



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 510 OF 2014**

**BETWEEN**

**BROOKS ALOLO OONJE .....CLAIMANT**

**VERSUS**

**CIVICON LIMITED ..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Matete Mwelese & Company Advocates for the Claimant*

*Munyao Muthama & Kashindi Advocates for the Respondent*

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**JUDGMENT**

1. In his Amended Statement of Claim filed on the 3<sup>rd</sup> December 2014, the Claimant states he was employed by the Respondent Company as a Welder, stationed in Uganda, in May 2008. He was subsequently transferred to Kenya. He worked under various fixed term contracts. The last is dated 15<sup>th</sup> July 2014, and was to expire on 20<sup>th</sup> December 2014. It was terminated prematurely by the Respondent on 11<sup>th</sup> June 2014. As of this date the Claimant earned a salary of Kshs. 34,500 per month. The Respondent alleged termination was on account of Claimant's incompetence and impropriety. The Claimant feels termination was unfair and unlawful. He was not issued sufficient termination notice. His Trade Union was not notified. He prays for the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 34,500.
- b) 12 months' salary in compensation for unfair termination at Kshs. 414,000.
- c) Salary for breach of contract based on remainder of the contract period at Kshs. 241,500.
- d) Pro- rata annual leave at Kshs. 15,500.

Total ..... Kshs. 705,500.

e) Costs of the Claim.

2. The Respondent filed its Statement of Response on the 10<sup>th</sup> December 2014. It concedes to have employed the Claimant as a Welder, in a fixed term contract, effective 15<sup>th</sup> January 2014. The contract was terminated by the Respondent on 11<sup>th</sup> June 2014, on account of the Claimant's incompetence and incapacity to perform his duties. Termination was fair and lawful, and in accordance with the Employment Act 2007.

3. Parties recorded an agreement on the 1<sup>st</sup> July 2016, to have the dispute considered and determined on the strength of their respective records. They confirmed filing of their Closing Submissions at the last mention in Court, on the 23<sup>rd</sup> September 2016.

**Claimant's Position**

4. The Claimant submits no reasons were give for termination. Fair procedure under Section 41 of the Employment Act 2007 was disregarded. The Response is a mere denial. No warning letter and letter to show, cause, were issued upon the Claimant before termination. There was no hearing. Termination took effect the same day the letter of termination issued. Terminal dues were not paid. The Respondent did not place the Claimant on any Performance Improvement Plan. Termination was unfair. The Claimant submits he is entitled to the prayers sought.

**Respondent's Position**

5. The Respondent submits its decision was based on clause 11 [c], [vi], of the Claimant's contract which states:

*“the company may summarily dismiss you from its employment with immediate effect, by way of notice in writing, if in the reasonable opinion of the Company are incompetent in the performance of your duties, or fail to consistently meet your key performance indicators.”*

Termination was fair and founded on the contract. He was paid 1 month salary in lieu of notice, and salary for 11 days worked in June 2014, totaling Kshs. 45, 481. He had only 5 months left in his contract. If termination was unfair and unlawful, he would only be entitled to the salary for the period left in the contract. The Respondent urges the Court to dismiss the Claim, with costs to the Respondent.

**The Court Finds:-**

6. There is no dispute the Claimant was employed by the Respondent as Welder. He worked under different fixed term contracts, in Uganda and Kenya. His last contract was to run from 15<sup>th</sup> January 2014, to 20<sup>th</sup> December 2014. Other contracts before 15<sup>th</sup> January 2014 are not in issue. The period of service is not in issue. Focus is on the approximately 1 year contract, made on 15<sup>th</sup> January 2014, expiring 20<sup>th</sup> December 2014.

7. This contract was terminated before maturity, on 11<sup>th</sup> June 2014. The Claimant states termination was substantively unjustified, and procedurally unfair. It did not meet the requirements of the law under Section 41, 43 and 45 of the Employment Act.

8. The Respondent answers termination was based on clause 11 [c] [vi] of the relevant contract of employment. The Respondent was allowed under this clause, to summarily dismiss the Claimant, if in the reasonable opinion of the Respondent, the Claimant was found to be incompetent in performance of his duties, or failed consistently to meet his key performance indicators.

9. There is no evidence on record showing that the Claimant was found incompetent. The Respondent did not place any material before the Court showing in what way the Claimant was incompetent. There were no performance indicators shown to the Court. It was not stated how or when the Claimant failed to meet

these undisclosed performance indicators. Without supplying the Court with evidence of poor performance and incompetence, the Respondent cannot be said to have had a reasonable opinion that the Claimant was guilty of poor performance, and was incompetent. He had worked on various fixed term contracts from the year 2008, with renewals up to the date of the last contract. He was a Welder throughout. Why would he become a poor performer, and incompetent at the last? A reasonable man would expect the Claimant to have become better with his experience. Termination was not substantively justified under Section 41, 43 and 45 of the Employment Act 2007.

10. Section 41 and 45 of the Employment Act required the Respondent to hear out the Claimant, before making the decision to terminate Claimant's contract prematurely. The Respondent could only make a reasonable opinion on the Claimant's performance and incompetence under the contract, upon charging the Claimant, and hearing what he had to say in his response. It was not practicable or reasonable to have an opinion, in a vacuum. It was not a requirement under the law, for the Respondent to involve the Labour Office before termination. The Claimant should have deleted this part of his Statement of Claim, which suggests the Labour Office should have been involved, at the time of amending his Statement of Claim.

11. It is the view of the Court that termination failed the substantive justification, and procedural fairness tests. It was unfair.

12. The Claimant had 5 months left in his contract. Section 49 [4] [f] of the Employment Act guides the Court to take into account the reasonable expectation as to the length of time for which employment might have continued, but for termination. The Claimant expected to work for 5 more months. He has no good reason to ask for the equivalent of 12 months' salary in compensation for unfair termination. The Court is similarly not bound to grant the Claimant an order for compensation, based on the remainder of the contract period. The Court looks at the gravity of the termination violation, and the entirety of the factors listed under Section 49 [4] of the Employment Act, in giving remedy. ***The Claimant is granted the equivalent of 4 months' salary in compensation for unfair termination, computed at Kshs. 138,000.***

12. The Claimant appears to have received salary in lieu of notice, and salary for days worked in June 2014 totaling Kshs. 45,481. Notice pay should therefore not be part of the contested items. His prayer for notice pay is rejected.

13. He is not entitled to anticipatory salary. Compensation for unfair termination has been granted and redresses Claimant's economic injury. There was only one injury, and one remedy suffices. The prayer for future earnings claimed at Kshs. 241,500 is rejected.

14. The Claimant did not support his prayer for pro-rata annual leave. He worked under separate contracts, each with its own terms and conditions of service. He did not show to the Court what his last contract stated on annual leave. He did not place his prayer of annual leave within Section 28 of the Employment Act. At the time of termination, he had only completed 6 months of his last contract. His prayer for pro-rata annual leave is rejected.

15. There shall be no order on the costs. IN SUM, IT IS ORDERED:-

***[a] Termination was unfair.***

***[b] The Respondent shall pay to the Claimant 4 months' salary in compensation for unfair termination at Kshs. 138,000.***

***[c] No order on the costs.***

Dated and delivered at Mombasa this 24<sup>th</sup> day of February 2017.

**James Rika**

**Judge**