



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 195 OF 2015**

**ELIAS BENEDICT MAHAGA.....CLAIMANT**

**VERSUS**

**NORTHERN NOMADIC DISABLED PERSONS ORGANISATION...RESPONDENT**

**JUDGEMENT**

1. The Memorandum of Claim was filed on 17<sup>th</sup> February 2015, summons were issued to the Respondent and Affidavit of Service filed on 18<sup>th</sup> June 2015. The Respondent did not enter appearance or file any defence. The matter came before court on 11<sup>th</sup> November 2015 when the judge directed the Claimant to serve the Respondent against which was done and Affidavit of Service was filed on 11<sup>th</sup> December 2015. The respondents again failed to enter appearance or file defence. On 25<sup>th</sup> February 2016 the court again directed the Claimant to serve the respondents again which was done and Affidavit of Service filed on 14<sup>th</sup> March 2016. Noting the various times the respondents have been served and not keen to defend the suit, the Claimant was heard in his evidence.

2. The claim is that on 1<sup>st</sup> April 2014 the Respondent employed the Claimant as a Project Officer at a salary of kshs.20, 000.00 per month. He served diligently until 9<sup>th</sup> September 2015 when he was terminated without notice or being given a hearing.

3. The Claimant is seeking notice pay; payment for the unexpired term of the contract; compensation for unfair termination; and costs of the suit.

4. In evidence, the Claimant testified that he was employed and issued with a written contract of employment where he was placed on probation for 3 months and upon successful completion he was confirmed into employment. While at the Respondent he was running a project of over two million Kenya shillings and had to oversee and procedure IEC material. One supplier Bernard uniform Material in South C was supposed to do t-shirts for the Respondent and the Claimant was required to rack all materials procedure under the project and to endure all payments were made. The project was running in Isiolo and the Respondent had not paid the supplier which he followed up. While following up on the due materials, the Claimant was accused of soliciting for funds from the supplier. He was suspended without any further communication. He was alter called and told to clear and hand over. The Claimant opted to write a letter of distress noting the unfair circumstances of his termination without a hearing but the Respondent was adamant that upon clearance he should be terminated from his employment.

5. The Claimant also testified that he went to Kituo cha Sheria and reported the matter, the office helped him to issue a demand letter to the Respondent but they were adamant and refused to oblige. That until his termination he had worked diligently. He suffered a lot of distress and trauma as he had just had

a baby and was not able to support his young family. That had he been given a hearing before termination, the Respondent would have given him a fair chance to continue working as he had falsely been accused of misconduct.

6. The termination of employment for any employee is traumatic. This is especially in a case where an employee is placed on suspension and without a hearing, an employer proceeds and effects a termination. This court has held in several case that once an employee has been suspended, such is to serve as a removal from the office of the employer to enable the employer conduct investigations and where found culpable such an employee must be recalled for hearing and where such does not yield sufficient explanations, a show cause must issue for the employee to know what charges they are faced with and for the employee to organise their defence. See the case of **Godfrey Odongo versus CFC Life Assurance, Cause No.1001 of 2012**. Also I make reference to the case of **Peter Kamwi versus Standard Group Ltd, Cause No.176 of 2015**;

Upon suspension, a show cause is issued upon an investigation of allegations against an employee. The subject employee must answer to the show cause and where the response is not satisfactory, then the employee must be called to a hearing.

7. Even where the process with regard to suspension or show cause was followed, which was not the case here, section 41 of the Employment Act apply thus;

*41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

8. Such is the requirements set out under section 41 and 43 of the Employment Act. An employee must be given a hearing before termination of employment. Such a requirement is mandatory. Even in the worst case of gross misconduct that warrant summary dismissal, section 41(2) makes it mandatory that such an employee must be given a hearing unless there exists exceptional circumstances that make it impossible for the employer to hear the employee. In that case, the duty is upon the employer to set out such exceptional circumstances that made it impossible to hear the employee before termination.

9. On the basis that the Respondent has opted not to defend the suit herein, I take it that the claims as set out are due and owing to the claimant. Without any evidence of due process followed before termination, I find he Claimant was unfairly terminated for no just cause. Where termination is without notice as required under section 35 of the Employment Act, payment in lieu is due. Equally, in a fixed term contract, section 18 read together with section 49 of the Employment Act apply and the payment is due for the unexpired term of the contract. However, the Claimant has not attached the employment contract for the court to assess its term and establish the rationale for the claim of the payment for the due term of the employment contract. In his evidence, the Claimant testified that he was issued with a written contract of employment. Despite the non-appearance of the Respondent and failing to file a defence, the claim with regard to dues owing for the unexpired term of the claimant's contract was his duty to prove. Without such a contract, and its term not being clear, such orders cannot issue.

**Judgement is hereby entered for the Claimant and a declaration that he was unfairly terminated;**

- a. **The Claimant is awarded compensation at 12 months gross salary all being Kshs.240,000.00;**
- b. **Notice pay is awarded at kshs.20,000.00;**
- c. **The Claimant shall be issued with a Certificate of Service under section 51 of the Employment Act.**

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH 2016.

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Lilian Njenga

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