



**REPUBLIC OF KENYA**

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

**CAUSE NO. 156 OF 2014**

**JOSEPHAT MACHARIA GATHII.....CLAIMANT**

**v**

**KUNDAN SINGH CONSTRUCTION LTD.....RESPONDENT**

**JUDGMENT**

1. Josephat Macharia Gathii (Claimant) was employed by Kundan Singh Construction Ltd (Respondent) from January 2007 as a Senior Concrete Foreman.
2. On or around 1 August 2013, the Claimant separated with the Respondent.
3. On 21 May 2014, the Claimant filed a Memorandum of Claim against the Respondent. He stated the issue in dispute as *unfair termination*. The Claimant in the Memorandum of Claim prayed for judgment against the Respondent for Kshs 4,266,768/20 being 2 months' salary in lieu of notice, 15 days unpaid leave, 12 months wages as compensation, severance pay and gratuity.
4. The Respondent was served and it filed a Response and documents to be relied on, on 26 June 2014. The Cause was heard on 24 November 2014 and 22 January 2015. The Claimant testified on his own behalf while the Respondent called 2 witnesses.
5. The Claimant filed his submissions on 17 February 2015 while the Respondent filed its submissions on 27 February 2015.
6. After considering the pleadings, documents, testimony of witnesses and the submissions, the Court has identified the issues for determination as, *whether the termination of the Claimant's employment was unfair and if so appropriate remedies*.

**Whether the termination of Claimant's employment was unfair**

***Procedural fairness***

7. The Claimant's case and testimony is that on 1 August 2013, he reported to work as usual and he worked until about 3.00pm when the Respondent's Project Manager, a Mr. Opiyo told him that his services were no longer required.
8. The said Mr. Opiyo directed him to the Respondent's offices in Nairobi to get the reasons for the decision. The Claimant stated that when he went to Nairobi, he met the Respondent's Senior Accountant

who sent him on 15 days leave.

9. After the 15 days leave, he reported back and was informed that his services were no longer needed. The Claimant also stated that he was not given formal (written) communication for the termination and that the section he was working in was closed and casual employees were also sent away. He said he was not given notice of termination and was not paid final dues and therefore the termination of services was unfair.

10. Being aggrieved, the Claimant stated that he consulted an employment consultancy and also reported a complaint to the Ministry of Labour, but no settlement was reached.

11. During cross examination, the Claimant admitted that conciliation was attempted and that the Respondent indicated it was willing to pay 2 months' wages in lieu of notice and 10 days outstanding leave but he rejected the payment.

12. The Claimant further admitted that all the employees in the section where he was working were sent off.

13. The Respondent's first witness was its Transport/Administration Manager, Antony Opiyo. He stated that the Claimant's contract was terminated because the construction project he was working on at Kabete was completed.

14. The witness also stated that the Claimant had worked on several projects and was not attached to any specific project. He further stated that all other employees under the Claimant had their contracts terminated.

15. In cross examination, the witness denied that the Claimant's position had been declared redundant and said that the site where the Claimant was working had been closed officially.

16. He also stated that the dues offered to the Claimant were in compliance with the Regulation of Wages (Building and Construction Industry) Wages Order, 2004.

17. The Respondent's second witness, its Chief Accountant more or less echoed the testimony of the first witness. He said the Claimant had 22 days leave and he sent him on 10 days leave. When he came back he offered the Claimant 2 months wages in lieu of notice and outstanding 12 days leave, but he declined to accept the same.

18. In cross examination, he confirmed that the Respondent has other Concrete Foremen.

19. The Employment Act, 2007 fundamentally altered the employment relationship in Kenya. Whereas prior to the commencement of the Act an employer could dismiss or terminate the services of an employee without cause provided damages equivalent to the notice period (or reasonable notice) was given (legally an employer could dismiss or terminate a contract for no reason, a bad reason or a good reason), that situation no longer obtains.

20. Where an employer intends to terminate an employment contract and the ground/reason is based on *misconduct, poor performance or physical incapacity*, the employer is under a statutory obligation to inform the employee in advance and hear any representations the employee may wish to make.

21. That is the import of the procedural fairness safeguards underpinning section 41 of the Employment Act, 2007. Procedural fairness in employment law is the sibling of natural justice (the *audi alteram partem* rule in public or what used to be administrative law).

22. Assuming that the Respondent terminated the Claimant's contract, it has not demonstrated that it granted the Claimant a hearing prior to taking the decision to terminate. The Court was not told who chaired the hearing, when and where it was held and whether there were any allegations or charges

against the Claimant.

23. But that is not all that there is to it. The evidence before Court, and this is common, is that the project the Claimant was working in at Kabete was completed. But this line of defence was a red herring. The Claimant was not on a contract of a limited nature or on a contract tied to a specific project.

