



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1980 OF 2013**

**WILLINGTON WENZALA OKWALO.....CLAIMANT**

**VERSUS**

**LAXMANBHAI CONSTRUCTION LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed plaint on 10<sup>th</sup> December 2013 seeking resolution of the dispute he framed as the wrongful and unlawful termination of his services and failure of the Respondent to pay full terminal benefits. He averred that he was employed by the Respondent as a general worker at a gross pay of Kshs. 13,093/- but was not given a letter of appointment as required under law. The Claimant stated that he served the Respondent with diligence until 19<sup>th</sup> April 2012 when he was working at a site fell from the 4<sup>th</sup> floor and fractured both his legs. He averred that the Respondent terminated his employment without any reasonable cause due to the injuries he had sustained and refused to pay his terminal benefits. The Claimant averred that the Respondent had exposed him to a risk of injury by failing to have in place suitable appliances for use and to ensure safety. He averred that the Respondent failed to provide protective gear and a proper system for working and as a result the Claimant suffered serious injuries thus loss and damage. The Claimant averred that he was recommended for retirement on medical grounds and the legal officer of the Respondent advised him to write a resignation letter with a promise that his terminal dues would be paid in 3 days. He averred that during the forced resignation the Respondent failed to comply with the dictates of the Employment Act. He thus sought 3 months salary in lieu of notice Kshs. 39,279/-, service pay for 12 months Kshs. 157,116/-, general damages for unlawful termination equivalent to 6 months pay Kshs. 78,558/- and general damages for injuries sustained at work (to be assessed by Court). He also sought a detailed certificate of service as well as costs of the suit. By an amended Memorandum of Claim filed on 4<sup>th</sup> April 2014, the Claimant amended his claim to exclude the claims in respect of his injuries and indicated that there was a suit CMCC 786 of 2014 pending before the Magistrates Court in respect of that claim. The claim thus was confined to notice pay, severance pay costs and general damages for unlawful termination.
2. The Respondent is alleged to have filed a defence.
3. The Claimant and Respondent consented to resolving the dispute through documentary evidence

as permitted under Rule 21 of the Industrial Court (Procedure) Rules 2010. The Claimant filed submissions on 4<sup>th</sup> June 2015. The Claimant submitted that he was employed in 2011 as a general worker earning Kshs. 13,093/- a month. He submitted that he served the Respondent with diligence and loyalty and on 19<sup>th</sup> April 2012 he fell while working on the Respondent's site and fractured both legs. He submitted that he was hospitalized and when he resumed duty he could not walk and hence could not work normally as he was seriously injured. He submitted the Respondent paid his salary while on sick off then suddenly stopped. He submitted that the legal officer of the Respondent deceived and/or coerced him to write a resignation letter promising to effect payment of terminal dues within three days. He submitted that the Respondent did not pay him the terminal dues within three days and neither was he paid under WIBA for injuries sustained. He submitted that the resignation constituted unlawful constructive termination of employment. The Claimant submitted that he ought to have been retired on medical grounds and paid his full benefits. The Claimant relied on the cases of **Stephen Miheso v Kaimosi Tea Estate Cause No. 346 of 2013** and **Simon Muguku Githinji v Taifa Sacco Society Ltd [2012] eKLR**.

4. The Respondent filed written submissions on 27<sup>th</sup> July 2015. In the submissions, the Respondent submitted that the Claimant's cause of action arose out of a claim by the Claimant against the Respondent for wrongful termination of employment. The Respondent submitted that the Claimant was its employee from July 2011, that the Claimant got injured during the course of employment on 19<sup>th</sup> April 2012 and that the Claimant remained out of work for 20 months until he tendered a resignation letter dated 12<sup>th</sup> November 2013. The Respondent submitted that the issues for determination were:-

- Was the Claimant coerced to sign a resignation letter dated 12<sup>th</sup> November 2013 leading to wrongful termination of employment?
  - Was the Respondent presented with medical reports for retirement on medical grounds?
  - Did the Respondent overpay the Claimant?
  - Is the Claimant entitled to claim from the Respondent?
- The Respondent submitted that at no time did it coerce and/or mislead the Claimant to write a resignation letter and that the circumstances existing then did not warrant for a misleading of the Claimant. The Respondent submitted that out of good faith it paid the Claimant for 20 months when he did not work for the Respondent due to the injury on 19<sup>th</sup> April 2012. The Respondent submitted that the Claimant ought to have been retired on medical grounds as he had remained in a condition that rendered him unable to resume his duties with the Respondent. The Respondent submitted that the allegations by the Respondent lacked essential medical reports recommending the Claimant's retirement on medical grounds. The Respondent submitted that it was not competent under the law to determine the medical condition that would have necessitated for the Claimant's retirement on medical grounds. The Respondent submitted that the Claimant was not entitled to any of the claims in his claim as he resigned from employment and the suit was a cheeky attempt to claim wrongful termination. The Respondent submitted that the claim for notice, service pay and general damages cannot be sustained in the circumstances. The Respondent submitted that it acted in good faith and maintained the Claimant on its payroll for 20 months despite the fact that the Claimant never rendered any services in return. The Respondent submitted that it was the Claimant who in the circumstances was supposed to refund the Respondent for the salary that was paid beyond 6 months. The Respondent did not object to issuing a certificate of service to the Claimant.
5. The Claimant filed supplementary submissions on 5<sup>th</sup> October 2015 without leave of the Court. The submissions attached the Work Injury Benefits Form 4 being in respect of a claim reference no. WIBA/NBI/1041/2013. The form filed by a Mr. Charles Theuri an Occupational Health and Safety Officer on 26<sup>th</sup> July 2013 assessed the disablement at 20% under part A and placed the figure of Kshs. 249,200.64 for the disablement and Kshs. 182,200 for the period of one year under part B. The form had been filed alongside his memorandum of claim.
6. The Claimant sued the Respondent claiming unlawful termination. The Claimant resigned from

