



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1378 of 2012**

**CECILS JUMA ABONGO.....CLAIMANT**

**VERSUS**

**MR. ZHANG'BIN.....1<sup>ST</sup> RESPONDENT**

**SICHUAN YONGZHI CONSTRUCTION CO. LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Claimant filed his Claim on 13<sup>th</sup> August 2012, seeking various reliefs as against the Respondents. He sought payment of 12 months wages as full compensation, one month in lieu of notice, severance pay for 1 year, annual leave for 45 days, overtime, house allowance and pay for public holidays. The Claim was supported by documentation which included bank statement and the Regulation of Wages (Building and Construction Industry) Order 2004 and a demand letter.
2. The Respondents opposed the Claim and filed a Memorandum of Response on 13<sup>th</sup> October 2012. The Respondents case was that the Claimant absconded from work in July 2012 after he received his June salary and in spite of calls by his supervisor, he never returned to work. He was thus dismissed in accordance with Section 44(4). The Respondents sought payment of 45,000/- being one months salary.
3. Mr. Kandere for the Claimant and Mr. Oyolla for the Respondents agreed on 12<sup>th</sup> April 2013 that the parties would prefer to have the dispute resolved by way of documentation. Parties agreed to file submissions and the Court would then deliver its judgment in line with the provisions of the Industrial Court (Procedure) Rules 2010.
4. The submissions by the Claimant were filed on 19th April 2013 and the Claimant sought to buttress his pleadings. The Respondents filed their submissions on 29<sup>th</sup> April 2013. In the submissions, the Respondent submitted that the Claimant absented himself from work and despite calls from his supervisor he failed to resume. They submitted that without proper cause the Claimant absented himself from work.
5. The Court has the task of ascertaining whether there was any impropriety in the termination of the Claimant's employment with the Respondents. The Pleadings filed by the Claimant aver that the Respondent verbally terminated the Claimant's services with the Respondents. Paragraph 3 of the Memorandum of Claim states: – 3. **THAT** at all material times prior to this institution's (sic) of this suit, the claimant was an employee of the respondents having been appointed verbally as site Engineer with effect from 1/12/2010 until 1/07/2012. At paragraph 5 of the Memorandum of Claim the Claimant pleads as follows:-

5. **THAT** on 1/07/2012 the respondents illegally and unlawfully terminated the services of the claimant verbally without terminal benefit as required by the Employment Act 2007.

6. The pleadings by the Respondents were that the Claimant absconded from work. The Claimant was called by the supervisor but he declined to return to work. The Respondents thus terminated the services of the Claimant. The Respondents attached a letter addressed to the Claimant's advocates. The contents of the letter (in *parri materia*) were as follows:-

**The company wishes to state that Mr. Juma left employment on his own accord and he was dismissed (sic) as he alleges.**

**He was requested to resume work but he flatly refused to resume.**

**As such, we are only legally supposed to pay his leave due, salary for days worked and service at the rate of 16 days not 17 days as indicated. We also demand one month's salary in lieu of notice as he left our employment without giving the notice as legally required.**

**He can get in touch with our office any time for the settlement.**

7. There is no indication as to whether Mr. Juma the Claimant took up the offer to pursue the settlement as proposed by the Respondents. The Respondent's letter admitted that there was money due to the Claimant being service pay at the rate of 16 days, leave due and salary for days worked. No figures or calculations were given for these dues. The number of leave days were not indicated.

8. The Claimant and the Respondents did not lay enough material before Court to determine conclusively whether there was desertion or dismissal. What is clear is that there was an end to the employment of the Claimant. The Claimant's version is that he was verbally terminated. If he was verbally terminated, that would in one perspective be in keeping with his verbal engagement. He has not stated who verbally dismissed him and whether reasons were advanced for the dismissal. It seems improbable that such details would have eluded the Claimant. The fact that he only makes bare pleadings, as per paragraph 5 reproduced above, is ample proof there was more to this story that he is not letting out. It would be speculation on my part to attempt to discern the elements which comprised his so called "verbal" termination. One would say that the Court should be more inclined to believe the version of the Respondents that the Claimant deserted his employment. Unfortunately, the Respondent failed to avail employment records which would have conclusively shown the desertion alleged. As it is unclear how the Claimant's services were terminated, there is no award under this head.

9. The Claimant's case was that he was owed pay for 45 days. As it is uncontroverted, I will award him the sum of Kshs. 67,500/- for the leave due. He was paid for June the month he worked last. He is therefore not entitled to pay for days worked as he received it prior to the termination. He worked for 19 months which is roughly over one and a half years.

10. There is no set formula for the calculation of service pay. In a practice that has evolved over time, the range is 15 days pay for each year of completed service. He worked for one and a half years. He thus has only a claim for 15 days. He has been offered 16 days by the Respondent. He claims 17 days. I would award him pay for 16 days as this is the number of days the Respondent has offered. This would work out to Kshs. 24,000/-.

11. The Claimant's case is partially successful but because he did not pursue the offer on the letter, these proceedings may have been unnecessary had the Claimant taken up the offer to go for settlement of his dues. I will not award him costs.

12. The Respondents claim for one month's notice would have been easy to award if records had been availed. Unfortunately none were made available and since we cannot have Courts getting involved in conjecture, I will say no more on that score.

13. In regard to the 12 months compensation sought, there has to be sufficient basis laid for the same. None was laid before Court. It would have been critical to hear how the Claimant was either disadvantaged or otherwise put out of employment to warrant the imposition of this fiat against the Respondents. In this case there is nothing which has been availed to enable the Court exercise its discretion in favour of the Claimant. Nothing will be awarded under this head.

14. As pertains to overtime and payments for Saturday and Sunday as well as public holidays, there is a cardinal rule in law. He who alleges must prove. The Claimant did not avail even one tiny element of evidence to prove he was entitled to the sums sought. These sums sought were not proved and cannot be awarded. The same fate befalls his claim for House allowance. There is no payslip or any document to show the split of his salary. Was the 45,000/- per month all inclusive or was it exclusive of house allowance? Speculation is not the forte of justice. The Claimant failed to prove this claim and it fails.

15. In the final result I enter judgment for the Claimant against the Respondents jointly and severally for the sum of Kshs. 91,500/-

It is so ordered.

Dated and delivered at Nairobi on this **21<sup>st</sup>** day of **May** 2013.

**Hon. Mr. Justice Nzioki wa Makau**

**Judge**

**Appearances**

Mr. Kandere instructed by S. K. Opiyo & Co. Advocates For Claimant

Mr. Oyolla instructed by Oyolla & Company Advocates For Respondents