



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 227 OF 2016**

**PHILIP AMANI MWINGA.....CLAIMANT**

**VS**

**CORRUGATED SHEETS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. On 29<sup>th</sup> March 2016, the Claimant filed a Memorandum of Claim alleging unlawful termination of his employment by the Respondent. In its defence, the Respondent filed a Memorandum of Response on 24<sup>th</sup> May 2016.
2. When the matter came up for hearing, the Claimant testified on his own behalf. Jason Laibuta and Francis Oketch testified for the Respondent.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent on 28<sup>th</sup> October 2010 as a machine helper, initially on casual basis but retained in continuous and uninterrupted employment until 27<sup>th</sup> August 2015. At the time of leaving employment, the Claimant earned a daily rate of Kshs. 525.
4. The Claimant pleads that on 27<sup>th</sup> August 2015, he reported to work but his Supervisor, Francis Oketch refused to allocate him work for the day, on the ground that the Claimant's name had not been included in the daily workman register. The Claimant therefore left the Respondent's premises, without working that day.
5. The Claimant adds that on the same day, he was summoned by the Respondent's Personnel Manager, Jason Laibuta who showed him a demand letter from the Claimant's Advocate, seeking compensation for an injury sustained by the Claimant while at work. Laibuta then told the Claimant to leave as his services were no longer needed.
6. The Claimant accuses the Respondent of unlawfully terminating his employment, pointing out that there was no valid reason for the termination and he was not afforded an opportunity to be heard.
7. The Claimant now claims the following from the Respondent:
  - a) One month's salary in lieu of notice.....Kshs. 13,650
  - b) Leave pay for 5 years.....55,125
  - c) 12 months' salary in compensation.....163,800
  - d) Certificate of service

**The Respondent's Case**

8. In its Memorandum of Response dated 17<sup>th</sup> May 2016 and filed in court on 24<sup>th</sup> May 2016, the Respondent states that the Claimant

started working as a general labourer in the month of February 2015.

9. The Respondent further states that the Claimant himself left employment without giving notice. The Respondent's case is that the Claimant deserted work sometime in August 2015. The Respondent therefore denies terminating the Claimant's employment.

10. The Respondent avers that the Claimant is a member of the Kenya Engineering Workers Union, with which the Respondent has a Recognition Agreement. Consequently, the Respondent maintains that this dispute ought to have been referred to conciliation in the first instance.

### **Findings and Determination**

11. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

12. The Claimant states that his employment was terminated on 27<sup>th</sup> August 2015 for the collateral reason that he had made a work injury claim against the Respondent. While denying the Claimant's assertion, the Respondent states that it is the Claimant who left employment on his own volition.

13. In his testimony before the Court, the Claimant's Supervisor, Francis Oketch stated that sometime in the month of August 2015, the Claimant reported to work late, after the list of workers required for the day had been closed. Oketch instructed the Claimant to report back the following day but the Claimant did not show up.

14. Section 47(5) of the Employment Act, 2007 provides as follows:

**(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

15. In *Omar Ndaro Zuma v Modern Coast Express [2019] eKLR*, this Court stated the following:

**“The import of Section 47(5) of the Employment Act is that an employee alleging unfair termination or wrongful dismissal must lay before the Court the actual circumstances leading to his exit from employment. It is not enough for an employee to simply say “my employment was unfairly terminated”. They must prove ingredients of the unfair termination or wrongful dismissal.”**

16. In response to a demand letter from the Claimant's Advocate, the Respondent wrote as follows:

*“That sometime in August 2015, your client took off from his place of work on his own without further informing Corrugated sheets of the reasons or whereabouts. He had not given any notice to leave employment by the time he left. He was therefore not unprocedurally terminated from his employment as alleged in your letter.*

However, our client is looking forward to continue hiring the services of your client both for mutual benefit and on humanity (sic) grounds factoring in the harsh economic conditions.”

17. There was no response to the Respondent's letter and when the Claimant came before the Court, he was categorical that he did not want to go back to work for the Respondent. Even assuming that the Claimant had been sent away unprocedurally, his failure to respond to the Respondent's offer for reemployment plus his testimony that he actually did not wish to go back to the Respondent's employment disentitle him from laying a claim for unlawful termination of employment.

18. In the result, the Court finds and holds that the claims for compensation and notice pay are without basis. The said claims are therefore dismissed.

### **Other Claims**

19. In response to the claim for leave pay, the Respondent's first witness, Jason Laibuta told the Court that the Claimant was not given annual leave because he was a casual employee. The Respondent did not bother to file any employment records to back its assertion that the Claimant was a casual employee. In the circumstances, I allow the claim for leave pay.

20. I therefore enter judgment in favour of the Claimant in the following terms:

- a) Leave pay for 4 years (525x21x4).....Kshs. 44,100

b) Prorata leave for 10 months (525x1.75x10).....9,188

**Total.....53,288**

21. This amount will attract interest at court rates from the date of judgment until payment in full.

22. The Claimant is also entitled to a certificate of service plus the costs of the case.

23. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF OCTOBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Muganda h/b Mr. Mbuya for the Claimant

Mr. Onyony for the Respondent