40 and 41 of the Employment Act, 2007.

16. The Claimant contends that he is entitled to the prayers sought in his Memorandum of Claim and sought to rely on the provisions of Section 40 (1) (g) and 74 of the Employment Act, 2007.

17. The Claimant further cited and relied on the Authority of **Industrial Court Cause No. 1591 of 2010 Tom Ndadema & Another Vs Club Click** where the Court ordered that ***the Claimants be paid their dues on account of.... No hearing of either Claimant is shown to have taken place as Section 41 and 45 of the Act demand. Termination was not shown to have been in accordance with justice and equity and amounts to unfair termination for which compensation is awardable...***

18. In conclusion, the Claimant urged this Honourable Court to award his Claim as drawn.

19. I have examined all the evidence and submissions of the Claimant before me. From the documents in Court, the Claimant was employed by the Respondent and that is why he was issued with a certificate of service (Appendix 1).

20. The Claimant aver that he was terminated unlawfully after he sued the Respondent's sister company for injuries sustained at work.

21. There is no evidence adduced by the Respondent to show that the Claimant left on his own volition or was otherwise terminated fairly.

22. The evidence of the Claimant remained uncontroverted by the Respondent who failed to defend this suit.

23. I therefore find the Claimant has established his case against the Respondent and I award him as follows:-

1. 1 month salary in lieu of notice = 13,380/=

2. Unpaid leave for 1 year = 13,380/=

3. Unpaid salary for days worked = 4,863/=

4. 8 months salary as compensation for unfair and unjustified termination = 8 x 13,380 = 107,040

TOTAL = 134,663/=

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 13th day of June, 2019

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties