



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 462 OF 2014

EMMANUEL ALUSACLAIMANT

VERSUS

PARBAT SIYANI CONSTRUCTION LTD.....RESPONDENT

JUDGMENT

1. Through a *Memorandum of Claim* lodged with the Court on 24 March 2014, Emmanuel Alusa (Claimant) sought service pay/gratuity/compensation for unfair termination of employment and salary in lieu of notice.
2. Parbat Siyani Construction Ltd (Respondent) filed a *Memorandum of Reply* on 18 April 2014 contending that the Claimant was summarily dismissed for gross misconduct, and was not entitled to any of the reliefs sought.
3. The Claimant joined Issue with the *Memorandum of Reply* on 7 May 2018 and the Cause was heard on 4 July 2019. The Claimant and the Respondent's Security and Safety Manager testified.
4. The Claimant filed his submissions on 29 July 2019 while the Respondent's submissions were filed on 30 August 2019.
5. The Court has considered the pleadings, evidence, and submissions and will proceed on the basis of Issues as proposed by the Claimant and adopted by the Court on 7 November 2018.

Unfair termination of employment

6. The Respondent's Security and Safety Manager handed to the Claimant a letter dated 7 January 2014 informing him of the termination of his employment with effect from 6 January 2014. The letter made reference to section 44(4)(g) of the Employment Act, 2007.
7. Section 35(1)(c) of the Act requires a *written notice of termination of employment*. The notice may serve as or take the form of what is generally called a show cause.
8. The Respondent's witness admitted no such notice was given.
9. Section 41(2) of the Act contemplates affording an employee an opportunity to make representations before summary dismissal.
10. The Claimant's testimony was that he was not afforded an opportunity to be heard. He narrated that he was attacked by a colleague on 4 January 2014 as a result of which he sustained injuries compelling him to attend Aga Khan Hospital (medical records were produced) and that when he reported back to work on 7 January 2014, he was stopped at the gates and was given the letter of termination of employment.
11. He contended that he was not afforded an opportunity to be heard.
12. The Respondent's witness stated that the Claimant's Supervisor alerted him of a fight at one of the sites and that he carried out investigations which established that the Claimant had attacked a colleague. He briefed the management which decided that the Claimant's contract be terminated.
13. When pressed during cross-examination, the Respondent's witness was unable to disclose exactly who afforded the Claimant an opportunity to be heard.
14. The witness could not precisely state whether his duties included discipline or when and how he afforded the Claimant an opportunity to make representations. It is instructive that the witness made a report to the Management on 6 January 2014 when the Claimant was not at

work and that he (Claimant) was given the termination letter when he reported the next day.

15. It is probable that what the Respondent was contending was a hearing was an investigatory process, conducted at the construction site to establish what had happened.

16. The Court is satisfied that the Claimant was not afforded an opportunity to be heard as contemplated by section 41(2) of the Employment Act, 2007.

17. The termination of the contract was unfair.

Salary in lieu of notice

18. With the conclusion that the termination of the Claimant's contract was unfair, the Court holds that the Claimant is entitled to the equivalent of 1 month salary in lieu of notice.

19. The Respondent did not produce pay records to rebut the Claimant's oral testimony that he was earning Kshs 15,000/- per month and the Court in consideration of section 10(7) of the Employment Act, 2007 will find that was the monthly salary.

Compensation

20. The Claimant served the Respondent for about 2 years, and in light of the length of service, the Court will assess compensation equivalent to 2 months gross wages as compensation.

Service pay/gratuity

21. There was no evidence that the Claimant was registered with the *National Social Security Fund* or was a member of a pension scheme. Section 35(5) & (6) of the Employment Act, 2007 becomes implicated.

22. The Respondent did not interrogate the Kshs 10,000/- sought by the Claimant on account of service pay, and the Court will allow it.

Conclusion and Orders

23. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(a) Salary in lieu of notice Kshs 15,000/- (b) Compensation Kshs 30,000/-

(c) Service pay Kshs 10,000/-

TOTAL Kshs 55,000/-

24. The Claimant to have costs.

Delivered, dated and signed in Nairobi on this 16th day of September 2019.

Radido Stephen

Judge

Appearances

For Claimant Ms. Ochogo instructed by Gakoi Maina & Co. Advocates

For Respondent Ms. Makori instructed by Mogeni & Co. Advocates

Court Assistant Lindsey