



**REPUBLIC OF KENYA**

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

**CAUSE NO.74 OF 2014**

KENYA BUILDING, CONSTRUCTION, TIMBER FURNITURE

& ALLIED INDUSTRIES EMPLOYEES UNION.....CLAIMANT

VERSUS

WESTCON CONTRACTORS (K) LIMITED.....RESPONDENT

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

**Introduction**

1 The claimant has brought this suit on behalf of Bernard Ondieki Osoro and Jackson Kahindi Kiyuge ( Grievants) who are members of the union. The suit is for payment of terminal benefits plus compensation for unfair and unlawful dismissal of the grievants from employment by the respondent on 12.3.2012. The respondent never filed any defence and never participated in this suit. Despite service with summons and hearing notices.

2 When the suit came up for hearing on 30.9.2014, Miss Chege for the claimant who had the grievants in court chose not to tender any evidence on ground that the dispute had previously been conciliated upon by the labour officer who made findings in favour of the grievants. Miss Chege therefore decided to rely on the report by the labour officer which she filed as part of the memorandum of claim as annexure VII. In addition she filed written submissions.

**Analysis and Determination.**

3 After perusing and considering the pleadings and the submissions filed by the claimant, there is no dispute that the grievants were employees of the respondent up to 12.3.2012. The issues for determination are whether the grievants were unfairly terminated and whether the reliefs sought ought to issue.

**Unfair and Unlawful Termination.**

4 There being no defence filed and evidence adduced the claim by the grievants was never controverted or rebutted. On a balance of probability therefore the court finds that the grievants the burden of proving that there existed a fair and valid reason for dismissal and that the procedure followed was fair rests with the employer the provision of Section 45 of the Employment Act in this case the employer never even filed any defence leave alone attempting to discharge the said burden of proving the reason and fair procedure

**Reliefs**

5 In view of the foregoing, the court makes declaration that the termination of the grievants employment was unfair and unlawfully. The grievants will therefore get the similar award as the one made by the county labour officer vide his report dated 30.10.2012 but with some alterations. The reason being that no further evidence from the one tendered before the said officer was tendered before this court to warrant a different award. The grievants will therefore get 6 months' salary as compensation for unfair .....compensation. In the courts view although the grievants could secure alternative employment within a shorter time the court has also considered the fact that they did not pray for gratuities at the rate of 22 days per years of service as provided for under clause 19 of the Collective Bargaining Agreement (CBA).

6 The grievants also awarded two months' salary in lieu of notice as per clause 18 of the collective bargaining Agreement ( CBA). They will also get 2 years leave for period between March 2011 to March 2013, the reason not award all the leave as prayed is because of time bar set up by Section 90 of the employment Act. The said provisions limits a right to sue under the Act to 3 years. The claim for under payment and house allowance was not substantiated and the same is declined. The claim for averance pay is also dismissed because the grievants were not declared redundant.

7 The award for each grievant is summarized as follows.

**Bernard Odieki Osoro**

Salary in lieu of Notice 38,168

Leave outstanding 38,168

Compensation 132,120

**Total** Ksh 208,456

**Jackson Kahindi Kiyage**

Salary in lieu of Notice 26104

Leave outstanding 26,104

Compensation 90,360

**Total** Ksh 142,568

**Disposition**

8 For the reasons stated above judgment is entered for the claimants declaring the termination of the grievants' employment to be unfair and unlawful and awarding the grievants the aggregated sum of Ksh 351,024 plus costs and interest.

DATED and DELIVERED at MOMBASA this 2<sup>nd</sup> day of October 2015.

**ONESMUS MAKAU**

**JUDGE**

2.11.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

**ONESMUS MAKAU**

**JUDGE**