



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT AT MOMBASA  
CAUSE NUMBER 233 OF 2014

**BETWEEN**

JUSTUS KATANA CHARO ..... CLAIMANT

**VERSUS**

READY CONSULTANCY COMPANY LIMITED..... RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Ms. Omolo Advocate, instructed by Lamanya Katee & Company Advocates for the Claimant*

*Ms. Maina Advocate, instructed by Marende Birir & Company Advocates for the Respondent*

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ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. Justus Katana Charo filed his Statement of Claim on 13<sup>th</sup> May 2014. He claims he was employed by the Respondent in July 2009 as a Machine Maintenance Personnel, earning a daily wage of Kshs. 471. He was injured while in the course of duty, and sued his Employer under the work injury regime, in the Chief Magistrate's Court at Mombasa. It was for this reason that he was compelled to leave employment by the Respondent. He had worked for 5 years. He prays the Court to find his contract was unfairly and unlawfully terminated and grant him the following orders:-

- a. A declaration that he was employed on permanent terms, having worked for 5 years;
- b. A declaration that termination was unlawful;
- c. A declaration that the Claimant was entitled to 1 month leave after every 12 months worked;
- d. He is paid: 2 months' salary in lieu of notice at Kshs. 28,260, arrears of annual leave of 5 years at Kshs. 70,000, gratuity of 5 years at Kshs. 30,000, and 12 months' salary in compensation for unfair termination at Kshs.169, 560 – total Kshs.297,820;

- e. Interest at Court rates;
- f. Costs; and
- g. Any other suitable relief the Court may deem suitable to grant.

2. The Respondent filed its Statement of Response on 12<sup>th</sup> June 2014 basically denying every other averment made by the Claimant, save for the description of the Parties and the jurisdiction of the Court. The alternative to the general denial, in the Response, is that the Claimant absconded duty, and refused to resume duty after he had recovered.

3. The Claimant gave evidence on 21<sup>st</sup> November 2014, as did Ms. Gloria Endekwa the Human Resources Manager of the Respondent, bringing the hearing to a close. The Dispute was last mentioned in Court on 15<sup>th</sup> December 2014 when the Parties' Representatives confirmed the filing of their Closing Arguments, and were advised by the Court the Award would be delivered on 20<sup>th</sup> March 2015.

4. Charo testified he worked for Kitui Flour Mills at Mombasa. The Respondent was an Agent for Kitui Flour Mills. He was a Maintenance Employee, attending to the Flour Mills Machines. He was paid Kshs. 471 per day. There was no written contract. He was not subscribed to the N.S.S.F. He did not go on annual leave. He left employment on 6<sup>th</sup> January 2014. He was injured while on duty. He was treated at Coast General Hospital. He sued the Respondent for injury compensation in the Chief Magistrate's Court at Mombasa, Civil Case Number 100 of 2014. The Respondent insisted the Claimant should withdraw that Claim to continue working. He refused to do so, and his contract of employment was terminated.

5. He testified under cross-examination that he saw Gloria on 6<sup>th</sup> January 2014. She asked him to withdraw the Civil Case. The Claimant did not report this demand to other Superior Management Staff. Gloria was in the company of about 4 other Persons. They asked the Claimant questions relating to the Civil Claim. One of the 4 Persons took a photograph of the Claimant's injured finger. It was the 4 Persons who questioned the Claimant, not Gloria. The Claimant was dismissed by Gloria through word of mouth. She said it was because the Claimant had sued the Respondent. He was not told to go heal and return after he had healed. He clarified on redirection that he used to see the 4 Persons at the Workplace. Gloria directed everything during the meeting. Termination followed the Claimant's Sick- Off. He was not recalled by the Respondent at any one time. He prays the Court to allow the Claim.

6. Gloria agreed the Claimant was employed by the Respondent. She did not meet him on the 6<sup>th</sup> January 2014. She was on leave. He was injured in November 2013. He had been cautioned not to grease the machine rollers. He ignored the instructions and greased the machine while it was on. He was injured. The Insurance Officers came to the Workplace and took photographs of his injuries. There was no Civil Case in November 2013. There was a demand made on the accident claim by his Lawyers. The Insurance was processing that claim. The Respondent was not involved, having left the claim to the Insurance. Gloria did not ask the Claimant to withdraw the Claim. The Respondent had no interest in that Claim. Gloria was not on duty on 6<sup>th</sup> January 2014. She wrote for him the letter facilitating his treatment; gave him off-duty days; and continued to pay him while he was off-duty. He returned to work in December 2013. He was still working in February 2014. The Respondent then received the Claimant's Advocates' demand letter alleging his contract was unfairly terminated. Gloria met the Claimant along the streets who told her he had left employment. The Respondent expected the Claimant to go back to work. It did not terminate his contract of employment.

7. She conceded under cross-examination that her Witness Statement filed in Court, did not reveal she was on leave at the material time. The Respondent maintained an Attendance Register of its Employees. She did not avail this to the Court. There was no letter inviting the Claimant to return to work. It is true he was injured at work. He was given the Sick-Off Sheet by the Respondent. He no longer works for the Respondent.

