



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 533 OF 2014**

**ALLAN DAN AYUO.....CLAIMANT**

**v**

**CHAIRMAN, LANGATA CONSTITUENCY**

**DEVELOPMENT FUND.....RESPONDENT**

**JUDGMENT**

1. Allan Dan Ayuo (Claimant) was employed as an Accounts Assistant by the Constituency Development Fund, Langata Constituency (Respondent) through an agreement dated 1 June 2012. The contract was to run until 31 May 2016.

2. On 10 October 2013, the Respondent wrote to the Claimant to inform him that the contract was being terminated on account of the previous Committee having breached the law by renewing his contract for 4 years and because he did not meet the qualifications set out in section 24(17) of the Constituency Development Fund Act.

3. The Claimant was aggrieved and he instituted legal proceedings against the Respondent alleging unfair termination of employment and breach of contract.

4. In the Memorandum of Reply, the Respondent denied unfair termination of employment. It was contended that the termination of employment was lawful.

5. On 16 May 2016, the Claimant filed an *Amended Memorandum of Claim* but the Court declined to admit it as it was never served upon the Respondent.

6. The Cause was heard on 16 July 2018 on the basis of the initial *Memorandum of Claim*. The Claimant testified and closed his case.

7. The Respondent's attempt to secure an adjournment was declined and it closed its case without leading any evidence.

8. The Claimant filed his submissions on 16 August 2018 while the Respondent's submissions were filed on 5 October 2018.

9. The Court has considered the pleadings, evidence and submissions on record.

**Unfair termination**

10. In terms of section 35 of the Employment Act, 2007 an employer should give written notice of termination at least 28 days in advance where the employee is paid by the month.

11. The Claimant's testimony that he was not issued with a notice of termination of employment was not rebutted by production of any such notice.

12. Section 41 of the Act on the other hand envisages a hearing.

13. The Respondent did not place anything on the record to demonstrate that the Claimant was afforded an opportunity to make representations before his contract was terminated.

14. Further, the Respondent did not present any witness to discharge the burden placed on employers by sections 43 and 45 of the Employment Act, 2007.

15. However valid and fair the reasons leading to a termination of employment are, an employer has to prove the same in Court where there is a challenge.

16. The Court in the circumstances finds that the termination of the Claimant's contract was unfair.

#### **Appropriate remedies**

##### **Salary for balance of contract**

17. The Claimant's contract had a balance of 2 years and 7 months to expiry and the Claimant sought Kshs 1,925,000/- on account of the unserved period.

18. The contract itself did not provide what would happen to remuneration lost due to premature and or unfair termination and therefore in the view of the Court, the default remedy is compensation and not lost income.

##### **Salary for October and November 2013**

19. The Claimant served up to 10 October 2013, and it is for those days he is entitled to salary. He did not quantify the same and the Court will consider this in assessing compensation.

##### **Salary in lieu of notice**

20. Clause 9(a) of the contract provided for 3 months' notice or pay in lieu of notice and because no notice was given, the Court will allow this head of claim (monthly salary was Kshs 35,000/-).

##### **Gratuity**

21. The separation was not on account of gross misconduct on the part of the Claimant, and therefore in terms of clause 5 of the contract, the Court finds that the Claimant is entitled to *pro rata* gratuity for the period served.

##### **Compensation**

22. The Claimant expected to serve for 4 years, but had his contract terminated mid-way. Considering that expectation and the period of time served and that the Court has declined to award wages for days worked in October 2013, the Court is of the view that the equivalent of 5 months wages as compensation would be fair.

#### **Conclusion and Orders**

23. The Court finds and holds that the termination of the Claimant's contract was unfair and awards him

(a) Salary in lieu of notice    Kshs 105,000/-

(b) Gratuity                            Kshs 130,000/-

(c) Compensation                    Kshs 175,000/-

TOTAL                                    **Kshs 410,000/-**

24. Claimant to have costs.

**Delivered, dated and signed in Nairobi on this 9<sup>th</sup> day of November 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant    Mr. Yusuf instructed by Ali & Co. Advocates

For Respondent    Mr. Mwangi instructed by Kwegu & Co. Advocates

