



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1324 OF 2016

BONIFACE ODONDI AJODE.....CLAIMANT

v

CHINA ROAD & BRIDGE CORPORATION.....RESPONDENT

JUDGMENT

1. Boniface Odondi Ajode (Claimant) instituted legal proceedings against China Road & Bridge Corporation (Respondent) and he stated the Issues in Dispute as

Unlawful termination of Boniface Odondi Ajode Termination Benefits

Certificate of Service

Unpaid salary

2. Although served, the Respondent did not enter an appearance or file a *Response* within the prescribed time, and on 9 January 2017, the Court directed that the Cause proceeds to formal proof.

3. On 14 September 2018, the Respondent moved the Court seeking leave to file a *Response* out of time and to be allowed to defend the Cause.

4. The parties consented to the application and the consent was adopted by the Court on 31 October 2018 paving way for the hearing on 18 September 2019.

5. When the Cause was called out for hearing on the aforementioned date, the parties informed the Court that they had agreed to have the Cause determined on the basis of the record, and submissions to be filed.

6. The Claimant filed his submissions on 7 October 2019 (should have been filed and served before 4 October 2019) while the Respondent's submissions were not on file by this morning.

Unfair termination of employment

7. The Claimant pleaded case was that his employment was unfairly terminated around 14 June 2016 without any reasonable cause or justification.

8. The Respondent's plea in defence was that the Claimant deserted work around 9 June 2016 after making demands in relation to an accident he had been involved in the course of work and that when requested to explain the failure to report to work, he responded that he was attending to personal matters.

9. The Claimant was advancing a cause of action for unfair termination of a contract while the Respondent was contending repudiation of contract by the Claimant.

10. The parties opted not to place any evidence before the Court.

11. In terms of Rule 21 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, parties are expected to have filed affidavits

containing the evidence to form part of the record before opting to proceed on the basis of documentary evidence.

12. Pleadings and witness statements which have not been adopted as evidence on oath cannot be considered as evidence.

13. The Court in this regard has no evidence, not even un rebutted evidence before it to enable it to determine the veracity of the pleaded versions advanced by the parties and therefore is unable to make a finding as to whether this was a case of unfair termination of employment or repudiation of contract.

14. Since section 47(5) of the Employment Act, 2007 places the first onus on a Claimant to prove that there was unfair termination of employment and the Claimant did not present evidence to discharge that burden, the Court has no option but to hold that this was not a case of unfair termination of employment.

15. *Compensation and pay in lieu of notice* as remedies, therefore, do not avail the Claimant.

Breach of contract

16. The Claimant also alleged breached of contract in that he did not take his annual leave.

17. Without any evidential foundation to support this alleged breach, the Court is unable to find for the Claimant.

Service pay

18. The Claimant filed copies of his pay slips. The pay slips show that the Claimant was a registered contributor with the National Social Security Fund.

19. In terms of section 35(5) & (6) of the Employment Act, 2007, the Claimant would not be eligible for service pay.

Certificate of Service

20. A certificate of service is a statutory entitlement and because the Respondent admitted an employment relationship, it should issue one to the Claimant within 21 days.

Conclusion and Orders

21. Save for a certificate of service, the Court finds no merit in the Cause herein and orders it dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 25th day of October 2019.

Radido Stephen

Judge

Appearances

For Claimant Samuel Nyambane & Co. Advocates

For Respondent Minishi & Associates Advocates

Court Assistant Lindsey