



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 82 OF 2015**

*(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)*

**JOACHIM KIMOJA .....CLAIMANT**

**-VERSUS-**

**EQUATOR BOTTLERS LIMITED .....RESPONDENT**

**J U D G E M E N T**

The Claimant was employed by the Respondent as Human Resource Manager by letter of offer dated 21st January, 2012 and an appointment letter dated 6th February, 2012. He worked as such until 17th February, 2015 when he received a letter of termination of his employment. The letter states that the termination is effective from 21st February, 2015.

The letter sets out his terminal dues as follows -

NAME	Mr. Joachim Kimoja	
DATE OF JOINING	6-Feb-12	
DATE OF LEAVING	28-Feb-2015	
LASLT SALARY-BASIC	176,400.00	
LAST SALARY HOUSING	43,000.00	
SPECIAL ALLOWANCE	46,500.00	
Total Gross Pay	265,900.00	
LEAVE DAYS	42 days(265900/195HRS*8HRS* 40DAYS)	436,348.72
SALARY-FEBRUARY 2015		265,900.00
NOTICE PAY	1 MONTH	265,900.00
Ex-Gratia	1 month's salary for every complete year of service	797,700.00
PENSION(FEB-15 CO.CONTR)		13,230.00
<b>TOTAL AMOUNT</b>		<b>1,779,078.72</b>

The letter however does not state the reasons for termination.

According to the Claimant his employment was terminated because several expatriate technicians from Italy who had been invited by the Respondent to install and/or carry out maintenance of machines/plants at the Respondent's factory were arrested and charged by Immigration Department for working without a work permit. They pleaded guilty to the charges and were fined Shs.90,000/- each. The Claimant was blamed for failing to acquire the work permits.

It is the Claimant's case that he was not involved and was not responsible for obtaining the work permits and that the expatriates were invited by the Managing Director.

It is the Claimant's contention that the termination of his employment was unfair because he was not given a hearing as provided by law. He prays for the following remedies -

- (a) Kshs.3,731,436
- (b) Costs of this suit
- (c) Interest on (a) and (c) above

For the Respondent it is averred that it was the role of the Human Resources Department which the Claimant was in charge of to procure visa's and ensure the expatriate technicians were legally in the County to undertake the work they were engaged to perform. The Respondent denied that the General Manager is the one who invited the technicians and failed to process special works permits for them.

At the hearing the Claimant testified on his behalf while the Respondent called **BENJAMIN OMONDI ALANDO RW1**, Its Human Resource Assistant. The parties thereafter filed and exchanged written submissions.

### **Findings and Determination**

I have considered the evidence on record and the issues for determination are whether the Claimant was unfairly terminated and if he is entitled to the remedies sought.

The law relating to termination of employment is contained in section 41, 43 and 45 of the Employment Act. Section 41 requires an employee to be given a hearing in the presence of a union official or a fellow employee of his choice while section 43 provides for proof of reason for termination by an employer. Section 45 provides that termination of employment is unfair unless the employer proves -

- (a) that the reason for the termination is valid;*
- (b) that the reason for the termination is a fair reason—*
  - (i) related to the employee's conduct, capacity or compatibility; or*
  - (ii) based on the operational requirements of the employer; and*
- (c) that the employment was terminated in accordance with fair procedure.*

In the present case RW1 who was the Assistant to the Claimant admitted in cross examination that the Claimant was diligent in his work, that the Claimant did not resign, He stated that he was not aware of the coming of the technicians from Italy and was not aware if the claimant was aware or was involved in the coming of the visitors. He stated that he had not come across records of the coming of the technicians within the Human Resource Department. He admitted that the technicians were invited by the Managing Director and the letter inviting them was not copied to Human Resource Department. RW1 stated that there was a meeting on 6th February, 2015 but he did not attend and was not aware of what transpired at

the meeting.

The Respondent did not produce any minutes of a disciplinary hearing or invitation to the Claimant to attend such meeting. The letter of termination does not refer to any such meeting and does not state grounds of termination.

From the foregoing it is clear that the Claimant was not given a hearing as provided in section 41 of the Employment Act. It is also clear that there was no valid reason for the termination as he was not responsible for obtaining work permits for the expatriate technicians nor was he involved in the process of invitation of the technicians or the processing of their work permits. The termination of his employment was therefore unfair from both want of fair process and lack of valid reason.

I therefore find and hold that the termination of the Claimant's employment by the Respondent was unfair.

### **Remedies**

The Claimant prayed for damages for wrongful dismissal at Shs.3,689,100 and withheld performance pay Shs.42,336/-. Section 49 of the Act provides for compensation upto a maximum of 12 months salary where an employee has been unfairly terminated. The Claimant prays for maximum compensation and relies on the case of *ASENATH DONELA HOCH v THE PRINCIPAL WOMEN'S INSTITUTE FOR SECONDARY EDUCATION & RESEARCH KISUMU ELRC CAUSE NO.95 of 2014*.

The Respondent on the other hand submits that having been paid all his terminal dues the Claimant is not entitled to compensation. The Respondent relied on the Kisumu Court of Appeal Case No.72 of 2014 - *HEMA HOSPITAL v DR. WILSON MAKONGO MARWA*. The Respondent further relied on the case of *D.K. NJAGI MARETE v TEACHER'S SERVICE COMMISSION [2013] eKLR* and *ABRAHAM GUMBA v KENYA MEDICAL SUPPLIES AUTHORITY [2014]eKLR*. In all the cases the court underscored the fact that compensation is intended to insulate employers from profit making motives and to make good an employee's loss.

In this case I have found that the Claimant was unfairly terminated without valid reason and without compliance with fair procedure. He had worked diligently and with no record of any disciplinary issues. According to section 49(1) (c) he is entitled to compensation up to a maximum of 12 months depending on the gravity of the case. The court is expected to consider the factors set out in section 49(4) before arriving at what the court considers a just remedy.

Having worked for three years and taking into account the circumstances which led to his dismissal and the conduct of the employer, it is my opinion that 6 months salary is reasonable compensation. The Claimant has calculated the compensation based on a salary of Shs.307,425 per month while the Respondent used the figure of Shs.265,900 to calculate the Claimant's terminal benefits.

According to the Claimant's payslip for January 2015 his basic salary was Shs.176,400, House allowance was Shs.43,000, special allowance of Shs.46,500 and sundry allowance of Shs.41,521 making a gross of Shs.307,521. According to Section 49(1) (c) compensation is based on gross pay.

The Claimant's 6 months salary is therefore Shs.1,844,552.94 which I award him.

The Claimant further claimed withheld performance bonus. RW1 admitted that all employees working under the Claimant were paid performance bonus for the period September 2014 to December 2014 but the Claimant's name which also appeared in the printed list for payment was cancelled by hand and there is nothing to show that the Claimant did not perform.

RW1 stated that there was no explanation for deletion of the claimant's name from the performance bonus list.

The foregoing being the case I find that the Claimant earned and is entitled to payment of the performance bonus of Shs.42,336.00 which I consequently award him.

The Respondent will pay Claimants costs for this suit and the decretal sum shall attract interest at court rates from date of judgement.

**Dated, Signed and Delivered this 17th day of November, 2016**

**MAUREEN ONYANGO**

**JUDGE**