



- ***Economic injury compensation***

**for 15 years unserved**                      **Kshs. 12,600,000/-**

- ***Leave for 15 years***    **Kshs. 1,050,000/-**

**Total**    **Kshs. 15,700,000/-**

**b. Damages for unfair termination**

**c. Costs and interest at Court rates of (a) and (b) above.**

5. The Respondents in their Memorandum of Reply admit having engaged the Claimant earning a monthly salary of 91,989/-. They however deny that the Claimant was entitled to any allowances as alleged.

6. The Respondents further aver that the Claimant's termination was based on poor performance which had been communicated on various occasions through both verbal and written warnings as evidenced by the warning letters annexed A and B.

7. The Respondents contend that the Claimant's services were lawfully terminated and further that he was paid all his dues at the time of separation.

8. The Respondents further contend that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent ought to be struck out with costs from the proceedings as they have been improperly sued. The Respondents urged this Honourable Court to therefore dismiss the instant Claim with costs.

9. The matter proceeded for hearing on **12<sup>th</sup> June, 2018** and **16<sup>th</sup> January, 2019** with both the Claimant and the Respondent calling one witness each.

10. It was CW1's testimony that at the time of engagement he was 40 years old and that he was not issued with an appointment letter at the time of engagement. CW1 further produced copies of his payslip as proof of employment.

11. CW1 further testified that during the subsistence of his employment with the Respondent he was forced to use his personal car to carry out official duties however, he was not paid any allowances for the same despite the fact that he was eligible to fuel allowances.

12. CW1 stated that given his age at the point of engagement he had a total of 15 years before he retires at the age of 60 years. The Claimant urged the Court to allow his claim as drawn.

13. On cross-examination, CW1 stated that his services were verbally terminated on 31<sup>st</sup> March, 2015. He further stated that on the said date the 2<sup>nd</sup> Respondent informed him that the Company no longer required his services.

14. On further cross-examination, CW1 further stated that he worked for the Respondent herein for a total of 4 years 8 months. He added by stating that prior to his termination he was not issued with any warning letter and that the letter attached to the Respondent's reply was never served on him.

15. CW1 insisted that he is entitled to damages for wrongful termination as no notice was issued to him prior to his separation from the Respondents' employment.

16. On re-examination, CW1 stated that he sought for 3 months' salary in lieu of notice since he did not receive any notice prior to his termination and also because it was a normal practice by the Respondents to pay the same at the time of separation.

17. The Respondent on the other hand called one witness, RW1 (Francis Musamula, an Assistant Financial Controller at the Respondent Company) testified on behalf of the Respondents herein.

18. RW1 sought and was allowed to have his witness statement filed in Court on 15<sup>th</sup> January, 2019 adopted as his evidence in chief. In his statement RW1 stated that the Claimant was employed by the Respondent only and not by any of its subsidiaries as alleged.

19. RW1 further averred that the Respondent convened a disciplinary meeting to discuss the Claimant's poor performance and that the Claimant was given a chance to explain why his performance was poor. However, the response received was unsatisfactory thus warranting his termination.

20. RW1 contended that the Claimant was paid all his dues at the time of separation and therefore the instant Claim ought to be dismissed with costs to the Respondents.

21. On cross-examination, RW1 stated that there were no minutes produced for the disciplinary meeting with the Claimant herein. He further averred that despite the fact that the Respondent had paid the Claimant all his dues at the time of separation there was no evidence to support that position.

22. Parties thereafter filed and exchanged their written submissions to the Claim filed herein.

### **Claimant's Submissions**

23. The Claimant submitted that his termination was unfair and that the same amounted to summary dismissal for the reason that there was no valid reason for his termination and that his termination was not in accordance with fair procedure as provided under Section 43 (1) and 45 of the Employment Act, 2007. To fortify this argument the Claimant relied on the cases of **John Wafula Simiyu Vs The Star Publications Limited (2016) eKLR** and **Samson Owiti Vs Kenya Ports Authority, Industrial Cause No. 131 of 2012** for emphasis.

24. It is further submitted that the Claimant is entitled to the reliefs as sought in his Memorandum of Claim. It was further submitted that this Court has power to award damages where wrongful termination occurs. The Claimant cited and relied on the Authority of **Dr. Ezekiel Nyangoya Okema Vs Kenya Marine & Fisheries Research Institute (2016) eKLR** for emphasis.

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

### **Respondents' Submissions**

26. The Respondents submit that due process was followed while dismissing the Claimant herein and in particular, the mandatory provisions as set in Sections 41, 45(5) and 49 of the Employment Act, 2007.

27. The Respondents further contended that the Claimant's termination was warranted due to the Claimant's poor performance and as such the Claimant is not entitled to the reliefs as sought in his Memorandum of Claim. For emphasis, the Respondents cited the Authority of **Francis Nyongesa Kweyu Vs Eldoret Water and Sanitation Company Limited (2017) eKLR** for emphasis.

28. In conclusion, the Respondent urged this Honourable Court to dismiss the instant Claim with costs as the Claimant has failed to prove his case on a balance of probability and further that due process was followed while terminating the Claimant's services.

29. I have examined all evidence of the Parties and submissions filed. The issues for determination are as follows:-

**1. Whether the Respondents had valid reasons to terminate the Claimant.**

**2. Whether the Claimant was given a fair hearing before dismissal.**

**3. Whether the Claimant is entitled to remedies sought.**

30. The Claimant has indicated that he was terminated ostensibly due to allegation that he was a poor performer. The Respondent aver that they had previously warned the Claimant about his poor performance without any change. No evidence was submitted by the Respondent though about the poor performance. There is no evidence that he had been warned of the poor performance either.

31. Section 43 of Employment Act 2007 states as follows:-

**1. "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".**

32. From the law, it is the Respondent to prove the fact that they had valid reasons to terminate the Claimant's services.

33. On issue of due process, the Claimant avers that he was verbally terminated without any formal disciplinary process. The Respondent insisted they gave the Claimant a chance to defend himself but provided no minutes to prove this allegation.

34. Section 41 of Employment Act 2007 states as follows:-

**1. "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".**

35. It is indeed the duty of the Respondent to accord an employee a fair hearing as indicated above. There is however no proof that this was

done in the case of the Claimant.

36. In view of the fact that there were no valid reasons advanced to warrant the Claimant's dismissal and no due process was followed, I find the termination of the Claimant unfair and unjustified as envisaged under Section 45 (2) of Employment Act 2007 which states as follows:-

**2. "A termination of employment by an employer is unfair if the employer fails to prove:**

**a. that the reason for the termination is valid;**

**b. that the reason for the termination is a fair reason:-**

**i. related to the employee's conduct, capacity or compatibility; or**

**ii. based on the operational requirements of the employer; and**

**c. that the employment was terminated in accordance with fair procedure".**

37. In terms of remedies, I find for the Claimant and I award him as follows:-

**1. 1 month salary in lieu of notice = 91,989/=was**

**2. 8 months' salary as compensation for unlawful termination = 8 x 91,989=735,912/=**

**TOTAL = 827,901/= less statutory deductions**

**3. 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 12<sup>th</sup> day of June, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Anganya holding brief Olando for Claimant

No appearance for Respondent