



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 109 OF 2013**

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

**PROTUS NAROTHO.....CLAIMANT**

**VERSUS**

**CRUZ CONTROL CENTRE LTD.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Memorandum of Claim dated 28th January, 2013. The issue in dispute is therein cited as;

- a. Unfair termination/Dismissal
- b. Non-payment of terminal dues & compensation damages

The respondent in a Reply to Memorandum dated 1st March, 2013 denies the claim and prays that it be dismissed with costs.

The claimant's case is that at all material times to this claim, and particularly from 27th August, 2009, he was employed by the respondent as a mechanic at a salary of Kshs.10,420.00 per months. He worked continuously for all this time to the satisfaction of the respondent.

The claimant's further case is that on or about the 27th August, 2012, he was instructed by the respondents manager, Mr. Sanje to remove a motor vehicle engine from one vehicle and fit it into another one. While at this, the manager informed him that if he did not complete fitting the engine that same day his employment would be terminated.

The claimant's other case is that when he reported to work on 15th August, 2012, he continued working on the engine until his summary dismissal by the manager on allegations that he had not finished fitting the engine as instructed.

The claimant avers that he was not offered a hearing before dismissal and that the reasons for dismissal were not truthful. The Constitutional requisite of fair labour practices and the general principles of rational justice were not pursued in the cause of this dismissal.

He claims as follows;

- i. One month salary in lieu of notice.....Kshs.10,420.00/=
- ii. Payment in lieu of untaken leave for the entire period of service being Kshs.10,420.00/= x 3 years.....Kshs.31,260.00/=
- iii. Service/gratuity calculated at 18 days salary for the entire period of service being 18/30 x Kshs.10,420.00/= x 3 years....Kshs.18,756.00/=
- iv. Damages for loss of employment calculated at 12 months gross salary being Kshs.10,420.00/= x 3 years.....Kshs.125,040.00/=
- v. Kshs.10,420/= x 12.....Kshs.125,040.00

He prays thus;

- a. A declaration that the Respondent's termination/dismissal of the Claimant's employment was illegal, unlawful, unfair and inhumane and that the Claimant is entitled to his due terminal benefits and damages.
- b. An order for the Respondent to pay the Claimant his terminal dues and compensatory damages totaling to Kshs.310,516.00/=
- c. An order for the Respondent to pay the Claimant's Costs of this claim plus interest thereon.

The respondent's case is that the claimant was employed by the respondent on or about 6th April, 2010 as an ungraded artisan. She denies the claim and particulars of his being employed as a mechanic.

The respondent's other case is that at the time of his appointment, the claimant was put on a 6 months probation period during which he was to undergo in-house training to up his skills. It was an express and or implied term of her employment that if he was unable to deliver after the 6 months, his services would be terminated.

The respondent's further avers that at the expiry of the probation period, the claimant could not justify his continued stay on the job and he pleaded to be given a second chance by way of extending the probation for a further 6 months. This was granted but he did not improve.

The claimant was unable to cope with the work schedules and time lines and at one time he was suspended for 15 days for failure to follow instructions.

9. Being unable to cope with the work schedules and time lines, on or about 14/8/2012, the Respondent informed the Management that he no longer wished to continue working for the Respondent. The Respondent did not have any objection to the request bearing in mind the fact that his continued stay was not adding any value to the Company.

At the time of separation/departure, the claimant was paid the Kshs.5,000.00 being wage for days worked in August, 2012.

The respondent's in the penultimate avers that to her surprise, the claimant reported the matter to the labour office, Industrial Area and after deliberation, she was found not to have committed any wrong. The matter was settled by a payment of a further Kshs.10,769.00 being pro rata leave.

The matter came to court variously until the 17th October, 2018 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submission dated 23rd April, 2018 reiterates his case. He even enjoys a case of permanent employment per Section 37 of the Employment Act, 2007, having put in slightly over three years of service.

The claimant in support of his case sought to rely on the authority of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers V Mombasa Sports Club, Cause No. 440 of 2013, at page 5** where Radido, J. observed thus;

No employer shall terminate the employment of an employee unfairly. He further went ahead to state termination of employment is unfair by an employer if the employer fails to prove (a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason ...

Again, he sought to rely on the authority of **Donald Odeke v Fidelity Security Ltd, Cause No.1998 of 2011, at page 3** where Ndolo, J. observed as follows;

That an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. Her ladyship went ahead to add that it does not matter what offence the employee is charged of. If the employee is not heard, the termination is ipso facto unfair.

The Respondent's written submissions dated 4th April, 2018 also reiterate her case. It is her submission that her Reply to Memorandum of Claim was served onto the claimant on 1st March, 2013 and to date, no counter-reply has been made or filed and the averments in the said reply have not been denied or controverted.

... parties in a suit are bound by their pleadings. The claimant has pleaded in paragraph 4 of his Memorandum of Claim that "on or about 14<sup>th</sup> August 2012, he was instructed by the Respondent's Manager Mr. Sanje to remove a Motor Vehicle Engine from one Motor Vehicle and fit it onto another Motor Vehicle". However, in his evidence, under oath, the Claimant stated that he was instructed to fit some spares on a car engine which had a problem. During Cross-examination the Claimant disowned the averments in the said Paragraph 4 of his claim.

The respondent further rubbishes the claimant's case by submitting that inasmuch as he alleged that he was employed as a mechanic, he would not produce any evidence of such qualification when challenged so to do.

Again, the respondent further rebuts the authenticity of the NSSF card being a criterion for the claimant's employment. This, she further submits, lacks authenticity.

The claimant's case of unlawful termination of employment is not proven on a balance of probabilities or even preponderance of evidence. It is gapping and therefore easily falls prey to the respondent's rebuttal and issue riddled defence. The claimant does not in any way display a concrete case of being a total employee of the respondent as a mechanic, he having been employed as an ungraded artisan. He does not seem qualified or display any competencies in this assignment. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination 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 same.

Dated and signed this day of 2018.

**D.K. Njagi Marete**

**JUDGE**

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

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Mr. Mulakho instructed by Namada & Company Advocates for the claimant.
2. Mr. Mwangi instructed by Swaleh, Mwangi & Company Advocates for the respondent.