



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 110 OF 2018**

**JUSTUS MIWANI.....CLAIMANT**

**VERSUS**

**JIANGXI WATER & HYDRO POWER CONSTRUCTION KENYA LIMITED....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent whom he alleged was his employer from 2<sup>nd</sup> May 2016 as general labourer. He averred that he earned Kshs. 720/- a day and that the daily wage was Kshs. 1,050/- on weekends. He averred that he worked for 9 hour a day from 7.30am to 5.30pm 7 days a week. The Claimant averred that as evidence of his employment the Respondent made monthly NSSF contribution on his behalf. He averred that he served with distinction and that the dismissal on 10<sup>th</sup> November 2017 after the Respondent's deputies alleged he was engaged in theft at the Respondent's premises. The Claimant averred that the Police released him as they found there was no case against him. The Claimant upon return to the premises of the Respondent was told to leave and not return again. He averred that he was shocked by the turn of events and to date he is yet to secure an alternative employment. He thus sought a declaration that his termination was unfair, unlawful and wrongful; terminal benefits and compensatory damages – overtime at Kshs. 112,183.60, one month's salary in lieu of notice – Kshs. 21,171.80, payment in lieu of leave not taken – Kshs. 29,925.50, maximum compensation for unfair termination – Kshs. 254,061.60; general damages for breach of the employment contract; interest on the sums claimed; certificate of service; costs of the suit and any other relief the honourable court may deem fit to grant.

2. The Respondent filed a defence in which it denied that the Claimant had been its employee from 2<sup>nd</sup> May 2016. The Respondent denied that the Claimant worked for 9 hours and averred that the Claimant was a casual labourer. The Respondent averred that the Claimant voluntarily resigned from his employment after being caught in possession of stolen property belonging to the Respondent. The Respondent averred that it paid all outstanding dues to the Claimant and that it was not served with a letter of demand. The Respondent averred that on 8<sup>th</sup> November 2018, the Claimant was searched when employees were knocking off from duty and was found with stolen property of the Respondent. The Respondent averred that the incident was reported to Kiringiti Administrative Police Post and that it opted not to pursue criminal charges after the recovery of all the stolen equipment. It averred that the Claimant was accorded the opportunity to be heard in accordance with Section 41 of the Employment Act and that during the period of notice in full satisfaction of Section 35 of the Act, the Claimant resigned from employment. The Respondent averred that it was actually the one owed one month's salary in lieu of notice under Section 36 of the Employment Act.

3. The Claimant testified and the Respondent failed to attend the hearing scheduled despite service. The Claimant stated that he was employed on 2<sup>nd</sup> May 2016 and was dismissed on 10<sup>th</sup> November 2017. He stated that he was a general labourer and worked every day of the week from 7.30am till 5.30pm. He testified that he was not told that he was a casual. He stated that he was paid Kshs. 720/- per day and on weekends he earned Kshs. 1,050/-. He said that he was paid at the end of the month and never went of leave. He stated that he was accused of theft and when taken to the Police the Police advised that no case could progress without evidence. He stated that at the office he was dismissed and the Respondent declined to pay him. He testified that no reason was given for the dismissal. He denied that he resigned and stated that he was dismissed and that no dues were paid upon dismissal.

4. The Claimant filed final submissions in which he submitted that he was unconditionally released despite the accusations made against him by the Respondent. He submitted that he would have been charged with theft if there was proof. He submitted that no disciplinary mechanisms were instituted to investigate and punish him which was indicative of the fact that the Claimant was innocent. The Claimant submitted that letter of resignation was written by the Respondent and was not his own as he had been terminated on 10<sup>th</sup> November 2017 and the letter was written on 11<sup>th</sup> November 2017 after he had left the Respondent. He cited the case of **David Kipkosgei Mutai v Green Palms Academy [2014] eKLR** and submitted that the termination without a valid reason such as his and without following procedure is unfair termination. He relied on Section 43 of the Employment Act as well as Section 41. The Claimant cited the case of **Kenya Union of Commercial Food and Allied Workers Union v Meru North Farmers Sacco Limited [2014] eKLR** where Mbaru J. held that there must be a hearing in the eventuality that the employee will face summary dismissal or termination. He submitted that Section 41 was couched in mandatory terms.

5. The Claimant was terminated circa 10<sup>th</sup> November 2017. He did not avail any documentation that proved employment from 2016. He was employed from all accounts in 2017. His NSSF statement is for 2017 as are his bank statements. Having regard to the pleadings and testimony adduced, the issues that emerge for determination in this case can be distilled as follows:-

1. Whether the Claimant's termination was unfair
2. If the termination was unfair what remedies is he entitled to?

Regarding his dismissal, the Claimant was dismissed without a hearing in terms of Section 41 despite the Respondent asserting that he was heard. As held in the case of **Kenya Union of Commercial Food and Allied Workers Union v Meru North Farmers Sacco Limited** (*supra*) Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of his chosen representative. He claimed overtime and the like but did not avail any proof of the time worked or any letter seeking payment of the overtime. If he worked overtime as the payments made suggest, the payments made (which varied each month) were sufficient recompense for the time he worked. He never raised any finger during his employ and there is therefore no proof that he was aggrieved by the pay he received. He also did not convince the court that he worked every day of the week for the entire duration of his employment. He also did not prove that he sought leave and was denied leave. No correspondence or rejected leave applications were availed to prove he did not go on leave. That said, granted that the failure to accord the Claimant a hearing in terms of Section 41 rendered the dismissal unfair and unlawful, the Claimant would be entitled to remedies as follows:-

- (i) One months' salary in lieu of notice – Kshs. 21,171.80
- (ii) 3 months' salary compensation – Kshs. 63,515.40
- (iii) Costs of the suit.

It is so ordered.

**Dated and delivered at Nyeri this 17<sup>th</sup> day of July 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**