



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 988 OF 2014

HARON OBIRI MEKENYE.....CLAIMANT

VERSUS

GURDEV ENGINEERING CONSTRUCTION WORKS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim as contained in Memorandum of Claim dated 4th June 2014 and amended on 20th April 2016 is for unlawful termination of employment and withholding of terminal dues.
2. The Respondent filed a Memorandum of Defence on 17th March 2015 but did not file a reply to the amended claim in spite of ample opportunity to do so. The Respondent also failed to attend the hearing despite due notice. The Court therefore heard the Claimant *ex parte* on 29th September 2016. The Claimant filed final submissions on 9th November 2016.

The Claimant’s Case

3. The Claimant was employed by the Respondent as a carpenter (Grade III Artisan) on 12th December 2008 at a daily rate of Kshs. 350. At the time of he left the Respondent’s employment, he earned a monthly salary of Kshs. 13,000.
4. On 15th March 2014, the Claimant fell ill while at work. He sought and was granted permission to seek medical attention. When he returned on 1st April 2014 to request for more time for recuperation, he was notified that he was no longer an employee of the Respondent.
5. It is the Claimant’s case that the termination of his employment was without lawful cause and in violation of the laid down procedure. He states that during his entire period of employment with the Respondent he was not paid house allowance and tool allowance as provided under the Collective Bargaining Agreement between the Respondent and Kenya Engineering Workers Union.
6. The Claimant’s claim is as follows:

- a) Salary for the month of March 2014.....Kshs. 20,592.99
- b) Accrued leave.....20,592.99

c) One month's salary in lieu of notice.....	20,592.99
d) Damages for wrongful dismissal.....	247,115.88
e) Severance pay @ 30 days' pay per year.....	111,545.36
f) House allowance for June 2011-March 2012.....	18,000.00
g) House allowance for April-December 2012.....	30,634.20
h) House allowance for January-May 2013.....	20,592.99
i) Tool allowance for April 2012-March 2014.....	10,800.00
j) Underpayment from May 2012 to April 2014.....	46,382.08
k) Certificate of service	
l) Costs plus interest	

The Respondent's Case

7. In its Memorandum of Defence dated 17th March 2015 and filed in Court on even date the Respondent admits having employed the Claimant as a carpenter on 12th December 2008.

8. The Respondent states that the Claimant absconded duty from 1st April 2014 and failed to resume in spite of being asked to do so. This information was relayed through the Claimant's colleagues, his union and his Advocates.

9. The Respondent pleads that on 15th March 2014, the Claimant asked for permission to seek medical attention which was duly granted. The Claimant however never returned to work nor did he inform the Respondent of his whereabouts or his health status.

10. The Respondent's attempts to reach the Claimant through his colleagues and the union bore no fruit.

11. On 7th April 2014, the Respondent received a demand letter from the Claimant's Advocates for compensation for unfair dismissal. In response, the Respondent expressed its surprise at the Claimant's allegations of unfair dismissal. The Respondent asked the Claimant's Advocates to advise him to resume duty.

Findings and Determination

12. There are two (2) issues for determination in this case:

- a) Whether the Claimant has proved a case for unlawful and unfair termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination or Desertion?

13. The Claimant alleges that his employment was unlawfully and unprocedurally terminated. In response, the Respondent denies ever terminating the Claimant and states that it is the Claimant who walked away never to return.

14. What is common is that on 15th March 2014, the Claimant was granted permission to seek medical

attention. In his testimony before the Court, the Claimant stated that when he resumed duty on 1st April 2014 he was asked to produce a medical certificate which he submitted on 2nd April 2014.

15. The Claimant further testified that he was later called to resume work but he declined because there was no return to work formula. This testimony tallies with correspondence between the Claimant's Advocate and the Respondent, produced before the Court.

16. My reading of this correspondence coupled with the Claimant's own testimony is that the Claimant was not interested in resuming work and the Court was therefore unable to find any basis for his claim for unlawful dismissal. The result is that the claim for damages on this account fails.

Other Remedies

17. Following the finding that the Claimant was in fact not unlawfully terminated, the claims for notice and severance pay must also fail. From the pay slip submitted by the Claimant, he was paid house allowance and the claim thereon is also without basis. The claims for tool allowance and underpayment were not proved and are dismissed.

18. Finally, the only claims I will allow are salary for days worked in March 2014 and prorata leave made up as follows:

- a) Salary for 15 days in March 2014(15,706/30x15).....Kshs. 7,853
- b) Leave for 2 months in 2014 (15,706/30x1.75x2).....1,832
- Total.....**
9,685

19. The Claimant is also entitled to a certificate of service.

20. Each party will bear their own costs.

21. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 3RD DAY OF FEBRUARY 2017

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JUDGE

Appearance:

Mr. Kiarie Mungai for the Claimant

No appearance for the Respondent