



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 904 OF 2010**

**(Before D. K. N. Marete)**

**BARRACK OJERO NYASIO.....CLAIMANT**

**VERSUS**

**TAWS LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was brought to court vide a Memorandum of Claim dated 10th June, 2010.

The respondent in a Statement of Defence and Counter-Claim dated 4th October, 2010 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that sometimes in 1991 he was employed by the defendant as a binder and punching machine operator. He earned Kshs.11,289.00 per month at the time of his resignation.

The claimant's further case is that the defendant promised to pay him all his dues in the form of severance benefits, unpaid for weekends and holidays but this remains unpaid to date.

The claimant's other case is that on 16th August, 2007 or thereabout, the respondent issued a written warning of pending dismissal should the claimant not report to work within a specified time frame. Since he was not able to meet the demand, the claimant opted to resign. He had had a sixteen (16) year stint of service with the respondent.

The claimant's further case is that he was unavailable for work for a period of time due to unforeseen and unavoidable circumstances. In this time, the respondent sent him a letter warning him of imminent salary dismissal should he not return to work within the stated time frame. He was unable to comply with the required time frame and therefore opted to resign other than be dismissed. He did a letter of resignation within a day or two of the warning letter. This letter was accepted by the respondent thereby waving her right to 30 days in lieu of notice under section 38 of the Employment Act, 2007.

The claimant forments a case of unlawful and unjustified termination of employment through which he had suffered loss and claims as follows;

a. Service/gratuity pay (11,289 x 16 x 2/3)	Kshs.121,018.00
b. Salary for June 2007	Kshs.11,289.00
c. Salary arrears	Kshs.11,289.00
d. Annual leave unpaid	Kshs.11,289.00
e. 5 days notice period	Kshs.1,881.00
<b>Total</b>	<b>Kshs.156,776.00</b>

He prays as follows;

- a. A declaration that the termination was unlawful, untimely and an order that the Claimant be paid his dues and benefits of

Kshs.156,766/= as aforesaid.

b. Costs of the claim and interest.

The respondent's case is a denial of the claim.

It is her case that in exercising compassion, she extended an olive branch to the claimant by allowing him to report back to work and resume duty which option he chose to ignore. He instead opted to resign with immediate effect vide his letter dated 18th August, 2009.

The respondent's further case is that she is owed one months salary in lieu of notice and further that by his resignation lost his entitlement to severance pay and salary in lieu of notice.

The respondent further raises a counter claim of Kshs.52,578.00 being two months salary in lieu of notice as no notice was issued at resignation.

The matter came to court variously until 20th April, 2018 when it was heard.

The issues for determination therefore are

1. Whether the claimant breached the terms of the employment contract?
2. Whether the respondent is entitled to the counter claim?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant breached the terms of the employment contract. The respondent in her written submissions dated 25th May, 2018 submits a case of a fundamental breach of the terms of the service contract by the claimant in that he absented himself from duty without cause. Further, the claimant did not obey instructions to return to work when so prompted by the respondent after absencing himself from work for about sixteen days. The claimant did not return to work but opted to resign instead.

The claimant denies breach of contract and submits that the respondent in accepting his resignation letter wave his right to notice and cannot now reclaim it. This is not true. The claimant absented himself from work without notice, leave or authority. In his letter dated 18th August, 2007, he offered to resign from employment instead of returning to work as requested. In another letter dated 29th September, 2007, the claimant wrote to the respondent apologizing for resignation and seeking leave to return to work. What does this tell of the claimant's conduct? This is a clear breach of the terms and conditions of employment and a liability to the claimant's case. I therefore find a breach of the contract of employment by the claimant and hold as such.

The 2nd issue for determination is whether the respondent is entitled to the counter claim. The respondent submits a case in favour of her counter claim. It is her case that the subsisting Collective Bargaining Agreement entitled her two months salary in lieu of notice by the claimant. The claimant has not in any way adduced any evidence in rebuttal. He only denies this and submits a case of waiver by virtue of acceptance of the resignation. This is not substantial defence. The respondent is therefore entitled to Kshs.22,578.00 being two months salary in lieu of notice.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of termination, and having been the causative of the cessation of employment he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

I also order that the respondent is entitled to his counter claim for two months salary in lieu of notice all amounting to Kshs.22,578.00 and the costs of the counter claim.

Dated and signed this 19th day of July, 2018.

**D.K. Njagi Marete**

**JUDGE**

**Delivered and signed this 20th day of July, 2018.**

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Miss Ochago Instructed Gakoi Maina & Company Advocates for the claimant.
2. Mr. Munyua Instructed by Rachier & Amollo Advocates for the respondent.