



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**OF KENYA AT NAIROBI**  
**CAUSE NO. 230 OF 2015**  
**EDWIN MAURICE BARAZA.....CLAIMANT**  
**VERSUS**  
**SAMANI CONSTRUCTION LIMITED.....RESPONDENT**  
**JUDGMENT**

1. The Claimant filed this suit on 24<sup>th</sup> February 2015 and sought various reliefs against the Respondent his erstwhile employer. He averred that he was employed by the Respondent on or about January 2005 as a carpenter. He stated that he stopped working for the Respondent in December 2007 but was recalled in June 2010 and worked for 2 months before he was terminated from working. He averred that he was recalled again in April 2014 and worked till July 2014 when he was again terminated after he sustained serious injuries to his left hand and fingers. He averred that he was hospitalised for 3 months and his relationship with the Respondent's human resource manager became frosty as the Claimant was demanding compensation from the insurers under the Work Injury Benefits Act and the Respondent was adamant prompting the Claimant to exert pressure through the Labour Office County occupational safety and health officer. He averred that immediately the Respondent's insurer paid the compensation to the Claimant with a cheque for 321,561/- the Respondent terminated the Claimant's services without giving him any notice as required by law. The Claimant stated that at the time of termination he was earning a monthly salary of Kshs. 17,750/-. The Claimant averred that he was convinced that the termination was orchestrated by the fact that he was persistent in asking for compensation for the fracture he suffered and the fact that he reported the Respondent to the labour office for refusing to pay the claim under WIBA. The Claimant's case was that Section 46(h) of the Employment Act prohibits an employer from terminating the employment of an employee for initiating a complaint under WIBA. He averred that the termination was unfair, unreasonable and unjustifiable for the reason that the Respondent never gave the Claimant any notice, that there was no explanation or a fair hearing prior to the termination of the Claimant's services and that the termination was orchestrated by the persistent demand for compensation for the fracture he suffered. He thus sought a declaration that the termination was unfair, maximum compensation for unfair termination – Kshs. 213,000/-, leave allowance for 52 months – Kshs. 53,841/-, severance pay for 52 months – Kshs. 38,458/-, general damages for unfair termination, interest on the sums claimed and any other relief that the honourable court may deem fit to grant.

2. The Respondent filed a statement of response to the Claimant's memorandum of claim on 23<sup>rd</sup> March 2015. In it, the Respondent averred that the Claimant was a casual worker at different periods. The Respondent denied that the Claimant was terminated from employment after sustaining injuries. The Respondent confirmed that the Claimant had an accident on 24<sup>th</sup> June 2013 while in the course of employment and that the Respondent took him to hospital and paid all his medical bills until he fully

recovered. The Respondent averred that it is a construction company that hires people depending on the work available. It averred that the Claimant did not have a frosty relationship with the human resource manager as a result of the Claimant's demand for compensation. The Respondent stated that the Claimant continued working for it until 17<sup>th</sup> July 2014. The Respondent denied that it had declined to pay the Claimant's claim under WIBA. The Respondent averred that it insures all its employees under WIBA and that after the accident the Respondent launched a claim and the compensation process kicked off and subsequently the Claimant was paid his compensation. The Respondent stated that the Claimant was paid all his dues amounting to Kshs. 37,462/- comprising of service pay, leave salary, one month notice and the same was taxed leaving a net of Kshs. 37,052.80. The Respondent thus sought that the suit be dismissed with costs. A witness statement was filed on 10<sup>th</sup> November 2015 by the Respondent in respect of its witness Mr. Richard Masese.

3. The Claimant testified on 15<sup>th</sup> June 2016 and stated that he was presently a *jua kali* worker in the construction industry. He testified that he was working for the Respondent on 24<sup>th</sup> June 2014 fitting glasses to a building at Lakeview when he got injured. He stated that he was treated and after 3 months was reinstated. He testified that he received Kshs. 355,059/- as compensation for the injury and that the cheque came after he reported the matter to labour. He denied that he was absent from work from 1<sup>st</sup> to 10<sup>th</sup> and that he was at work on the days he was indicated as absent.

4. In cross examination he confirmed that he knew he had taken an oath to tell the truth and nothing but the truth. He testified that he was claiming dues from previous times. He stated that he worked from 2006 and that he was registered for NSSF in 2005. He said that he had not produced nor carried proof that he was registered in 2005. He testified that after termination he was not paid. He stated that from June 2010 to July 2010 he worked as a carpenter for the 2 months. He testified that he did not get paid for the year 2007 but he had not sued. He was referred to para 6 of the claim and he stated that he was hospitalised for 3 months. He was referred to the letter at page 7 of the Respondent's bundle and testified that he was hospitalised for 3 days and then had sick off for 3 months. He stated that he did not work for the 3 months. He testified that there was a reply to the Respondent's letters and that he was claiming dues for the previous times.

