



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

**CAUSE. NO. 1739 OF 2013**

**MERCY NJAMBI CHEGE.....CLAIMANT**

**VERSUS**

**OTHAYA VILLAS COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent in May 2012. In total, she claims Kshs.915,480 plus costs and interest. The respondent has denied the alleged unfair termination. She averred that the claimant suffered injuries while on duty and stayed away on full pay up to 15.9.2013 when she absconded from work. She denied liability to pay the reliefs sought and prayed for the suit to be dismissed with costs.
2. The suit was heard on 14.3.2018 when the claimant testified as Cw1 but the respondent and her counsel never attended Court. Thereafter the claimant filed written submissions.

**Claimant's Case**

3. The claimant testified that she was employed by the respondent as a Cleaner in a Construction Site in April 2010. She was not given any written contract but she worked continuously earning Kshs.1800 per week. On 20.2.2011, she fell down from 4th floor to the ground floor and suffered serious bodily harm including fractured left leg, broken jaw and loss of 10 teeth. She blamed the employer for failure to provide protective barrier as the cause of her injuries.
4. She further testified that after the accident she was taken to hospital and admitted upto May 2011 but remained in crutches for one year. Although she never reported to work, the employer retained her in the pay roll and continued to pay her Kshs.1,800 per week until April 2012. However when she reported back to work in May 2012 after becoming better, she was told that her job was over by the supervisor Mr. Deepak.
5. Thereafter she instructed her lawyer who served a demand letter on 10.1.2013 but the respondent never responded to it. She contended that she was unfairly terminated because she was not served with a prior notice and prayed for compensation for the unfair termination plus costs.

**Analysis and Determination**

6. There is no dispute that the claimant was employed by the respondent earning Kshs.1,800 per week. There is also no dispute that she suffered bodily injuries after falling from a height while on duty and stayed on sick leave for over a year enjoying full pay. The issues for determination are:
  - a. Whether the claimant deserted employment in September 2013 or she was unfairly terminated in May 2012.
  - b. Whether she, is entitled to the reliefs sought.

**Desertion or unfair termination**

7. As earlier observed, the respondent never tendered any evidence to support her defence that the claimant is the one who deserted employment from September 2013 despite being paid all her salary upto that date while on sick leave. The claimant has on the other hand stated that she was dismissed by the respondent's site supervisor in May 2012 after reporting back to work. Without any evidence to rebut

the claimant's evidence, I find and hold that the claimant has proved on a balance of probability that she was indeed dismissed by Mr. Deepak as she alleges. Consequently, I dismiss the allegation by the respondent that the claimant deserted work in September 2013. In **Harrison Kamau Nganga Vs Attorney General & Another [2004]eKLR**, Aluoch J (as she then was) held as follows:

**“From the evidence I have considered in this case as a whole, I make a finding of fact that the 2 Defendants having failed to give evidence on oath in Court, their defences and submissions drawn by their lawyers cannot rebut the plaintiff's oral evidence on which he was cross examined strenuously. I therefore reject the defence of the 2 defendants plus the submissions tendered on their behalf instead I believe the plaintiff's evidence from which I find that he proved his case on a balance of probabilities”.**

8. The question that follows is whether the termination was unfair. The claimant testified that he was unfairly terminated because he was not given prior notice. Under section 45(2) of the Employment Act, termination of an employee's employment 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. In this case, the respondent never tendered any evidence and as such she has not discharged the said burden of proving the reason for terminating the claimant's employment and fair procedure. Consequently, it is my finding that the termination of the claimant's contract of service was unfair and I so declare.

#### **Reliefs**

9. Under section 49 of the Act, I award the claimant Kshs.7,200 being one month salary in lieu of notice plus Kshs.72,000 being 10 months' salary compensation for unfair termination. In making the said award, I have considered the fact that she did not contribute to the termination through misconduct.

10. The claim for leave is dismissed for lack of particulars and evidence. Likewise, the claim for severance pay is dismissed because the termination was not through redundancy. She will however get certificate of service and costs of the suit.

#### **Conclusion and Disposition**

11. For the reasons that the claimant was unfairly terminated, I enter judgment for her in the sum of Kshs.79,200 plus costs and interest at Court rate from the date hereof till payment in full. The sum 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**