



**REPUBLIC OF KENYA**

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

**ELRC NO. 522 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 1<sup>st</sup> July, 2019)**

**ELKANA KWENDO KIBOI.....CLAIMANT**

**VERSUS**

**KARSAN RAMJI & SONS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed a Memorandum of Claim dated 31<sup>st</sup> March, 2014, and filed in Court on 1<sup>st</sup> April, 2014 through the firm of Y. Jeruto & Company Advocates seeking damages for wrongful dismissal from the Respondent's employment and failure and/or refusal and/or neglect to pay his terminal dues at the time of separation.

2. The Claimant states that he was employed by the Respondent on 1<sup>st</sup> April, 1988 as a casual worker and was thereafter confirmed as a permanent employee. He further averred that he was earning a monthly salary of Kenya Shillings: Nine Thousand Six Hundred Only.

3. The Claimant contends that he diligently and dutifully rendered services until on or about 30<sup>th</sup> September, 2013 when he was unlawfully terminated from his employment due to unjustified reasons and was denied payment of his terminal dues.

4. The Claimant further contends that the Respondent failed to provide him with housing during the subsistence of his employment contract. He further seeks payment of his terminal dues consisting of the following:

1. <i>Salary in lieu of notice (Kshs. 9600 x 3 months)</i>	<i>Kshs. 28,800/-</i>
2. <i>House allowance( Kshs. 2,000 x 12 x16 years)</i>	<i>Kshs. 384,000/-</i>
3. <i>Service for 15 days x16 yearsx400 per day</i>	<i>Kshs. 96,000/-</i>
4. <i>Leave allowance 1 year</i>	<i>Kshs. 8,400/-</i>
<b><u>Total</u></b>	<b><u>Kshs. 517,200/-</u></b>

5. In his Memorandum of Claim the Claimant prays for the following:-

- a) **The principal sum of Kshs. 517,200/-**
- b) **Interest at Court rates on (a) above**
- c) **Costs of the suit**
- d) **Any other relief this honourable Court will deem fit to grant.**

6. The Claimant urges the Court to allow his claim as drawn.

7. The Respondent in its Statement of Response dated on 15<sup>th</sup> May, 2014 and filed in Court on 16<sup>th</sup> May, 2014 in which the Respondent confirms that indeed the Claimant was its employee. However, they contend that the Claimant was employed on 20<sup>th</sup> April, 2007 as a general worker at the Respondent's quarry site and a copy of the appointment letter was annexed to the Response and is marked Appendix 1.

8. The Respondent further avers that on or about 23<sup>rd</sup> January, 2013 an explosion occurred at its quarry site as a result of which the Claimant herein was injured and was allowed to proceed on sick leave as recommended by the Medical report prepared.

9. The Respondent contends that the Claimant resumed duty in May 2013 but his performance had deteriorated due to the injuries he sustained in January. It is further the Respondent's contention that the Claimant did give an oral notice of his intention to leave the Respondent's employment.

10. The Respondent states on 14<sup>th</sup> November, 2013 it did issue the Claimant with a letter of termination at his request to assist him expeditiously process his dues from NSSF.

11. The Respondent avers that the Claimant is not entitled to the reliefs as sought in his Memorandum of Claim having voluntarily resigned from his employment and further that he (the Claimant) was duly paid all his terminal dues at the time of separation.

12. The Respondent further urges the Court to dismiss the Claim with costs.

### Evidence

13. The Claimant, CW1 in his evidence stated that he was employed by the Respondent to crush stones at its quarry and was paid Kshs. Four Hundred Only per day.

14. It was further CW1's evidence that his services were terminated on 30<sup>th</sup> November, 2013 while he was on duty and that no reason was given to him for his termination. CW1 further averred that he was not paid his dues at the time of separation. He further urged the Court to allow his Claim as drawn.

15. On cross-examination, CW1 stated that he was not issued with any appointment letter. CW1 further stated that following his injury at the Respondent's quarry he was admitted at Kenyatta National Hospital and that he paid for the medical bill himself. He further contended that the amount that was paid to him for the injury by the insurance was retained by the Respondent as payment for the hospital bill.

16. CW1 on further cross examination stated that when he resumed duties following his injury he learnt that the Respondent had been deducting his salary. It was his further testimony that he did not resign as alleged by the Respondent but rather his services were unlawfully and unfairly terminated by the Respondent and reasons thereof not given to him.

17. CW1 contended that Appendix 5 (the termination letter dated 14<sup>th</sup> November, 2013) was not signed by him. He further contended that he is entitled to the reliefs as sought in his Memorandum of Claim.

18. The Respondent on the other hand opted to close its case without calling any witness.

19. Parties thereafter filed and exchanged written submissions to the Claim.

### Submissions

20. It is submitted on behalf of the Claimant that his termination by the Respondent was wrongful, unfair and unlawful as it was contrary to the provisions of Section 45 (1) and (2) of the Employment Act. To fortify his argument the Claimant relied on the case of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where the Court held:-

***"...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."***

21. It is further submitted that the Claimant's termination also contravened Section 41 of the Employment Act, which requires an employer before terminating the employment of an employee to explain to the employee the reasons for which the employer is considering termination.

22. The Claimant further submitted that he is entitled to the reliefs as sought in his Memorandum of Claim and placed emphasis on the provision of Section 10(7) of the Employment Act and Regulation 17(1) of the Regulation of Wages and Conditions of Employment Act. The Claimant further cited and relied on the Authority of **Gilbert Kasumali Kithi Vs Nyali Beach Hotel Resort (2015)** for emphasis.

23. In conclusion, the Claimant urged this Court to allow his Claim as drawn.

24. The Respondent on the other hand submitted that the Claimant is not entitled to salary in lieu of notice as he orally resigned from work in order to access his NSSF pension dues as evidenced by Appendix 4 being the letter dated 14<sup>th</sup> November, 2013 from NSSF to the Respondent herein.

25. It is further submitted that the Claimant is not entitled to service pay having failed to establish the basis for the same. Further that the Claimant at Appendices 5 and 6 of the Memorandum of Response undertook that he has no claim with the Respondent herein. The Respondent to fortify its argument cited and relied on the cases of **Katiwa Kanguli Vs Bamburi Cement Limited (2015) eKLR** and **Coastal Bottlers Limited Vs Kimathi Mithika (2018) eKLR** for emphasis.

26. I have considered evidence of the Claimant and submissions filed. The Respondent failed to call any evidence and therefore the Claimant's case remained undisturbed. The Respondent had contended that the Claimant resigned but there was no evidence to prove this.

27. In view of the fact that the Claimant's case remained undisturbed, the findings of this case is that the Claimant was terminated unfairly as pleaded.

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

*1. 1 month salary in lieu of notice = 9,600/=*

*2. House allowance at 15% of 9600 x 12 x 16 years = 1440 x 12 x 16 = 276,480/=*

*3. Leave for 1 year = 8400/= as prayed*

*4. 6 months salary as compensation for unlawful termination = 6 x 9,000 = 57,600/=*

**TOTAL = 352,080/=**

*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 1<sup>st</sup> day of July, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kilonzo for Respondent – Present

Claimant – Absent