8. The Claimant submits termination was unfair under Section 45 of the Employment Act 2007. Relying

on several decisions of the Industrial Court of Kenya, the Claimant urges the Court to find he was unfairly treated by Gloria; was dismissed without notice; and he is granted terminal benefits and compensation for unfair termination as prayed. The Respondent urges the Court to find the Claimant was untruthful and deliberately misled the Court in his testimony. His claim for injury compensation was being processed by the Respondent's Insurance. It would not make sense for the Respondent to dismiss the Claimant on the basis of his injury claim. He was photographed by the Insurance Officers in processing of the injury claim. He continued working after the accident and the filing of his Civil Claim. He is not entitled to compensation and notice pay having left employment voluntarily. The claim for gratuity is not based on any law or the contract of employment. He took annual leave in bits. He is not entitled to costs.

9. Was the Claimant's contract of employment terminated by the Respondent? Was termination fair and based on valid grounds? Is the Claimant entitled to the remedies sought?

*The Court Finds:-*

10. The Claimant was employed by the Respondent in a triangular relationship, in July 2009. He was outsourced to Kitui Flour Mills, where he worked as Machine Maintenance Personnel, receiving a daily rate of Kshs. 471. He was injured while at work, sometime in November 2013. He claims the Respondent unfairly and unlawfully terminated his contract of employment on 6<sup>th</sup> January 2014, in retaliation for the Claimant having initiated a Civil Claim for Compensation under the work injury benefit regime, against the Respondent. The Respondent's position is that it did not initiate termination; the Claimant left on his own volition on 6<sup>th</sup> January 2014. The Respondent did not victimize him for initiating the Civil Claim; that Claim was being handled by the Respondent's Insurance, and the Respondent had nothing to do with it.

11, The Court is persuaded by the evidence of Gloria Endekwa, that the Respondent did not terminate the Claimant's contract. The reason cited by the Claimant as justification for termination, was discounted by the strong evidence of Ms. Endekwa, which is: the Claimant sustained injury to his fingers while maintaining the Machine at work; he filed his Claim for compensation, and continued working even after filing of this Claim; he was photographed by the Insurance Personnel, pursuant to the processing of the injury Claim; the Respondent would have no reason to later on attempt to prevail upon the Claimant to withdraw the Civil Claim; and the Respondent in fact, facilitated the Claimant's treatment, giving him sick-off days when required. This evidence in the view of the Court, is convincing and does not reveal any wrongdoing on the part of the Respondent.

12. Termination was not at the instance of the Respondent. The Respondent was willing to have the Claimant resume duty after he had sufficiently repaired. The Respondent expected the Claimant to return. He met Endekwa along the streets after he left employment, and informed her he had left. There was no act of termination attributed to the Employer. The Claimant did not present himself at the Workplace. He was not locked out. His claim that termination was at the initiative of the Respondent was wholly unpersuasive.

13. Consequently, the Court has no factual or legal basis to declare termination was unlawful or unfair. Termination was not instigated by the Respondent. The prayers for notice pay of two months, and compensation for unfair termination, have no justification. These claims are rejected.

14. It is not contested that the Claimant worked for an aggregate of 5 years. He was not treated as a Casual Employee, and the Respondent has not adopted the position that the Claimant was on irregular terms. There is no reason given to the Court why it should declare that the Claimant was employed on permanent basis. His status as an Employee working on regular terms and conditions of employment was not in issue. The Court declines to make a declaration on the status of the Claimant's terms and conditions of employment.

15. Being a regular Employee, he was entitled to annual leave pay at a minimum of 21 working days, with full pay. He cannot be denied his terminal benefits, regardless of the manner of termination. The Respondent offered no material to show the Claimant utilized his annual leave entitlement. All the

Respondent states in its Closing Submissions is that ‘ *the Claimant did go on leave during the 5 years worked... he may not have gone on leave of one full month...but he took his leave in bits...*’ No evidence was supplied to the Court, of annual leave utilized either in full, or in bits. ***The Claimant is allowed the prayer for annual leave pay, based on 5 years x 21 days = 105 days x Kshs 471 per day =Kshs. 49,455.***

16. The Respondent offered no evidence on the provision of social security payment to the Claimant at the end of his service. There was no evidence that the Respondent had any Social Security Plan at the Workplace, to which the Claimant was a beneficiary. No evidence was availed to the Court that he was subscribed to the N.S.S.F. He is eligible to have the prayer for service pay, under Section 35 of the Employment Act. ***The Court allows him service pay at a minimum of 15 days’ salary for each of the 5 complete years of service at Kshs. 471 x 15 days =Kshs. 7,065 x 5= Kshs. 35,325.***

In Sum, IT IS ORDERED:-

- a. ***The Respondent shall pay to the Claimant annual leave pay of Kshs. 49,455 and service pay of Kshs. 35,325- total Kshs. 84,780- to be paid within 30 days of the delivery of this Award.***
- b. ***No order on costs and interest***

Dated and delivered at Mombasa this 20th day of March 2015

James Rika

Judge