

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 430 OF 2017

HAMISI HASSAN OMAR.....CLAIMANT

VERSUS

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION CO. LTD.....RESPONDENT

JUDGMENT

1. The Claimant filed suit against the Respondent alleging wrongful, unprocedural dismissal from employment and failure to pay him his terminal benefits. The Claimant averred that he was employed by the Respondent on or about 9th October 2012 as a shower operator for the construction of the Marsabit – Turbi Road project until 24th December 2014 when he was allegedly wrongfully/unprocedurally and unfairly dismissed without being paid his terminal dues. The Claimant averred that his employment and the termination/dismissal were marred with gross and/or blatant contravention of the Employment Act and other enabling provisions of the law. The Claimant averred that the Respondent failed to accord him due process and also failed to prove that the reason for dismissal was valid thus violating Sections 41, 43, 44 and 45 of the Employment Act. The Claimant averred that the Respondent breached a Collective Bargaining Agreement entered into between his Union and the Respondent’s management. The Claimant averred that he made several oral complaints to the Respondent for his proper working terms and conditions, and sought the collective bargaining agreement and the law to be adhered to but the Respondent gave him a deaf ear necessitating his union to seek the intervention of the Marsabit County Government leading to the letter dated 23rd April 2014 addressed to the Respondent asking it to comply but this again yielded no fruit. The Claimant thus seeks for a declaration that the termination process carried out by the Respondent was unlawful and seeks one month’s pay in lieu of notice – Kshs. 20,445/-, gratuity/service benefits – Kshs. 20,160/-, maximum compensation for unfair termination for 12 months – Kshs. 224,640/-, underpayment of wages – Kshs. 130,000/-, annual leave dues – Kshs. 37,440/-, unpaid house allowance – Kshs. 43,125/-, overtime for Sundays worked – Kshs. 144,00/- all totaling Kshs. 619,810/- plus interest and costs of the suit.
2. The Respondent failed to file a response as directed by the court and the defence that was subsequently filed was expunged from the court records as it was filed without leave of the court after directions were given by the Court. The cause thus proceeded undefended.
3. The Claimant filed his affidavit of evidence and in his affidavit of evidence. The Claimant herein deponed that he worked diligently and with full commitment until 24th December 2014 when he was wrongfully, unprocedurally, unfairly, unjustifiably and/or unlawfully terminated and was not paid his lawful and/or terminal dues. He deponed that the Respondent never provided him with any reasonable housing and/or paid him any house allowance and that it paid him wages less than what is required by law being Kshs. 13,520/- per month instead of Kshs. 18,720/- per month. He deponed that the Respondent made him work overtime, on public holidays and even on rest days without payment, and that it never allowed him to proceed on annual leave during the subsistence of employment. He deponed that the Respondent never issued him with a notice to terminate his services and/or any warning. He deponed that he was not summoned to any forum to discuss the reasons or give him a chance to give his side of the story. He deponed that despite several complaints to the Respondent about its contravention and/or breach of the law, it never rectified the situation. The Claimant deponed that they were forced to complain to the Kenya Building Construction Timber and Furniture Union (KBCTFU) and the Union approached the Respondent and brokered a collective bargaining on behalf of employees on one side and the Respondent on the other and the agreement was signed on 27th July 2012. The Claimant deponed that despite the existence of the collective bargaining the Respondent failed to comply with the terms therein and the employees reported to the Union which informed the County Government of Marsabit of the Respondent’s continued breach of the terms and conditions of the collective bargaining agreement and the contravention of the law. He deponed that the County wrote a letter requiring the Respondent to adhere to the law but again this was not followed. The Claimant thus prayed that the court declares the termination of employment as illegal, unlawful, unfair, unjustified and order the Respondent to pay the dues sought.
4. The Claimant testified and reiterated what was contained in his memorandum of claim. He stated that he worked for 2 years 3 months and no leave was ever given. He testified he was entitled to double but was paid 1½ times instead. He stated that he sought the help of the union to fight for his dues and the Union wrote a letter and the Respondent did not comply. He stated that the Union sought the interposition of the County Commissioner who wrote a letter to the Respondent urging it to comply. He testified that he was not paid as recommended and he thus sought the prayers in the claim as prayed.
5. The Claimant filed submissions and submitted that his termination was unlawful. He relied on the case of **Regina Mwikali Wilson v Stephen M. Gichui & Another [2016] eKLR** where the court held *the role of the court after having entered interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory in regard to quantum of damages.* He also attached the case of **Felix Mathenge v Kenya Power Company Limited [2008] eKLR** a Court of Appeal decision cited in the **Regina Mwikali Wilson v Stephen M. Gichui & Another** case above. He also attached the Regulation of Wages Order to the submissions. Evidence cannot be attached to submissions and as such the said order was not considered in determination of the claim. He submitted that he had proved the claim and sought the grant of prayers as sought in the claim.

6. Unfortunately for the Claimant, in any claim the court upon entry of interlocutory judgment cannot simply award damages as sought as a matter of right. The court must assess the proof in respect to special damages sought. The Claimant asserts he was underpaid. He did not avail any pay statement or even seek discovery to have access to the Respondent's records so as to prove the underpayment. He did not prove this head. In regard to his leave he did not offer any letter showing his request for leave or any correspondence on this aspect. A demand letter cannot be evidence. The Claimant only succeeded in showing that his contract ended without notice and would recover compensation for this capped at 3 month's salary – Kshs. 60,335/-. He also would recover one month's salary as notice and costs of the suit. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a) One month's salary in lieu of notice – Kshs. 20,445/-
- b) Compensation for unlawful dismissal capped at 3 month's salary – Kshs. 60,335/-
- c) Costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 16th day of December 2019

Nzioki wa Makau

JUDGE