



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

**AT KERICHO**

**CAUSE NO. 153 OF 2016**

*(Before D. K. N. Marete)*

**BERNARD CHEMNJOR.....CLAIMANT**

**VERSUS**

**AL NAGEL HOLDING LT.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a statement of claim dated 1st November, 2016. The issue in dispute is therein cited as;

*Wrongful dismissal and unfair termination under section 49 of the Employment Act No.11 of 2007 and Article 41 of the Constitution of Kenya.*

The Respondent in a Respondent’s Memorandum of Defence dated 4th March, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant’s further case is that he worked for the respondent and this relationship was guided by the Employment Act, 2007 and the Constitution of Kenya.

It is the claimant’s case that he worked for the respondent under an employment contract annexed as Appendix A of the Claim and dated 1st May, 2016. It is his other case that the respondent’s action of termination his employment was calculated to deny him his constitutional rights under Article 41 of the constitution and the Employment Act, 2007.

It is the claimant’s further case that the respondent did not assign any reasons for termination and was therefore unjustified, unwarranted and should therefore not be allowed to stand. It was wrongful and unfair and a contravention of Section 49 of the Employment Act, 2007.

He claims as follows;

- a. The respondent’s dismissal of the claimant was unfair and unlawful thus amounted to wrongful dismissal and unfair termination.*
- b. Payment of the claimant’s terminal benefits as set out and particularized hereunder:-*
  - i. One month’s salary in lieu of notice .....150,000.00*

ii. Salary arrears for May, June, July,

August and September 2016 .....750,000.00

iii. 12 months compensation ....150,000 x 12 .....1,800,000.00

**Total amount due**

**2,700,000.00**

In the penultimate, he prays as follows;

*c. The respondent's dismissal of the claimant was unfair and unlawful thus amounted to wrongful dismissal and unfair termination.*

The respondent's case is that whereas there was in existence a contractual relationship between the parties, the same had not fully matured into a contractual relationship of employment in view of the express stipulations of the agreement executed on the 1st May, 2016 and more so the provisions and stipulations of Paragraph B regarding "Terms of Employment".

It is the respondent's further case that the claim is malafides in that there was indeed no termination of the claimant's services and that he was issued with a show cause letter requiring him to show cause as to why disciplinary action should not be taken against him for misappropriation of company proceeds regarding installation of a three phase electricity supply from the Kenya Power and Lightning Company Limited.

Further, the respondent contends that;

*a. The Claimant had not completed his probation with the Respondent and thus his status as an employee had not been confirmed.*

*b. The claimant was advanced an amount exceeding the sum of Ksh.500,000/= (Kenya Shilling Five Hundred Thousand Only) to facilitate electricity connection for the Respondent but he failed to do so and the installation he put in place was a fake one that was so declared by the KPLC.*

*c. The claimant has falsified his terms and dues, more particularly his monthly dues to a staggering figure of Kshs.150,000/= (Kenya Shilling One Hundred and Fifty Thousand Only) and his contention that he was entitled to the said amount is untrue. He is put to strict proof thereof.*

The respondent's penultimate case is that the claimant miserably failed on his obligations and the contract and therefore the issuance of a show cause letter to him. It is her case that no disciplinary action was undertaken as the claimant absconded duty and rushed to court.

The issues for determination are;

1. Was there a termination of the employment of the claimant by the respondent?
2. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this cause?

The 1st issue for determination is whether there a termination of the employment of the claimant by the respondent. The parties hold opposing positions on this.

The claimant in support of the claim annexes the following documents to the claim;

1. Employment Contract dated 1st May, 2016.

2. Letter of demand to the Respondent for wrongful dismissal and unfair termination of the claimant's services,

In all, the claimant forments a case of unlawful termination of employment which the respondent merely denies but does not controvert by evidence. The respondent's case as presented seems plausible but this ends at that. It is not supported by any evidence in contradiction of the claimant's case.

I agree with the submission of the claimant as founded under section 47(5) of the Employment Act, 2007 and cited in the authority of **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR**, where the court held as follows;

*“The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in section 47(5) of the Employment Act. The section provides that for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

*An employee therefore has the burden of proving that an unfair termination of employment has occurred. An unfair termination could be because no notice was given as required by section 35(1); no reason were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract. The obligation on an*

*employee is not as onerous as the obligations on an employer.*

*On the side of the employer, apart from the requirement in section 49(5) of the Employment Act to justify the grounds of termination, section 43 demand that the employer prove the reasons for the termination, while section 45(2)(a) and (b) required an employer to prove that the reasons for termination were valid and fair reasons.*

*And if it is a case of summary dismissal for fundamental breach of contractual obligations or gross misconduct, section 41(2) of the Employment Act obliges the employer to hear and consider any representations which the employee may wish to make.”*

The respondent's did not file written submissions in support of the defence. This left his entire case to the hapless defence. I therefore find that she has *in toto* failed to establish a case of no termination of employment. I therefore find a case of termination of employment and hold as such. And this answers the 1st issue for determination.

Likewise, the respondent also fails to dislodge a case of substantive and procedural unfairness as presented by the claimant. The defence of a show cause letter and abscondment of duty by the claimant should have been ably demonstrated by the respondent in evidence. In the absence of such proof, the claimant's case carries the day. I would find a case of unlawful termination of the employment of the claimant by the respondent and hold as such. Issue No. 2 is therefore settled.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on the twin pointing issues in this cause, he is entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. A declaration be and is hereby issued that the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful.

ii. One (1) month's salary in lieu of notice .....	Kshs.150,000.00
iii. Three (3) days salary for September, 2016.....	Kshs.15,000.00
iv. Four (4) months unpaid salary for May, June, July and August, 2016 .....	Kshs.600,000.00
v. Three (3) months compensation for unlawful termination of employment .....	Kshs.450,000.00
<b>TOTAL .....</b>	<b>Kshs.1,215,000.00</b>

vi. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 22nd day of May, 2017.

**D. K. Njagi Marete**

**JUDGE**

Appearances

1. Mr. Tombe instructed by Tombe & Company Advocates for the Claimant.
2. Mr. Ondego holding brief for Pascal instructed by Pascal & Associates for the Respondent.