



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 281 OF 2014**

**BETWEEN**

**JOSEPH MAINA .....CLAIMANT**

**VERSUS**

**CLEARSPAN CONSTRUCTION LIMITED ..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Cootow & Associates, Advocates for the Claimant*

*Njeru & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant originally filed his Claim against his former Employer, the Respondent herein, at the Senior Resident Magistrate's Court Mombasa, in February 2008. He was employed by the Respondent. It is not clear in his Plaint in which capacity he worked. Paragraph 3 states he carried several tasks assigned to him by the Respondent, suggesting he was a General Worker. He worked between 1998 and 11<sup>th</sup> October 2004 when he was summarily dismissed for absconding work for 2 months. He disputed the reason given by the Respondent in justifying termination. He prayed for Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 10,893.
- b) Gratuity for years worked at Kshs. 10,893
- c) Costs and interest.

He seems to have later added through amendment of Pleadings, a prayer for general damages.

2. The Respondent filed its Statement of Defence in March 2008. Its position is that the Claimant absconded for 2 months. He was summarily dismissed for gross misconduct and not entitled to any reliefs. The Respondent objected to the jurisdiction of the Senior Resident Magistrate's Court to hear the matter, under Section 87[2] of the Employment Act 2007.

3. Parties agreed to have the matter placed before the present Court, where it was registered as Cause

Number 281 of 2014. It came for hearing on 29<sup>th</sup> November 2016.

4. The Claimant was unable to give coherent evidence as he is quite old and recollected nothing of his employment history. The Court concluded his evidence added no value to the material on record, and would only tax judicial economy, tax his withering capacity for recollection of the relevant events, and muddy the record. With the concurrence of the Advocates, it was ordered the dispute be determined on the strength of the record.

5. Parties confirmed the filing of their Submissions at the last mention on 27<sup>th</sup> February 2017.

**The Court Finds:-**

6. As submitted by the Respondent, the Respondent was not under the Employment Act in force at the time of termination, required to justify its decision. Employment was at the time, at the will of the Employer. Termination could be for good cause, bad cause, or for no cause at all. The concept of unfair termination and the remedy of compensatory award were not present under the old Employment Act. Notice pay sufficed.

7. The Claimant could however have accessed a compensatory award under the Trade Disputes Act Cap 234 the Laws of Kenya, if he had approached the old Industrial Court through his Trade Union, after termination in 2004. The concept of unfair termination and remedy of compensation were known to the Trade Disputes Act. He approached Kenya Building, Construction, Timber, Furniture and Allied Industries Employees' Union, which did not file a dispute with the old Industrial Court. Instead, the Claim was filed before the Senior Resident Magistrate's Court, which declined jurisdiction. The Claimant has moved up and down the corridors of justice, from the year 2004, looking for closure.

8. He confined his prayers to notice pay and gratuity in his un-amended Plaintiff. In the view of the Court his prayer for general damages introduced later, is not well founded in the law which he invoked, on filing the Claim.

9. He should nonetheless have been recognized and rewarded for his years of service. He worked for 6 years. He claimed a months' salary as gratuity, for all the 6 years, which in the view of the Court was quite minimal. It was not clarified to the Court if this minimalist mode of computing gratuity, was derived from any CBA or Wage Order. He asked for 1 month salary as notice pay.

10. It was a fair and reasonable demand, which the Respondent should have given serious consideration, instead of adopting a position which has resulted in the Claimant spending considerable part of his sunset years, running after the wind in the corridors of justice. It may well be that the Claimant had a disciplinary lapse leading to termination of his contract. Loss of employment was punitive. Loss of entire benefits was doubly punitive. Fair dealing at the workplace requires Parties not only to look at the law, but also at what is equitable and fair. The Respondent does not appear to have cared that, although the Claimant may have made a detour in the course of his duty, he served for 6 years, and contributed to the growth of the Respondent. Why should a senile man, poor of memory and weak of body, spend years in Court running after Kshs. 21,786, which could have been paid in 2004? This is senseless litigation.

11. The Court orders:-

***a) The Respondent shall pay to the Claimant gratuity and notice pay as claimed at Kshs. 21,786.***

***b) No order on the costs and interest as the Claimant seems to have contributed to the circumstances leading to termination.***

Dated and delivered at Mombasa this 20<sup>th</sup> day of June 2017

**James Rika**

**Judge**