



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 196 OF 2016

BETWEEN

JOSEPH NDARAWA MOHAMMED..... CLAIMANT

VERSUS

ARM CEMENT formerly known as ATHI RIVER LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mwaure & Mwaure Waihiga Advocates for the Claimant

No appearance for the Respondent

JUDGMENT

1. Joseph Ndarawe Mohammed filed his Statement of Claim on 17th March 2016. He states he was employed by the Respondent Mining Company as a Stone Breaker, on 18th June 2007. He earned a daily wage of Kshs. 252. His contract was terminated by the Respondent, on 13th March 2013. He states termination was not based on valid reason. He was told the Respondent had recruited another Employee to perform the role the Claimant used to perform.
2. He prays for Judgment against the Respondent for 1 month wages in lieu of notice at Kshs. 6,552; annual leave pay for 5 years at Kshs. 26,460; Public Holidays of 5 years at Kshs. 25,200; 5 years' service pay at Kshs. 18,900; and compensation for unfair termination at Kshs. 78,624. He prays for cost and interest.
3. The Court record indicates the Respondent was served with the Notice of Summons and Statement of Claim. Subsequently, the Respondent was served with various Mention Notices. The Respondent filed nothing, and did not attend Court at any turn. The Claimant gave evidence by way of formal proof, and closed his case, at Malindi on 6th June 2017.
4. He restated the contents of his Pleadings in his evidence, outlining his employment history, his grievances against his former Employer, and his prayers before the Court. Like his colleagues in Court,

he produced various documents in support of the Claim, among them an Internal Memo from the Respondent dated 28th March 2013, granting the Claimant access to Respondent's premises to collect his terminal benefits. Also produced were Statements of Account from the N.S.S.F.

The Court Finds:-

5. The Claimant has shown he was employed by the Respondent Company as a Stone Breaker. He was employed on 18th June 2007, earning a daily wage of Kshs. 252. His contract was terminated by the Respondent on 13th March 2013. He was told by the Respondent another Employee, had been recruited to play his role. This was not a valid reason, in terms of Section 43 and 45, of the Employment Act, in justifying the decision. There was no hearing under Section 41 of the Act. The Claimant was not heard at all. There was no notice.

6. The Claimant has shown termination was unfair. He was denied annual leave entitlement; he was not given notice or 1 month wages in lieu thereof; and N.S.S.F Statements show the Respondent remitted contributions over a period 3 years and 2 months, totaling Kshs. 15,200. The Claimant worked for 5 years. The period is not fully accounted for by the Respondent under the National Social Security Fund. The Court, relying on *Elijah Kipkoros Tonui v. Ngara Opticians t/a Bright Eyes Limited [2014] e-KLR*, concludes the Claimant is entitled to service pay, less the amount of Kshs. 15,200 available to him under N.S.S.F.

7. Service pay is allowed at 18,900 less Kshs. 15,200 available to him under the N.S.S.F.

8. The prayer for public holiday pay has not been established. The specific days are not stated. The mode of computation is not shown. No wage instrument supporting the items, and the mode of computation, has been brought to the attention of the Court. The amount of Kshs. 25,200 in holiday pay, is made in a vacuum and is rejected.

9. Other prayers have sufficient support in law and fact **IT IS ORDERED:-**

a) It is declared termination was unfair.

b) The Respondent shall pay to the Claimant 1 month wages in lieu of notice at Kshs. 6,552; the equivalent of 12 months' wages in compensation for unfair termination at Kshs. 78,624; annual leave pay over a period of 5 years, at 21 days per year, at Kshs. 26,460; and service pay less available pension under the N.S.S.F at Kshs. 3,700 – total Kshs. 115,336.

c) Costs to the Claimant.

d) Interest granted at 14 % per annum from the date of Judgment till payment is received in full.

Dated and delivered at Mombasa this 9th day of June 2017.

James Rika

Judge