



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT NAIROBI**  
**CAUSE NO 173 OF 2011**

**FREDRICK MUSEMBI.....CLAIMANT**

*Versus*

**GEORGE NDIRANGU – CHAIRMAN**

**SAMUEL KIPNG’ETICH KIMOSOP – VICE CHAIRMAN**

**MUNDIA NJERU GETERIA - TREASURER**

**(Sued on behalf of the PUBLIC SERVICE CLUB.....RESPONDENTS**

**Mr. Munyu for Claimant**

**Mr. Kibe Muigai for Respondent**

**JUDGMENT**

1. The Claimant was employed by the Respondent by a letter of employment dated 19<sup>th</sup> March, 2007 for a renewable term contract of three years but subject to confirmation. The employment commenced on 1<sup>st</sup> April, 2007.
2. The Claimant’s employment was terminated by a letter dated 24<sup>th</sup> August, 2009 under Clause 13(a) of the contract of employment which provided,

***“(a) Termination by Notice***

*1This appointment may be terminated by either party giving seven days written notice or seven days salary in lieu of notice during the probation period and one month’s written notice or one month’s salary in lieu of notice after confirmation.”*

3. The reason for the termination was stated thus,

*“Consequently, our audit report indicates that the Club lost Ksh.4,109,770 between*

*January 2008 and April, 2009 which was within your tenure.....”*

4. This was attributed to poor work performance by the Claimant.
5. At the time of termination the Claimant had six more months to serve the Respondents.
6. The Claimant in the Memorandum of Claim dated 18<sup>th</sup> February, 2011, seeks a declaration that the dismissal from employment on 24<sup>th</sup> August, 2009 was unlawful. That he be paid special damages set out in paragraph 11 of the Memorandum of Claim in the sum of Kshs.720,000 and that he be awarded 12 months salary as compensation for the wrongful dismissal in terms of Section 49 of the Employment Act, 2007.
7. At the time of dismissal, the Claimant earned Kshs.75,000 monthly salary and states he had not taken 19 days accrued leave days. He also seeks payment in lieu of 14 days paternity leave not taken and service gratuity.

### **Response**

8. The Respondents rely on Amended Response filed on 3<sup>rd</sup> July, 2014 in which it is admitted that the Claimant was an employee of the Respondent on a 3 year fixed term contract effective 1<sup>st</sup> April, 2007.
9. The Respondents state that it lost Kshs.4,109,770 due to poor work performance by the Claimant.
10. That upon termination of the Claimant's employment, terminal dues were calculated and a cheque was procured but the Claimant refused to collect the same in the sum of Kshs.122,500 being one month's salary in lieu of notice and payment of leave days not taken.
11. The Respondents deny any basis for the claim of compensation under Section 49 of the employment Act, 2007. Further, the Respondent states that by dint of Clause 6(a) of the contract of employment the Claimant was not entitled to payment of gratuity since he was dismissed for gross misconduct. The claim for 14 days paternity leave is also denied.
12. The Claimant testified under oath in support of the particulars of claim whereas the Respondents called Gladys Gathoni Gatotho (RW1), the Acting General Manager of the Club to testify in support of its case. RW1 stated that the Claimant was not dismissed from employment but his employment was terminated with payment in lieu of one month notice.

### **Determination**

13. The issue for determination is
  - i. Whether the termination of the Claimant was for a valid reason and if the termination was effected in terms of a fair procedure,
  - ii. If the Claimant is entitled to the reliefs sought.

### **Issue 1**

14. RW1 told the court that there is need to give a fair hearing to an employee before his employment was terminated. The witness further told the court that a notice to show cause needed to be given to the Claimant and then he would appear before a Human Resource sub-committee for a disciplinary hearing to take place.
15. The witness told the court that from the documents on record, there was nothing to show that any of the above took place.

16. RW1 said that the Claimant had not been paid terminal benefits to date. The witness also told the court that the Club normally gives 14 days paternity leave to its employees.
17. RW1 told the court also that since he was not in the employment of the Respondents at the time the termination of the employment of the Claimant took place, he was not familiar with the circumstances of the termination and therefore could not testify on the matter.
18. The testimony of RW1 largely collaborated the evidence by the Claimant that he was not taken through a disciplinary process prior to the termination. That he was a good performer and there was no basis at all to attribute loss of shs.4,109,770 to him. That there was no evidence before court to show that any such loss occurred nor was there any evidence of poor work performance by the Claimant.
19. It is the court's considered view and finding that the Claimant has proved on a balance of probability that the allegation that poor performance by the Claimant caused the Respondents to lose Kshs.4,109,770 had no factual basis.
20. That the Claimant had no record of poor work performance but to the contrary had improved the financial performance of the Respondent during his tenure. That he was not charged with any offence of misconduct or poor work performance, was not given notice to show cause why his employment should not be terminated and was not subjected to any disciplinary hearing in terms of the Respondents' Human Resource Manual.
21. The Claimant has therefore proved on a balance of probability that his termination from employment was not for a valid reason and the termination did not follow a fair procedure.
22. That the conduct by the Respondent contravened Section 43 as read with Section 45 of the Employment Act, 2007.
23. The Claimant is therefore entitled to compensation in terms of Section 49 of the Employment Act.
24. The Claimant had a fixed term contract, and had six months remaining to serve the remainder of the contract. The termination was a breach of the contract and curtailed contracted employment and remuneration for a further period of six months. The Claimant therefore suffered loss and damage as a result thereof. The Claimant did not receive 25% gratuity he was entitled in terms of Clause 6(a) of the contract and was not given a certificate of service to enable him obtain alternative employment. These are aggravating circumstances in this case.
25. The Claimant was offered payment in lieu of one month's notice and payment in lieu of 19 days leave which he declined to take. This is a mitigating factor for the Respondents.
26. The court finds that from the evidence of RW1 the Claimant was also entitled to 14 days paternity leave which he was not granted and is entitled to payment in lieu thereof.
27. Considering all the circumstances of the case and in particular having regard to the decision of **Enoch Ochieng Amollo V. Visions institute International Limited, (2013) LL 167 (ICIL)** to the effect compensation ought not to exceed the remainder of the term in a fixed term contract, the court awards the Claimant six (6) months' salary as compensation for the unlawful and unfair termination of employment in the sum of Kshs.(75,000 x 6) = Kshs.450,000.

#### **Other benefits**

28. The Claimant has proved on a balance of probability that he is entitled and is duly awarded as against the Respondents;
  - i. One month's salary in lieu of notice in the sum of Kshs.75,000

- ii. Kshs.47,500 in lieu of 19 days leave not taken
- iii. Kshs.35,000 in lieu of 14 days paternity leave
- iv. Kshs.562,500 gratuity in terms of Clause 6(a) of the Employment Contract

Total award to the Claimant as against the Respondent is Kshs.1,170,000.

- v. The award is payable with interest at court rates from date of filing suit till payment in full.
- vi. The Respondent is to pay the costs of the suit.

**Dated and delivered in Nairobi this 1<sup>st</sup> day of April, 2016.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**