



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR  
RELATIONS COURT AT MOMBASA  
CAUSE NUMBER 457 OF 2016

BETWEEN

ABUBAKAR ALI.....CLAIMANT

VERSUS

CENTRAL ELECTRICALS INTERNATIONAL LTD.....RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe.*

*Otieno Otwere & Associates Advocates for the Claimant*

*Muumbi & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 14<sup>th</sup> June 2016. He states, he was employed by Respondent as an Electrician, in the year 2009. His contract was terminated by the Respondent on 30<sup>th</sup> August 2014.

2. He states, termination was without notice, or just cause. N.H.I.F. and N.S.S.F contributions were deducted from his salary, but not forwarded to the respective statutory bodies. He prays for Judgment against the Respondent as follows:-

- a) Gratuity for 5 years at Kshs. 75,000.
- b) Unpaid annual leave for 5 years at Kshs. 150,000
- c) 1 month salary in lieu of notice at Kshs. 30,000.
- d) Unremitted N.S.S.F deductions at Kshs. 14,000.
- e) Unremitted N.H.I.F deductions at Kshs. 21,200.
- f) 12 months' salary in compensation for unfair termination at Kshs. 360,000
- Total.....Kshs. 650,200**
- g) General damages for unfair termination.
- h) Certificate of Service and Recommendation Letter.
- i) Gratuity

j) Terminal benefits.

k) Costs.

l) Interest.

3. The Respondent filed its Statement of Response on 10<sup>th</sup> November 2016. It is conceded that the Claimant was employed by the Respondent as an Electrician. He was summarily dismissed by the Respondent on account of poor performance. He was invited to show cause why disciplinary action should not be taken against him. His dismissal was fair and lawful. The Respondent raised various points of preliminary objection based on the principle of *res judicata*. This was dealt with in a Ruling dated 11<sup>th</sup> July 2018. The Respondent prays that the Claim is dismissed, with costs.

4. The Claimant gave evidence in the absence of the Respondent and its Advocates, on 6<sup>th</sup> February 2019. The Claim was last mentioned on 20<sup>th</sup> September 2019, when the Claimant confirmed filing his Closing Submissions. The Respondent filed unsigned Closing Submissions on 21<sup>st</sup> May 2019, which were expunged from the record on 20<sup>th</sup> September 2019.

5. The Claimant adopted his Witness Statement and Documents on record, as his evidence. He affirmed he is an Electrician, holding National Grade Test 1 Certificate, from National Industrial Training Authority (NITA). He was paid Kshs. 1,065 per day as salary. He worked for 5 years and 2 months. He was registered under the N.S.S.F late. There was no warning issued before termination. He was issued a letter dated 26<sup>th</sup> August 2014 alleging poor performance. It was followed by the letter of summary dismissal. He prays the Court to allow the Claim.

**The Court Finds:-**

6. The Claimant was employed by the Respondent as an Electrician. The date of employment is disputed. He states, he was employed in the year 2009. In his letter of demand of 20<sup>th</sup> January 2016, he states, he was employed sometime in July 2009. In his oral evidence, the Claimant stated he was employed in July 2009.

7. The Respondent gives the date of employment as 2010. N.S.S.F Provisional Member Statement of Account exhibited by the Respondent, gives the date of employment as 1<sup>st</sup> July 2013. The Claimant told the Court he was first registered with the N.S.S.F in 2013. The date indicated in the N.S.S.F Statement cannot therefore be conclusive evidence, on the date of employment.

8. The Respondent did not produce a written contract, made pursuant to Section 10 of the Employment Act. The burden of proving or disproving an alleged term of the contract, in the absence of a written contract or written particulars, rests with the Respondent under Section 10 (7) of the Employment Act. Having failed to prove its position, or disprove the Claimant's position as to the date of employment, the Court upholds July 2009, as the date of employment.

9. It is not disputed that the Respondent summarily dismissed the Claimant, on 30<sup>th</sup> April 2014.

10. The reason given by the Respondent, in justifying summary dismissal, is that the Claimant's performance was poor.

11. The Respondent issued the Claimant a notice to show cause, dated 26<sup>th</sup> August 2014. The notice informs the Claimant that: *you have become too lazy*. He was given 2 days to explain his poor performance. He does not seem to have replied. At the end of the 2 days, on 30<sup>th</sup> August 2014, the Claimant was summarily dismissed.

12. Was termination based on a fair procedure, and valid reason or reasons, under sections 41, 43 and 45 of the Employment Act?

13. The Claimant was not heard after being issued with the notice to show cause. He was not called before a disciplinary panel, and confronted with the allegations made against him. He was not invited to a disciplinary hearing and heard as required under sections 41 and 45 of the Employment Act. There is no evidence on record, to establish that the Claimant performed poorly. No appraisal records, with specific performance targets and indicators, have been exhibited. The Claimant had worked for 5 years and 2 months. He was not at any time, placed on a Performance Improvement Plan (PIP). If it is correct that his performance was poor, the Respondent gave him no time to improve. The Court is satisfied termination was unfair for lack of fairness of procedure and validity of reason.

14. The Claimant told the Court he worked from Monday to Friday. His daily rate of pay was Kshs. 1,065. This cannot translate to a monthly salary of Kshs. 30,000. The correct rate is Kshs. 21,300 monthly.

15. ***He is granted 1 month salary in lieu of notice at Kshs. 21,300.***

16. He worked for 5 years and 2 months. His record was, save for the days leading to termination, unblemished. His national identity card on record shows he was born in 1983. He was a young lad at 31 years, at the time of termination. The Court has considered he expected to work for the Respondent for a considerable number of years, had his contract not been terminated prematurely, in 2014. He is not shown to have contributed to the decision made by the Respondent, to end the employment relationship. ***He is granted equivalent of 11½ months' salary in compensation for unfair termination at Kshs. 244,950.***

17. The Claimant has not given evidence to establish his prayer for unremitted N.H.I.F contributions.

18. He has not shown entitlement to gratuity of Kshs. 75,000. He was registered to the N.S.S.F on 2<sup>nd</sup> July 2013. He merits service pay for the period he was unregistered, between July 2009 and June 2013. There is no evidence that the Respondent deducted N.S.S.F contributions from the Claimant's salaries over this period. Rather than claim unremitted N.S.S.F dues, the Claimant ought to have claimed service pay for the period. While the Court declines the prayers for gratuity over a period of 5 years, and the prayer for unremitted N.S.S.F contributions, **the Court grants the Claimant service pay for 4 years completed in service between July 2009 and June 2013, at the rate of 15 days' salary for each year, totaled Kshs. 63,900.**

19. The Respondent offered no annual leave records, to discount the Claimant's position that he never went on annual leave. He was not paid in lieu of annual leave. **He is granted the statutory minimum of 21 days of annual leave for 5 years, amounting to Kshs. 111,825.**

20. **Certificate of Service to issue.**

21. The prayers for other forms of general damages and terminal benefits have no foundation, and are declined.

22. Likewise the prayer for a recommendation letter has no legal basis and is rejected.

23. **Costs to the Claimant.**

24. **Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.**

IN SUM, IT IS ORDERED:-

**[a] The Respondent shall pay to the Claimant: notice at Kshs. 21,300; equivalent of 11½ months' salary in compensation for unfair termination at Kshs. 244,950; service of 4 years at Kshs. 63,900; and annual leave at Kshs. 111,825 total Kshs. 441,975.**

**[b] Certificate of Service to issue.**

**[c] Costs to the Claimant.**

**[d] Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.**

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of November 2019.**

**James Rika**

**Judge**