



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 105 OF 2014**

**BETWEEN**

**DANIEL WACHIRA NG'ANG'A .....CLAIMANT**

**VERSUS**

**ELSEK AND ELSEK [K] LIMITED .....RESPONDENT**

*Rika J*

*Court Assistant- Mr. Kombe*

*Daniel Wachira Ng'ang'a, the Claimant in Person*

*No appearance by Godfrey Mutubia & Company Advocates for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

1. The Claimant filed his Statement of Claim in person on 21<sup>st</sup> March 2014. The Respondent replied in a Statement of Response filed on 13<sup>th</sup> May 2014. The Claimant and Counsel for the Respondent Ms. Tsuma, appeared in Court on 1<sup>st</sup> July 2014. Parties informed the Court that they were negotiating settlement. The Court ordered the matter be adjourned to give room for the negotiation. In default of settlement, it was agreed hearing would proceed on 6<sup>th</sup> October 2014.
2. On 6<sup>th</sup> October 2014 there was no settlement recorded. The Respondent neither attended Court, nor communicated the reasons for non-attendance. The Claimant proceeded with his case *ex parte*.
3. He testified that he was employed by the Respondent Company as a Storekeeper, on 16<sup>th</sup> April 2009. His contract was terminated at the initiative of the Employer on 6<sup>th</sup> August 2013, on the allegation that he stole fuel from the Employer. The Respondent called in Police Officers, who on investigation absolved the Claimant from the allegation. He was not arrested or charged in connection with the allegation. The

Claimant was not paid any terminal dues.

4. He approached the Legal Aid Centre [KITUO CHA SHERIA] who made a demand upon the Respondent, to pay the Claimant:-

- 1 month salary in lieu of notice at Kshs. 19,828;
- 6 days' salary for days worked in August 2013 at Kshs. 3,966;
- Service pay for 4 years at 15 days' salary for each completed year of service, at Kshs. 39,656;
- Accrued leave of 2 years at Kshs. 39,656;

5. The Claimant seeks these prayers. In his Statement, he further asks for 12 months' salary in compensation for unfair termination; a declaration that the Company's action was unconstitutional and that he was unlawfully dismissed; he is issued the certificate of service; he is paid costs and interest; and granted any other relief the Court considers suitable.

6. The Respondent, in the Statement of Response concedes the Claimant was its Employee. He worked as a Storekeeper, based at the Respondent's construction Site in Kikambala, Mombasa. The Respondent found its fuel was missing, and reported the matter to Kijipwa Police Station. Investigations are on-going and beyond the Respondent's control.

*The Court Finds and Awards:-*

7. It is agreed the Claimant was employed by the Respondent on 16<sup>th</sup> April 2009. He worked in the position of a Storekeeper. He left employment on 6<sup>th</sup> August 2013, under circumstances which are contested. He earned Kshs. 19,828 per month.

8. He claims his contract was unlawfully and unfairly terminated after the Respondent alleged he had stolen fuel from the Respondent. The Respondent reported the matter to the Police, who upon investigations, did not arrest or charge the Claimant with any offence. The Respondent agrees there was an allegation made by the Respondent that its fuel had been stolen. It reported the matter to Kijipwa Police Station and investigations are underway.

9. The Employer has an obligation under Section 43 and 45 of the Employment Act 2007, to demonstrate fair and valid reason in justifying its termination decision. In this dispute the Employer has not given any evidence, or shown any fair and valid reason for the termination of the Claimant's contract of employment. The allusion by the Respondent to on-going investigations by the Police concerning theft of its fuel, suggests to the Court that the Respondent was not certain about its allegations on theft of fuel, and on the Claimant's part in the offence. No evidence, independent from the Police Investigation, was shown to have been carried out by the Employer, and no form of hearing under Section 41 of the Employment Act 2007, is shown to have taken place at the Workplace.

10. The Court is satisfied based on the pleadings and the unchallenged evidence of the Claimant that the termination of the **Claimant's contract of employment was unfair**. There is no material on record, which calls upon the Court to consider a declaration touching on the Constitution, the Employment Act 2007 being the first port of entry. The remedies under Statute are sufficient. **The Claimant is granted 6 months' salary in compensation for unfair termination at Kshs. 118,968.**

11. There are no records availed to the Court by the Employer showing that the Claimant was subscribed to any Social Security Plan, which would deprive him of service pay under Section 35 [6] of the Employment Act 2007. **He is allowed the prayer for service pay, calculated at 15 days' salary for each year completed in service as prayed, amounting to 19,828 divide by 26 working days x 15 = Kshs. 45,756.**

12. The Claimant did not explain to the Court his prayer for 2 years of accrued leave calculated at Kshs. 39,656. He did not show when this leave accrued, and how it amounts to the given figure. The claim is declined. **He is allowed the prayer for 1 month salary in lieu of notice at Kshs. 19, 828; the prayer for 6**

*days worked in August 2013 at Kshs. 4,575; and the prayer for certificate of service.* There shall be no order on the costs and interest. In sum:-

- a. *The termination of the Claimant's contract of employment was unfair;*
- b. *The Respondent shall, within 30 days of the delivery of this Award pay to the Claimant 6 months' salary in compensation at Kshs. 118,968; service pay at Kshs. 45,756; and 1 month salary in lieu of notice at Kshs. 19,828- total Kshs. 184,552;*
- c. *The Respondent to release to the Claimant his certificate of service forthwith; and*
- d. *No order on the costs and interest.*

**Dated and delivered at Mombasa this 16th day of October 2014**

**James Rika**

**Judge**