



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 87 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 2<sup>nd</sup> October, 2018)**

**PATRICK OSANO OGETO.....CLAIMANT**

**VERSUS**

**IVRCL LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed his Memorandum of Claim on 28/1/2014 through the firm of Nyabena Nyakundi & Company Advocates claiming unfair and unlawful termination of employment and refusal by the Respondent to pay him his terminal benefits.
2. The Claimant's case is that he was employed by the Respondent on 4.1.2013 as a Driver earning a basic salary of 20,000/= per month. He avers that he served the Respondent faithfully until 21.11.2013 when the Respondents terminated his services without notice at all and without any valid reason.
3. He avers that no notice or payment of salary in lieu thereof was given to him and neither was he invited to explain why he should not be terminated. He avers that the Respondent also refused to pay him his dues.
4. The Claimant's claim is for payment of 3 months' salary in lieu of notice 60,000/=, prorata leave of 18,330.16, house allowance for 11 months – 33,000/=, service gratuity and 12 months' salary as compensation for unfair termination plus issuance of a certificate of service all totaling 371,331/=.
5. The Claimant gave his oral evidence in Court and also produced documents to show the employment relationship including the appointment letter and a demand notice issued to the Respondents.
6. The Respondents were served with summons and Memorandum of Claim and entered appearance and filed a defence on 23.5.2014 through the firm of Gitonga Mureithi and Company Advocates. The Respondent however failed to call any witness and so the Claimant's case remained uncontroverted.
7. In the Court of Appeal (Civil Appeal No. 140/2008 at Nairobi **JJA, Mwilu (as she then was) Visram and Odek** rendered themselves as follows:-

***“in Der Raj Sharma vs Reginam 1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCANJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial Judge and the Judge cannot use the document as evidence”.***

8. The position of the law is that without the defence calling any witness to lead their evidence and have the documents they seek to rely on or adopted as evidence, their defence remained as a pleading and there was therefore no evidence in support of their case.
9. I have examined evidence of the Claimant accordingly. I find the Claimant has proved the employment relationship. There is no indication as to how this relationship was determined. There was no disciplinary hearing. There is also no proof that there were valid reasons to warrant the dismissal. It is my finding that the termination of the Claimant was unfair and unjustified.

10. It is therefore my finding that the Claimant is entitled to the following remedies as prayed:-

1. *3 months salary in lieu of notice as per the appointment letter = 20,000 x 3 = 60,000/=.*

2. *House allowance at the rate of 15% of 20,000 x 11 months = 33,000/=.*

3. *Prorata leave for 11 months = 11/12 x 20,000= 18,333/=.*

4. *Service pay for 11 months = 18,333/=.*

5. *8 months salary as compensation for unlawful termination 8 x 20,000= 160,000/=.*

**Total = 289,666/=**

6. *Issuance of a Certificate of Service.*

7. *The Respondent will pay costs of this claim plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in open Court this 2<sup>nd</sup> day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

**JUDGE**

**In the presence of:**

Nyabena for Claimant – Present

Mutanda holding brief for Kitonga for Respondent – Present