



## **REPUBLIC OF KENYA**

### **IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**

#### **KENYA AT NAIROBI**

#### **CAUSE NO 808 OF 2014**

**NZOKA MUSYOKA.....CLAIMANT**

**VERSUS**

**KEL CHEMICALS LIMITED.....RESPONDENT**

#### **JUDGEMENT**

1. This matter proceeded ex-parte after the court was persuaded that the respondent though properly served did not attend court. The claimant averred that he was employed by the respondent on 18<sup>th</sup> January, 2008 as a guard at a monthly salary of Kshs 18,000/= per month. He used to report to work at 6:30 a.m. and work until 6:30 pm daily.
2. On 22<sup>nd</sup> November, 2013 the respondent's manager called him and wanted to compel him to sign a document which he had not read. He refused requesting to be allowed to read before signing but was told to go home and not to report to work the next day as he had been dismissed. The claimant reported the dispute to labour offices but the respondent failed to turn up for conciliation. The claimant further pleaded that during his entire time of service he was never paid house allowance, nor given a rest day and never went on leave.
3. The respondent on its part stated that the claimant was employed on a daily wage of Kshs 432/40. The respondent further averred that on 22<sup>nd</sup> November, 2013, the Security Manager Mr Mwanzia called all daily wage employees the claimant being one of them and explained to them that the respondent had decided to convert all daily wage employees to monthly contract employees and offered them letters of appointment together with Company's Rules and Regulations for signing and the claimant refused to take and sign the document and never reported on duty on 23<sup>rd</sup> November, 2013.
4. The respondent further denied that the claimant was not paid house allowance, leave and overtime. According to the respondent, it did not terminate the claimant's services. The respondent however admitted that the claimant was entitled to 42 days leave pay at the rate of 432/40 per day and service pay for 3 years.
5. In claim for unfair termination, the onus is on the claimant to show unfair termination has taken place while the onus of justification for reasons for termination is on the employer. The burden of proof for other heads of claim such as overtime, underpayment and non-payment of house allowance etc rest on the claimant.
6. Whereas he alleged that he was earning Kshs 18,000/= no evidence was produced by him to show he was earning any such salary. The claimant did not further exhibit any payslip or document to show his salary was without house allowance. It however cannot be gainsaid that the claimant was on some salary which the respondent has correctly pointed was Kshs 432/40 per day as per the prevailing wage order.
7. The respondent did not attend court to rebut the claimant's allegations that he was terminated without a reason and that due process was not followed in terminating him. The dispute was reported to the Labour Office and from the document attached by the respondent there is none addressed to the claimant demanding his return to work at the pain of dismissal in default. It was therefore more probable than not that the claimant was asked not to come to work unless he agreed to sign the contract the respondent referred to in the memorandum of response.
8. The evidence in support of the claim is rather scanty, however one thing that is clear is that the separation between the respondent and the claimant did not follow the procedure laid in the Employment Act.
9. The court to that extent will declare the termination unfair and award the claimant as follows:

**Kshs**

a. One month's salary in lieu of notice	12,972.00
b. 42 days of leave (admitted)	18,170.00
c. Service pay 5 years at the rate of 15 days pay for each completed year of service	32,437.50
d. Five months salary for unfair termination of service	<u>64,860.00</u>

**128,439.50**

e. Costs of the suit

10. It is so ordered.

**Dated at Nairobi this 9<sup>th</sup> day of August, 2018**

**Abuodha J. N.**

**Judge**

**Delivered this 9<sup>th</sup> day of August, 2018**

**Abuodha J. N.**

**Judge**

**In the presence of:-**

..... for the Claimant

..... for the Respondent