



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 784 OF 2017**

**GIDEON KISAKA MAKAKA.....CLAIMANT**

**v**

**DIMAMU AGENCIES LIMITED.....RESPONDENT**

**JUDGMENT**

1. On 20 November 2017, the Court directed that the Cause proceeds to hearing undefended because the Respondent though served had only filed a *Notice of Appointment* but failed to file a *Response*.
2. On 15 October 2019, a day before the hearing, the firm of Kariuki & Runo Advocates filed a *Notice of Change of Advocate* to come on record for the Respondent.
3. An attempt by the Respondent's new advocate on record to secure leave to file a *Response* out of time, and also get an adjournment on the day of the hearing on 16 October 2019 was declined by the Court. It needs no gainsaying that the Respondent despite causing an advocate to come on record on 13 July 2017 had failed to file a *Response* without tendering any sufficient reason.
4. Gideon Kisaka Makaka (Claimant) testified and adopted his written witness statement but was not cross-examined because the Respondent's advocate on record left the Court after the Court declined to adjourn.
5. In the view of this Court, the conduct of the advocate of the Respondent leaving the Court after Court declined to adjourn was not only unceremonial but uncourteous and professionally negligent.
6. The Claimant filed his submissions on 29 October 2019 and the Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

7. The Claimant's testimony that he was dismissed without being afforded an opportunity to be heard on 6 September 2016 (dismissal letter collected on 14 September 2016) was not challenged or rebutted.
8. Section 35(1)(c) of the Employment Act, 2007 requires an employer to issue a *written notice of termination of employment* (unless it is a case of summary dismissal) while section 41 of the Act obligates the employer to afford the employee an opportunity to be heard.
9. There was no evidence before the Court that the *notice* was issued, or that the Claimant was heard, and the Court finds that the Claimant has proved that there was unfair termination of employment.

*Compensation*

10. The Claimant served the Respondent for about 2 years and in consideration of the length of service, the Court is of the view that the equivalent of 2 months' gross wages as salary would be fair (gross salary according to the witness statement was Kshs 20,000/-).

**Breach of contract**

*Earned wages*

11. An employee is entitled as of right to earned wages. The Claimant sought Kshs 3,846/- being wages up to date of separation. He is

entitled to the wages.

**Leave**

12. Annual leave of at least 21 days is a statutory entitlement of all employees. The Claimant sought Kshs 37,692/- on account of leave.

13. The Claimant stated that he never proceeded on leave during the 2 years of employment. The Court will allow this head of the claim.

**Rest days**

14. The Claimant's evidence that he worked 7 days a week remained unchallenged. Each employee is entitled to at least 1 rest day each week.

15. Consequently, the Court will allow this head of the claim in the sum of Kshs 92,307/- as sought.

**Overtime**

16. Equally, the Claimant's testimony that he worked during public holidays without payment of overtime remained unchallenged and the Court allows this head of the claim in the sum of Kshs 8,461/-.

**House allowance**

17. The Claimant's wage was computed using a daily rate and paid every fortnight. Such daily rates include an element to cover house allowance, and therefore the Court will decline to grant any relief in respect to house allowance.

**Service pay**

18. A copy of the Claimant's payslip produced in Court shows that he was a contributor and/or member of the *National Social Security Fund*.

19. The Claimant also produced a copy of his statement of Account from the Fund. He is therefore ineligible for *service pay* by dint of section 35(5) & (6) of the Employment Act, 2007.

**Certificate of Service**

20. A *certificate of service* is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

**Conclusion and Orders**

21. The Court finds and declares that the termination of the Claimant's employment was unfair, and further that the Respondent was in breach of contract/statute and awards the Claimant

(a) Compensation	Kshs 40,000/-
(b) Earned wages	Kshs 3,846/-
(c) Leave	Kshs 37,692/-
(d) Rest days	Kshs 92,307/-
(e) Overtime	Kshs 8,461/-
<b>TOTAL</b>	<b>Kshs 182,306/-</b>

22. The Claimant to have costs.

**Delivered, dated and signed in Nairobi on this 8<sup>th</sup> day of November 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant

Mr. Muli instructed by Muli & Co. Advocates

For Respondent

Kariuki Runo & Co. Advocates

Court Assistant

Lindsey