his employment on 12<sup>th</sup> November 2013. The letter was handwritten and read as follows:-

To: Management

Laxmanbhai construction

Box 44706

Nairobi

Dear sir/Madam,

RE: DUTY RESIGNATION

Due to the accident that I circumed (sic) while working at F. Palace site on 9<sup>th</sup> April 2012 and led to breaking of my both two legs, I wish to surrender from duty because of transport problem and inability to work to your satisfaction of the company.

Yours employee

(signed)

Willington Wanzala

Payroll No. 2846

7. The letter was not shown to have been rejected by the Respondent and as such it seem the resignation was accepted. The Claimant's suit for wrongful termination was therefore misplaced. The letter was unequivocal and no follow up letter was shown from the Claimant suggesting that the resignation was coerced or obtained through deceit. The Claimant was therefore misplaced to bring the suit before the Court.
8. In the case of **Rwaken Investments Limited & Another v The Ministry Of Labour & 2 Others [2012] eKLR** Mbaru J. held as follows:
  - Article 162 (2) and 163 (3) of the Constitution of Kenya, 2010 established the Industrial Court and superior courts respectively. Under these powers the Industrial Court had original jurisdiction to hear all labour relations disputes in Kenya. The Labour Institutions Act and the Industrial Court Act also granted the Industrial Court jurisdiction to entertain all disputes between employees and employers.
  - However, these provisions notwithstanding, Article 161 of the Constitution, which was supreme, granted the Chief Justice powers in the capacity as the head of the judiciary to make practice directions to facilitate the work of the High Court and indeed of the Industrial Court as constituted the above provisions notwithstanding. Thus by these powers the Chief Justice under provisions outlined in Section 16 of the Labour Institutions Act designated lower courts presided over by officers of the rank of Senior Resident Magistrate and above as Special Courts to hear labour relations matters specifically on work injury related matters.
  - These practice directions were issued vide Kenya Gazette Notice No. 9243. Subsequent to these directions the lower Courts had handled all matters of employee and employer as outlined under the gazette notice.
  - The powers of magistrates in those courts did not abate until those powers were revoked by issuance of a gazette notice. Even with the coming into force of the industrial Court Act, 2011, the powers granted to the Senior Resident Magistrates to operate with relation to labour relations

under the Labour Institutions Act, 2007, Employment Act, 2007, Occupational Safety and Health Act 2007 and Labour Relations Act 2007 was not revoked and or repealed by the operation of the Industrial Court Act.

- The special jurisdiction of the lower Court officers under section 16 (2) of the Labour Institutions Act, confers jurisdiction upon these courts to hear or grant orders relating to offences that may have been committed by employers and employees as outlined. These were provisions meant to ensure that the Rules of procedure were applied properly towards the attainment of substantive justice under the Constitution, the Labour Institutions Act, the Employment Act, the Occupational health and Safety Act and Labour Relations Act with due cognizance of the provisions of Section 162 (2) of the Constitution that established the Industrial Court.
  - The offences and charges as stated before the lower court in relation to offences and work injury related matters were therefore proper for such court to so act unless shown to have extended to other matters outside the granted authority specifically set out under the gazette Notice. Thus any party dissatisfied with the decision of the lower court under the orders referred to under the gazette notice, shall appeal to a Judge at the Industrial Court.
  - The provisions of section 3 and 4 of the Industrial Court Act and section 3 of the Labour Institutions Act only recognized the need to attain the overriding objective in the exercise of the powers conferred on the court under the Act or any of its provisions. The said provisions did not purport to overrule any of the provisions of both Acts but only provide that in the exercise of the powers under the Act the court ought to ensure that the overriding objective of the Act was attained.
9. As the balance of matters in this case fall squarely within the remit of the Magistrate's Court vide Kenya Gazette Notice No. 9243, I refer the matter to the Chief Magistrates Court at Milimani for hearing and disposal of the WIBA claim. This Court is the appellate court in such matters and it would be remiss of the Court to determine the matter at appeal level while the parties have a proper forum for the same.
10. The upshot of the foregoing is that the claim against unfair dismissal lacks merit and is dismissed but I make no order as to costs. Case referred to Chief Magistrate for hearing on WIBA claim.

Orders accordingly.

Dated and delivered at Nairobi this 21<sup>st</sup> day of **October 2015**

**Nzioki wa Makau**

**Judge**