



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**  
**CAUSE NO 65 OF 2017**

**[FORMERLY MOMBASA ELRC CAUSE NO 317 OF 2016]**

**CLEMENT KAZUNGU PHILIP.....CLAIMANT**

**VS**

**ARM CEMENT**

**(formerly known as ATHI RIVER MINING LTD).....RESPONDENT**

**JUDGMENT**

**Introduction**

1. I took over this matter from my brother, **Makau J** at the close of the Claimant’s case. With the consent of the parties, I proceeded to hear the Respondent’s case.

2. The Claimant’s claim is documented by a Memorandum of Claim dated 12<sup>th</sup> April 2016 and filed in court on 18<sup>th</sup> April 2016. The Respondent filed a Memorandum of Reply on 7<sup>th</sup> December 2016.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as an Electrician on 2<sup>nd</sup> January 1995. At the time of leaving employment on 22<sup>nd</sup> June 2015, he earned a monthly basic salary of Kshs. 18,615.67 plus a house allowance of Kshs. 3,000.

4. The Claimant avers that his employment was terminated without any justifiable cause and in violation of due procedure. He further avers that he was not paid his terminal dues. He now claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 21,615.67
- b) Unpaid leave for 20 years.....349,020.00
- c) Public holidays for 20 years.....332,400.00
- d) Unfair termination @ 12 months’ salary.....259,388.04
- e) Costs plus interest

**The Respondent’s Case**

5. In its Memorandum of Reply dated 7<sup>th</sup> December 2016 and filed in court on even date, the Respondent admits having employed the Claimant from 1<sup>st</sup> January 1995, initially by oral agreement. The Claimant was issued with a written employment contract on 25<sup>th</sup> November 2003.

6. While denying the Claimant’s claim for unlawful and unfair termination, the Respondent states that the Claimant willingly resigned from employment with effect from 22<sup>nd</sup> June 2016. The Claimant’s proffered reason for resignation was to undertake further studies.

7. By a letter of even date, the Respondent accepted the Claimant's resignation and advised the Claimant that his terminal dues were being computed. The dues were paid to the Claimant on 7<sup>th</sup> August 2016.

### **Findings and Determination**

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

- a) Whether the Claimant has proved a case for unlawful and unfair termination of employment ;
- b) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

9. In response to the claim for unlawful termination of employment, the Respondent states that the Claimant himself resigned voluntarily by his letter dated 22<sup>nd</sup> June 2015. In this letter, which the Claimant did not dispute, he expressed his wish to go for further studies.

10. In his testimony before the Court however, the Claimant stated that he was forced to resign. Nothing in this letter, which is fairly detailed and whose tenor is positive, suggests any coercion exerted on the Claimant to resign. The Court therefore finds that the Claimant voluntarily resigned from employment and the claim for unlawful termination is without basis and is dismissed. Having resigned, the Claimant was not entitled to notice pay.

11. According to the Respondent's own documents filed in court, the Claimant was entitled to the following terminal dues:

- a) Leave pay for 46 days;
- b) Severance pay for 20 years;
- c) Salary for 22 days;
- d) Overtime worked;
- e) Travelling allowance;
- f) Baggage allowance;
- g) One month's salary in lieu of notice.

12. The Respondent did not produce any document to prove payment of these dues to the Claimant which are therefore due and payable.

13. The claim for public holidays was not proved and is dismissed.

14. Ultimately I enter judgment in favour of the Claimant in the following terms:

a) Leave pay for 46 days.....	32,935
b) Severance pay for 20 years.....	429,592
c) Salary for 22 days.....	18,290
d) Travelling allowance.....	4,500
e) Baggage allowance.....	4,500
<b>Total.....</b>	<b>489,817</b>
Less 1 month's salary in lieu of notice.....	(18,616)
<b>Amount due to the Claimant.....</b>	<b>471,201</b>

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

16. The Claimant will have the costs of the case.

17. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MALINDI THIS 6<sup>TH</sup> DAY OF JUNE 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Marubu for the Claimant

Mr. Kalimbo for the Respondent