



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

**AT NAKURU**

**CAUSE NO. 195 OF 2017**

**JOHN KIOKO NZUKI.....CLAIMANT**

**VERSUS**

**INTEX CONSTRUCTION LIMITED..... RESPONDENT**

**JUDGEMENT**

On 2<sup>nd</sup> May, 2017 the claimant filed the Memorandum of Claim. On 5<sup>th</sup> September, 2017 the respondent entered appearance. No defence was filed. On 10<sup>th</sup> April, 2018 parties attend for hearing directions, the respondent was served and returns filed and remained absent.

Court directed hearing of the claim by way of formal proof as no defence had been filed. The respondent was served with a hearing notice and returns filed to confirm the same.

On the due date, 31<sup>st</sup> July, 2018 the respondent was absent.

**Claim**

The claimant was employed by the respondent as a Grade Operator on 17<sup>th</sup> September, 2014 at a salary of Kshs.31,330.00 per month and a house allowance of Kshs.6,266.00 per month all being Kshs.37,596.00.

On 17<sup>th</sup> March, 2015 the claimant's employment with the respondent was terminated without notice, reasons or a hearing. The salary due for the period of 16<sup>th</sup> December, 2014 to 17<sup>th</sup> March, 2015 was not paid.

The claimant made a demand with regard to his terminal dues but the respondent declined to pay.

The claim is that the termination of employment was contrary to section 35 of the Employment Act as there was no notice or payment in lieu thereof, there was no fairness contrary to section 45 of the Act and there was no hearing contrary to section 41 of the Act. Such amounted to unfair termination of employment and compensation is due.

The claimant is seeking the following;

- a) Compensation at kshs.451,152.00;
- b) Notice pay kshs.37,596.00;
- c) Withheld salaries kshs.115,198.00;
- d) Pro rata leave Kshs.Kshs.18,798.00;
- e) Costs

The claimant testified that upon employment by the respondent he was able to undertake his duties diligently until 17<sup>th</sup> March, 2015 when without any justifiable cause the respondent terminated his employment. There was no due process or payment of terminal dues.

The claimant also filed written submissions.

### **Determination**

Every party to court proceedings has the right to be heard as secured under Article 51 of the Constitution, 2010. In employment and labour relations, Part IV (4) of the Employment and Labour Relations Court Act, 2011 stipulate how parties are to attend court and secure their right to be heard. Therefore when a claimant files suit and the respondent is served, to ensure that due process and the right to fair hearing is secured, Rule 13 and 14 of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires a respondent to enter appearance and file a defence together with all the relevant evidence.

Where the respondent enters appearance and fails to file a defence, Rule 15 allows the court to proceed with the matter undefended.

Termination of employment is regulated under the law. Section 35 of the Employment Act, 2007 (the Act) requires an employer to issue notice to the employee and even where there is notice, section 43 of the Act requires the employer to state the reason(s) leading to termination of employment. Further section 45 of the Act requires the employer to show that the reason(s) leading to termination of employment are fair and just.

Where an employer therefore fails to abide the provisions of the Act and further fails to take the employee through due process by giving them a hearing as required under section 41 of the Act any resulting termination of employment is unlawful and unfair.

Without any defence to challenge the claimant's case and based on the evidence that the claimant was on 17<sup>th</sup> March, 2015 terminated in his employment without notice, hearing or being given any reason, such is contrary to the provisions of the law, section 41 and 45 of the Act and therefore unfair.

The salary due to the claimant for the period served is payable whatever the reasons leading to termination of employment and in the absence of any evidence that such payment should be withheld. The claimant is awarded withheld salary at Kshs.112, 788.00.

Notice pay is due in a case where termination of employment is without due process.

The claimant is awarded Kshs.37, 596.00.

The claim for accrued leave is not challenged; the court finds upon the claimant working for 6 months, he was entitled to 11.5 days of leave. The claim for pro-rated leave at Kshs.18, 798.00 is reasonable payment in lieu to the leave days due.

On the finding that termination of employment was unfair; the claimant was in the service of the respondent for 6 months. There is an award for unpaid salaries and compensation is awarded at three (3) months gross pay all at Kshs.112, 788.00 as an appropriate remedy.

**Accordingly, judgement is entered for the claimant against the respondent with a declaration that termination of employment was unfair; compensation awarded at Kshs.112,788.00; notice pay Kshs.37,596.00; unpaid salaries Kshs.112,788.00; pro-rated leave pay Kshs.18,798.00; and costs of the suit.**

Dated and delivered at Nakuru this 11<sup>th</sup> day of October, 2018.

**M. MBARU JUDGE**

In the presence of: .....