



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 822 OF 2011**

**(Before Hon. Justice Hellen S. Wasilwa on 15<sup>th</sup> July, 2015)**

**MICHAEL MUCHUI.....CLAIMANT**

**VERSUS**

**SHEMAY LIMITED .....RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimant herein filed his Statement of Claim on 23/5/2011 through the firm of Mudeizi and Company Advocates claiming unlawful termination of employment.
2. It is the Claimant's case that he was employed by the Respondent on 15/5/2009 as a Site Coordinator at a monthly salary of 50,000/=.

The Claimant was tasked with the duty to coordinate and supervise the construction works undertaken by the Respondent at Aga Khan Hospital premises.

3. The Claimant avers that on 10/8/2009 the Respondent willfully and unlawfully terminated his services. The Claimant avers that on this day the Respondent had tried to access a computer on site and he couldn't. This caused the Respondent to be annoyed and claiming the Claimant was controlling the company as he had the pass word to the computer. He then fired the Claimant.
4. The Claimant avers that he had executed his job diligently and had set up the site office, internet, computer and software and had incurred a fee of 20,000/= which the Respondent failed to pay him.
5. It is also the Claimant's case that the termination was unfair as he was not given any hearing. He also stated that he was not given any notice, Certificate of Service and also the August 2009 salary.

In cross examination the Claimant averred that he was hired specifically because he had qualifications from the USA and the machines used in Aga Khan had American specifications which he had to interpret.

6. The Respondents filed their defence on 11/2/2015 through the firm of Nyaencha Waichari & Company Advocates. They averred that they employed Claimant on trial basis for a period of

three months between 15<sup>th</sup> May and 10<sup>th</sup> August and he was site coordinator at Aga Khan University Hospital where the Respondent was undertaking medical gases installation.

7. It is Respondents case that Claimant was negligent on his duty and failed to check on quality of piping used on site which was an act of gross misconduct. He was therefore summarily dismissed and was informed of the reason for the dismissal.
8. No formal contract was however drawn and the Respondent avers that such a contract was to be drawn after a period of three months if the Claimant proved he was up to the task within the said period.
9. On cost of purchasing some soft wares by the Claimant, Respondent denied knowledge of the same. The Respondent also denied that the Claimant worked overtime. They deny that the termination was not unfair and ask this court to dismiss the claim accordingly.
10. After examining the evidence of the parties and upon considering their submissions, the issues for determination are as follows:
  1. ***Whether the Claimant was unfairly terminated.***
  2. ***Whether the Claimant is entitled to remedies sought.***
11. On the 1<sup>st</sup> issue, there was no written formal employment contract between the Claimant and Respondent but Respondent has admitted the Claimant worked for them from May to August 2009 for 3 months. The Claimant exhibited the work he did during this period in his Appendix 2 to 8. This has not been denied by the Respondents.
12. The Respondents aver that they terminated the Claimant's services summarily because of gross misconduct. Incidences of gross misconduct are set out under Section 44(4) of Employment Act. The Respondents have not proved the allegations of gross misconduct.

The Respondent had submitted that the Claimant failed to do the work assigned to him at Aga Khan Hospital and in this court's view, it would have been prudent for the Respondent to call evidence even from the hospital of the omission occasioned by the Claimant. This, the Respondents didn't do and this, this court finds is not proved.

13. On the issue of unfair termination, Section 45 (3) of Employment Act 2007 states as follows:

***“An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”***

14. Under the law, only persons who have been in employment for a period of not less than 13 months before termination can complain of unfair termination. The reasoning here is actuated by the probation period which is maximum 12 months.

The Claimant having worked for only 3 months cannot therefore allude unfair termination.

15. Having found as above, I find that the remedies the Claimant is entitled to are as follows:
  1. ***1 month salary in lieu of notice = 50,000/=.***
  2. ***10 days salary for the month of August = 19,230/=***

**Total payable is 69,230/=**

Plus costs of this suit.

The Respondent should also issue the Claimant with a Certificate of Service.

**Read in open Court this 15<sup>th</sup> day of July, 2015**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Okeyo Omwanza holding brief for Mrs. Nyaencha for Respondent

Claimant – Absent