24. The Claimant was being discharged for no fault on his side. It could not be because of any *misconduct, poor performance or physical incapacity* on his part. It was involuntary and this was a classic case of redundancy.

25. Under the prevailing statutory framework, redundancy is governed by section 40 of the Employment Act, 2007. The section has outlined several conditions an employer should comply with. These conditions include informing the employee and the local labour officer in writing and one month advance of the extent and reasons for the redundancy. Selection criteria would be another relevant condition.

26. There was no suggestion or inkling that the Respondent complied with any of these conditions.

27. In the view of the Court, the termination of the Claimant inevitably fails the test for failure to comply with the section 40 conditions on redundancy.

28. The consequence of the foregoing is that the Respondent did not comply with the procedural fairness safeguards in section 41 of the Employment Act, 2007 nor the conditions for declaration of redundancy in section 40 of the Act.

29. The termination of the Claimant's contract, whichever way, was thus procedurally unfair.

30. With the conclusion reached, it is not necessary to examine whether the Respondent has proved the reasons for the termination (section 43 of the Employment Act, 2007) or that the reasons were valid and fair (section 45 of the Act) and based on its operational requirements.

### **Appropriate relief**

#### ***2 months salary in lieu of Notice***

31. The Claimant sought Kshs 288,000/- on account of this head of claim. It is not in dispute that his basic salary at separation was Kshs 120,000/-. Pay in lieu of notice is customarily calculated on the basis of basic wage.

32. The Court would award the Claimant Kshs 240,000/- as 2 months wages in lieu of notice pursuant to the Regulation of Wages (Building and Construction Industry) Wages Order, 2004.

#### ***15 days unpaid leave***

33. Under this head, the Claimant sought Kshs 72,000/-. The Claimant pleaded a balance of 15 days leave. The Respondent had offered 10 days leave at Kshs 46,153/90.

34. The Claimant did not dispute the Respondent's evidence that he had a balance of 12 days leave.

35. For the 12 days, the Claimant would be entitled to Kshs 55,384/- and the Court awards him the amount.

#### ***12 months compensation***

36. On account of compensation, the Claimant quantified the same at Kshs 1,728,000/-.

37. Award of a number of months' gross wages is one of the primary remedies where the Court finds

there is unfair termination or wrongful dismissal.

38. The remedy is discretionary, and the Court's hands being fettered to the 13 factors set out in section 49(4) of the Employment Act, 2007.

39. The Claimant served the Respondent for about 6 years.

40. Considering the length of service and other entitlements due to him, the Court would award him the equivalent of 8 months' gross wages as compensation. The same is assessed at Kshs 1,152,000/-.

### ***Lost salary to retirement***

41. The Claimant sought Kshs 1,728,000/- being the income he would have earned had he served the Respondent until retirement at 60 years.

42. The Claimant did not lay any evidential, contractual or statutory foundation for this head of claim. Even the retirement age was not proved.

43. This claim fails.

### ***Severance pay***

44. Under this head, the Claimant sought Kshs 755,451/40.

45. The facts as proved in this case, and the law as applied to those facts leave no doubt that the Claimant was declared redundant. He would therefore be entitled to severance pay.

46. Severance pay under section 40 of the Employment Act, 2007 and compensation under section 49(1) (c) of the same Act are distinct statutory entitlements. They are legally exclusive.

47. But the Court was not informed of the formula used to compute the severance pay.

48. The Court has therefore made an allowance under compensation in lieu of severance pay.

### ***Gratuity***

49. Regulation 16(1) of the Building Construction Order, 2004 provides that an employee who has served for more than 4 years is entitled to gratuity equivalent to 21 days pay for each year of completed service.

50. Section 35(6) of the Employment Act, 2007 on the other hand provides that an employee who is a member of the National Social Security Fund or a pension scheme would not be entitled to service pay.

51. The evidence before Court is that the Claimant was a contributing member to the National Social Security Fund.

52. Although the Court requested the parties to address this anomalous situation in the submissions, it was given just a fleeting mention if at all.

53. With the compensation and severance pay awarded, the Court is of the opinion that it would not be fair to award gratuity.

### ***Conclusion and Orders***

54. The Court finds and holds that the termination of the employment of the Claimant was unfair and awards him and orders the Respondent to pay him

(a) 2 months salary in lieu of Notice	Kshs 240,000/-
(b) 12 days pending leave	Kshs 55,384/-
(c) 8 months gross wages compensation	Kshs 1,152,000/-
<b>TOTAL</b>	<b>Kshs 1,447,384/-</b>

55. The claims for lost income and gratuity are dismissed.

56. Claimant to have costs of the Cause.

**Delivered, dated and signed in Nakuru on this 13<sup>th</sup> day of March 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant            Ms. Muthoni instructed by Karanja Mbugua & Co. Advocates

For Respondent        Mr. Kisila instructed by Nyachoti & Co. Advocates