



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE. NO. 1991 OF 2013**

**FRANCIS ASUNZA MUTANGE.....CLAIMANT**

**VERSUS**

**DPL FESTIVE LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimant's employment contract on 6.6.2013 by the respondent. It is the claimant's case that his termination was unfair because it was constructively done without any valid reason or preceded by notice. In total, he prayed for Kshs.474,500.
2. The suit was heard on 11.4.2018 when the claimant testified as Cw1 but the respondent and his counsel never attended the hearing to tender evidence. After the hearing, the claimant's counsel filed written submissions.

**Claimant's Case**

3. The claimant testified that he was employed by the respondent on 13.12.2012 as a General Labourer earning Kshs.12,000 per month. He worked until 6.6.2013 when a Security Guard tried to stop him from loading bread on allegation that he was searching people for a lost phone and when he refused the search and continued working, the guard grabbed his clothes and the other employees separated him from the guard. On the following day, he was suspended for 3 months without pay. Thereafter he was called to a meeting where the security guard Mr. Wanyonyi apologized to him for attack on 6.6.2013. However the claimant stated that the meeting occurred after filing this suit and he was being asked to withdraw it as a condition for reinstatement to his employment.

**Analysis and Determination**

4. There is no dispute that the claimant was employed by the respondent. That fact was proved by the appointment letter produced as exhibit 1. There is also no dispute that the claimant was suspended from employment on 7.6.2013 for a scuffle with a Security Guard and he was never paid any salary thereafter and he was never called back to work until after filing this suit. The issue for determination are:
  - a. Whether the claimant employment was constructively and unfairly terminated by the respondent;
  - b. Whether the reliefs sought should be granted;

**Unfair Constructive termination**

5. The evidence by the claimant that he was suspended without pay and never called back to work has not been contested by the respondent. The Court does not therefore have any other option but to agree with the claimant that he was constructively terminated by the employer. Constructive termination of contract of service occurs where the employee is prevented from performing his part of the contract by the employer's conduct which amount to a repudiatory breach.
6. In this case, the respondent breached the contract by suspending the claimant without any pay for 3 months and thereafter failed to call him back to work and continued to withhold his salary. The said conduct entitled the claimant to treat his contract of service as having been terminated under section 45(2) of the Employment Act. Termination of employees contract of service, is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. As earlier observed herein above, the

respondent never tendered any evidence herein and as such the constructive termination of the claimant's employment was unfair within the meaning of section 45 of the Act because she has not discharged the said burden of proving that there was valid reason and that fair procedure was followed before dismissing the claimant.

**Reliefs**

7. Under section 49 of the Act, I award the claimant Kshs.12,000 being one month salary in lieu of notice plus Kshs.36,000 being 3 months' salary compensation for the unfair termination.

8. In addition the claimant will also have Kshs.36,000 being salary for the 3 months he was serving suspension from 6.6.2013. However, the claims for service pay because he never served for a complete year. Likewise, claim for off days worked are dismissed for lack of evidence.

**Conclusion and Disposition**

9. For the reasons that the claimant's contract of service was constructively and unfairly terminated, I enter judgment for him in the sum of Kshs.84,000 plus costs and interest from the date hereof. The award shall be subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018**

**ONESMUS N. MAKAU**

**JUDGE**