



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

**CAUSE NO. 617 OF 2014**

**PETER WAHOME NDIRANGU CLAIMANT**

**V**

**TIMSALES LIMITED          RESPONDENT**

**JUDGMENT**

1. Peter Wahome Ndirangu (Claimant) in a Memorandum of Claim filed in Court on 26 November 2014 seeks *unpaid dues, gratuity, pay in lieu of notice and costs* from Timsales Ltd (the Respondent).
2. The Respondent filed a Response on 3 February 2015, *Agreed Issues* were filed on 3 March 2016, and the Cause was heard on 29 November 2016 when the Claimant testified, and 1 March 2017 when the Respondent's Supervisor testified.
3. The Claimant filed his submissions on 22 March 2017 while the Respondent filed its submissions on 13 April 2017.
4. The Court has considered the pleadings, evidence and submissions and will examine the evidence and submissions in light of the issues as agreed (5 Issues were agreed while in substantially only 3 issues are in contention).

**Whether Claimant was an employee of the Respondent**

5. Although identified as a disputed issue, the Respondent admitted in paragraph 2 of the Response that the Claimant was its employee.
6. The Respondent's witness admitted as much in his testimony and went further to state that the Claimant was initially deployed to the farm before being transferred to the factory.

**Compliance with procedures before dismissal**

7. Section 41 of the Employment Act, 2007 envisage a process of informing an employee of allegations being considered for termination of employment and affording the employee a hearing, if possible, accompanied with a colleague or union representative, if a member of a union.
8. The Claimant testified and produced documents to show that he was admitted in hospital from 9 January 2014 to 17 January 2014 and asserted that he was given a dismissal letter dated 18 January 2014 when he reported back to work on 20 January 2014.
9. He contended that he not given notice of termination of employment nor was he afforded a hearing

prior to the termination of employment.

10. The Respondent's Supervisor on his part stated that the Claimant was dismissed for unexplained absence/absence without permission. The pleaded defence was that the Claimant had absconded.

11. However, he did not disclose whether the Claimant was issued with a show cause notice, afforded an opportunity to make representations and who heard the Claimant's representations. He did not even disclose when such a hearing took place and where.

12. On the basis of the testimony and documents produced, the Court is satisfied that the termination of the Claimant's employment was devoid of procedural fairness as contemplated by sections 35 and 41 of the Employment Act, 2007.

13. It was callous of the Respondent not to give the Claimant an ear when he reported back on duty because the hospital admission though technically amounting to absence without permission meant that the Claimant had lawful cause to be absent from work.

14. With the finding it is not necessary for the Court to examine the fairness and validity of the reasons for termination in terms of sections 43 and 45 of the Employment Act, 2007.

### **Appropriate dues**

#### ***Unpaid dues***

15. No particulars of unpaid dues were outlined in the Memorandum of Claim or during testimony and this head of claim therefore was not proved.

#### ***Gratuity/Service***

16. The Claimant sought Kshs 144,946/- on account of gratuity and the formula indicating how the computation was made was set out in the Memorandum of Claim.

17. The Claimant's pay slips show he was a contributor to the National Social Security Fund and therefore he would not be entitled to service pay in terms of section 35(5) and (6) of the Employment Act, 2007.

18. If the gratuity was anchored on contract or other foundation, no evidential basis was laid before Court and therefore this head of relief is declined.

#### ***Pay in lieu of Notice***

19. Because the Claimant was not given notice of termination as required by section 35(1)(c) of the Employment Act, 2007, he is entitled to Kshs 17,130/- being the equivalent of 1 month basic pay at time of separation (December 2013 pay slip).

#### ***Compensation***

20. The Claimant served the Respondent for about 12 years and in consideration of the length of service, the Court is of the view that the equivalent of 12 months gross wages would be fair and appropriate (gross wage as of December 2013 was Kshs 24,205/-).

### **Conclusion and Orders**

21. The Court finds and holds that the termination of the Claimant's employment was procedurally unfair and awards him and orders the Respondent to pay him

(a) Pay in lieu of Notice	Kshs 17,130/-
(b) Compensation	Kshs 290,460/-
<b>TOTAL</b>	<b>Kshs 307,590/-</b>

22. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 21<sup>st</sup> day of April 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Oteyo/Mrs. Musila instructed by Gekonga & Co. Advocates

For Respondent Mr. Mburu instructed by M.C. Getanda & Co. Advocates

Court Assistant Nixon/Daisy