



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

**AT MOMBASA**

**CAUSE NO. 284 OF 2016**

**DOMINIC RINGOMA .....CLAIMANT**

**VERSUS**

**VICTORIA ENGINEERING CO. LTD .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. The twin issues for determination herein are whether the claimant's contract of employment was unfairly terminated and whether he is entitled to any remedy.

**BACKGROUND**

2. The claimant was employed by the respondent as a welder on 6/8/2014 for a monthly salary of ksh.17050. On 11/2/2016, at 3pm he was instructed by his supervisor Mr. Tan to weld a broken crusher Machine which was exposed to rain. To avoid being electrocuted, the claimant requested the supervisor to pend the welding until the rain stopped. However the Supervisor became furious and terminated his employment. The claimant reported the matter to the Personnel Manager but the latter upheld the termination by the Supervisor.

3. The claimant was aggrieved and brought this suit contending that the termination of his employment contract by the respondent was unfair and unlawful and prayed compensation plus terminal benefits totaling to ksh.273060.

4. The respondent never filed defence and the suit proceeded exparte on 9/11/2016 when the claimant testified as CW1 and thereafter filed written submissions.

**ANALYSIS AND DETERMINATION**

5. There is no dispute that the claimant was employed by the respondent as a welder from 6/8/2014 to 11/2/2016 when he was terminated. The issues for determination are:

- a. Whether the termination of the contract was unfair.
- b. Whether he is entitled to any remedy.

**UNFAIR TERMINATION**

6. Under Section 45(2) of the Employment Act, termination of employment contract is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure.

#### REASON FOR TERMINATION

7. Under Section 43 of the Act, the burden of proving the reason for termination in proceedings challenging termination like this one, lies with the employer and default the termination becomes unfair within the meaning of Section 45(2) of the Act. In this case, the respondent filed no defence and as such the burden of proof imposed by Section 43 of the Act was never discharged.

8. According to the claimant he was dismissed for declining the instructions to weld a machine while being rained on. The said reason was not justified by the respondent as required by Section 47(5) of the Act. On ground that the respondent has neither proved nor justified the reason for termination, I find and hold that the termination of the claimant contract of employment was unfair within the meaning of Section 45 of the Act.

#### PROCEDURE FOLLOWED

9. Just like the foregoing default to prove the reason for the termination, the respondent has failed to prove that she followed a fair procedure before terminating the claimant's contract of employment. Section 41 of the Act, requires in mandatory terms that before terminating the contract of employment on ground of misconduct, physical incapacity and poor performance, the employer must explain the reason to the employee in language he understands, and in the presence of a fellow employee or shop floor union representative of his choice and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided.

10. In this case the foregoing mandatory procedure was not followed by the respondent before terminating the claimant's contract of service. The termination was therefore unfair.

#### REMEDIES

11. Under Section 49 of the Act an unfairly terminated employee is entitled to salary in lieu of notice plus compensation for unfair termination if not reinstated or re-engaged to his employment. In this case the relationship between the parties herein has irretrievably broken down. The claimant's appeal to the personnel manager was a waste of time because he could not intervene. I therefore award the claimants ksh.17000 being one month salary in lieu of notice plus ksh.136000 being 8 months' salary as compensation for the unfair termination. In making the compensation, I have also considered the fact that the claimant never contributed to the termination through misconduct.

12. In addition to the foregoing, I award the claimant ksh.6270 being salary for the 11 days worked in February 2016. I also award the claim for ksh.20,259.25 being 31 leave days on pro rata basis under Section 28 of the Act. I however dismiss the claim for overtime for lack of particulars and evidence. I also dismiss the claim for severance pay because the termination of the contract of service was not through redundancy. Although the submissions by counsel talked about service pay under Section 35(5) of the Act, the same was at variance with the pleadings.

#### DISPOSITION

13. For the reason that the claimant's contract of service was unfairly terminated by the respondent, I enter judgment in his favour and as against the respondent in the sum of **ksh.179, 539.25** plus costs and interest.

Dated, Signed and delivered this 31<sup>st</sup> March 2017

O.N. Makau

Judge