5. In re-exam he testified that he was injured in 2013 and hospitalised. He stated that it was initially bearable but when he asked for his dues work became unbearable. He testified that it was the responsibility of the Respondent to pursue WIBA.

6. The Respondent called Mr. Ricahrd Masese Ochengo who testified on 5<sup>th</sup> July 2016. He stated that the Claimant was a carpenter at the Respondent and had worked over periods of time and would always be paid his terminal dues. He stated that when there was work the Claimant would then re-engaged. He said that the Claimant got injured while working at a site in Westlands on 24<sup>th</sup> June 2014 and that the Respondent took the Claimant to hospital and the Claimant was treated and the Respondent cleared all the debts. He stated that the Claimant was paid his full salary while on sick off and that the Respondent lodged the claim for WIBA. He testified that the before lodging the compensation claim the Claimant had to have recovered in to enable the doctor assess the extent of the damage. He stated that the injury was assessed at 20% disablement and that the Claimant was compensated. He stated that the Claimant received terminal dues and signed an acknowledgment that the Claimant had received all his terminal dues and that the Claimant had no other claims against the Respondent. He testified that NSSF was paid on a monthly basis. He testified that the Claimant was paid Kshs. 321,000/- because there was payment of full salary during the 2 month sick off.

7. In cross-examination, he testified that the Claimant was first employed in 2006, worked till September 2007 and was recalled for 3 months in 2012 and was hired for 1 year 4 months in 2013. He stated that the Claimant was laid off according to site needs. He testified that the Claimant was absent between 1<sup>st</sup> July to 10<sup>th</sup> July and that the foreman marked 'A' on the job attendance card. He denied that the form was prepared for court.

8. The Claimant filed submissions on 8<sup>th</sup> July 2016 and the Respondent filed submissions on 25<sup>th</sup> July 2016. In his submissions, the Claimant submitted that the issues for determination were whether the Claimant was a casual or permanent employee of the Respondent, duration of employment of the Claimant, was the manner of removal from employment amount to redundancy, and if the Claimant was removed on account of redundancy did the account meet the test under Section 40 of the Act and finally what remedies would lie if the removal from employment contravened Section 46(h) of the Employment Act. It was submitted that the Claimant was employed for a longer period than was provided for under Section 2 of the Employment Act. The Claimant submitted that the employer was bound to keep a register in which details of the employee are entered and the record should be sent to the Director no later than 31<sup>st</sup> January of the following year. The Claimant submitted that failure to maintain records was illegal. The Claimant submitted that the Section 40 provides for various conditions which an employer must fulfil before declaring an employee redundant. The Claimant submitted that his removal from employment contravened Section 46(h) of the Employment Act and further that he was not given a chance to be heard before his services were terminated. He thus urged the Court to find in his favour and grant the Claimant the prayers sought.

9. The Respondent submitted that the Claimant's claim must fail as the Respondent had demonstrated in unequivocal terms that the Claimant's services had been fairly terminated. The Respondent submitted that the discharge voucher shows the Claimant was paid WIBA compensation. The Respondent submitted that the Claimant was paid his terminal dues in compliance with Section 40(1) of the Employment Act.

10. The testimony adduced and the submissions of both counsel were at variance. The pleadings never made reference to redundancy or the like. There was no evidence led on the point by either party save for allusion that the termination was unfair. If redundancy was the reason for termination, Section 41 makes provision that the employee and the labour office be informed. No evidence was led on this point by either the Claimant or the Respondent. The Claimant asserted that he was dismissed for following up on his WIBA compensation. If that is so, then there was no redundancy declared as the dismissal was on account of the Claimant being an irritant. Under Section 43 of the Employment Act, the employee has a burden to show that the termination was unfair while for the employer the burden is to show that there was reason for the termination. The Claimant did not demonstrate the unfairness of the dismissal. He failed to adduce evidence on this as the persistent demands for compensation were not documented before court. No letter or note was produced to show he as persistent in seeking payment for the injury. It was the Respondent's position that the Claimant ceased being its employee because there was a reduction in work. A letter of recommendation was exhibited and it clearly states that the Claimant was put on hold due to reduction in jobs within the company. This would have been a good ground to declare a redundancy but none seems to have been made. The Claimant to his detriment, signed a discharge asserting that he had no other claims against the Respondent. This barred him for attempting to recover more from the Respondent and the only end to this suit is its dismissal.

Orders accordingly.

**Dated at Nairobi this 11<sup>th</sup> day of August 2016**

**Nzioki wa Makau**

**JUDGE**

**Delivered at Nairobi this 24<sup>th</sup> day of August 2016**

**Hellen Wasilwa**

**JUDGE**