



**REPUBLIC OF KENYA**

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

**KENYA AT NAIROBI**

**CAUSE NO 896 OF 2014**

**ANTONY ONDARA .....CLAIMANT**

**VERSUS**

**WEIDNER EAST AFRICA LIMITED.....RESPONDENT**

**JUDGEMENT**

1. By a memorandum of claim filed on 28<sup>th</sup> May, 2014 the claimant pleaded that he was contracted by the respondent on 1<sup>st</sup> April, 2011 to work as a technician and worked as such until May, 2013 when he quire employment as the respondent had stopped and or refused to pay his salary which according to him amounted to constructive dismissal. His salary was Kshs 15,200/= per month.
2. The claimant further averred that the respondent was to pay him a commission of 5% on sales and Kshs 500 o any repair of machines whose service charge was above Kshs 2,500 as well as refund all the travelling expenses incurred in the course of employment. Furhter the respondent was to remit Kshs 400/= monthly contribution to NSSF. According to the claimant, the respondent refused or ignored to do all these which he sought the order of the court to compel the respondent to pay.
3. The respondent admitted the claimant was its employee but pleaded that he left employment abruptly without notice hence was obliged to pay respondent Kshs 15,200 as one month's salary in lieu of notice.
4. In his oral evidence the claimant additionally stated that he joined the respondent on 1<sup>st</sup> February, 2011 and was to work for three months then be issued with a letter of appointment but was never issued with one. It was his evidence that he worked for three months and that he used to work at respondent's premises and at customer sites.
5. The claimant further stated that he left employment on 22<sup>nd</sup> May, 2013 since the respondent was not paying him his monthly salary, fare and was also not making his NSSF and NHIF contributions. According to him NSSF was not contributed for 21 months.
6. In cross-examination he stated that he joined the respondent in April, 2011. He further stated that he did not have any document to show there was sales for Kshs 168,000/=. He denied knowledge that the respondent was having financial difficulties. The respondent's witness Mr Solomon Njoroge stated that he was in private business but was previously the director of the respondent. According to him whenever the claimant was to do repairs away from the office he would be given transport. He further admitted that the claimant was owed 3 months' salary due to cash flow problems. Mr Nyaga denied the claimant was entitled to any commission since he was not a sales person but a technician.
7. In cross-examination he stated that the claimant was owed 3 months salary and that his NSSF contributions were never remitted for the period. He further stated that away jobs would be done through job cards and that the job card would on completion of the work be signed and stamped by the customer. The claimant would further stated the nature of the work done on the job card. He further stated that the claimant would be paid extra Kshs 500/= for any job over Kshs 2000/=.
8. The claimant resigned from employment after working for three months because the respondent was not paying his salary. The respondent has admitted this fact. Salary is an entitlement for work done. The respondent has alleged non-payment was occasioned by cash-flow problems and further stated that the respondent had since closed business. To fail to pay an employee salary and for such a period of time obviously places such an employee to hardship. It was the responsibility of the respondent to explain or at least inform the employee of the nature of the financial difficulties and what arrangements if any were being put in place to pay an employee's salary arrears or at worst terminate the contract.
9. The respondent has not furnished any such evidence. All it says is that the claimant left employment on his own and without notice and purported to counterclaim for the notice period. This cannot help as construed the respondent's conduct as constructive dismissal hence

unfair termination of service.

10. The court will therefore enter judgement against the respondent for the admitted three months' salary arrears and seven months' salary for unfair termination of service. Concerning claim for commission and bus fare these will be disallowed as the claimant failed to furnish any evidence to support the claims.

11. In conclusion there will be judgement against the respondent as follows:

a. Three months salary arrears	45,600	
b. Seven months salary as compensation for unfair termination	<u>106,400</u>	
		<b><u>152,000</u></b>

c. Items (a) and (b) shall be subject to statutory deductions.

d. Costs of the suit

12. It is so ordered.

Dated at Nairobi this 7<sup>th</sup> day of December, 2018

**Abuodha Jorum Nelson**

**Judge**

Delivered this 7<sup>th</sup> day of December, 2018

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.