



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 99 OF 2015**

**RICHARD OWITI.....CLAIMANT**

**v**

**MWANENKO COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. This is an undefended Cause because despite the Federation of Kenya Employers filing a Memorandum of Appearance on behalf of the Respondent on 16 March 2015, no Response was filed.
2. On 11 March 2016, the Court scheduled the hearing of the Cause for 5 December 2016, but the Court did not sit on that day and the Registry gave a rescheduled hearing date of 23 February 2017.
3. According to an affidavit of service filed in Court on 23 February 2017, the Federation of Kenya Employers acknowledged receipt of the hearing notice on 6 December 2016. There was no representation however during the hearing.
4. The Claimant in his sworn testimony stated that he was employed by the Respondent in June 2008 as a packer (cattle feeds) and that on 2 September 2015 he joined the Kenya Union of Commercial, Food and Allied Workers and this prompted the Respondent's Managing Director Samuel Odhiambo to ask him to apply afresh for his job, which was followed 2 days later with a request to sign a new contract.
5. According to the Claimant, he declined to sign a new contract before consulting with the Union, which led the Managing Director to instruct him to go back to work but after 2 hours, a supervisor informed him that the Director had ordered he leave for home after surrendering his overall.
6. In the view of the Claimant, the Respondent never gave him notice of termination of employment and therefore the termination was unfair.
7. On other terms and conditions of employment, the Claimant produced copy of a salary voucher dated 31 October 2014 and also stated that despite being deducted contributions towards the National Social Security Fund and National Hospital Insurance Fund, some of the deductions were not remitted.
8. He further stated that he did not go on leave during the period of employment.
9. The Claimant filed his submissions on 24 March 2017 (timeline agreed was before 23 March 2017).
10. The Court has considered the evidence on record and the submissions which have identified 2 main Issues as arising for determination.

## **Evaluation**

### **Fairness of termination of employment**

11. In terms of section 35 of the Employment Act, 2007, the Claimant being paid by the month was entitled to a written notice of termination of at least 28 days, and because none was given, the Court reaches a conclusion that there was an unfair termination of employment.

12. The Respondent did not defend the Cause to show that it complied with the requirements of section 41 of the Employment Act, 2007 or that it had valid and fair reasons to terminate the employment of the Claimant as contemplated by sections 43 and 45 of the Act.

### **Appropriate remedies**

#### **Compensation**

13. For the unfair termination of employment and considering the 6 or so years of service, the Court would award the Claimant the equivalent of 6 months gross wages as compensation.

#### **Unremitted NSSF/NHIF contributions**

14. As regards the unremitted NSSF and NHIF contributions, the primary statutes governing the Funds have elaborate provisions for dealing with unremitted contributions and the Claimant should make use of those avenues in the first instance.

#### **Service pay**

15. The Claimant would not be entitled to service pay by virtue of his membership of the National Social Security Fund in terms of section 35(5) and (6) of the Employment Act, 2007.

#### **Leave**

16. On unpaid annual leave, the Claimant did not lay an evidential basis for the Kshs 82,272/- pleaded.

### **Conclusion and Orders**

17. The Court finds and holds that the Claimant's employment was unfairly terminated and awards him and orders the Respondent to pay him

(a) Pay in lieu of Notice	Kshs 13,712/-
(b) Compensation	Kshs 82,272/-
<b>TOTAL</b>	<b>Kshs 95,984/-</b>

18. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 10<sup>th</sup> day of April 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant

Ms. Wachira, instructed by Wachira Wanjiru & Co. Advocates

For Respondent

Federation of Kenya Employers

Court Assistant

Nixon