



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1082 of 2010**

**EVANS MOGUTE NYAUNDI.....CLAIMANT**

**VS**

**CHINA ROAD AND BRIDGE CORPORATION (K) LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim in this case is for wrongful and unfair termination of employment. The Claimant filed a Memorandum of Claim on 17th September 2010 and the Respondent filed a Reply on 5th November 2010.

2. The matter was heard on 21st March 2013 with Mr. Nyabena instructed by Nyabena Nyakundi & Co Advocates appearing for the Claimant and Mr. Okelo instructed by Miller & Co Advocates appearing for the Respondent. The Claimant testified on his own behalf and the Respondent did not call any witnesses. Both parties filed written submissions.

**The Claimant's Case**

3. According to the Claimant he was employed by the Respondent as a Labourer on or about 15th October 2009. His monthly salary was Kshs. 14,419. He was not issued with a letter of appointment. The Claimant worked for the Respondent until 9th May 2010 when his employment was terminated without notice and without lawful cause. The Claimant claimed to have had a clean employment record.

4. In reply to the accusation by the Respondent that he had deserted duty the Claimant testified that he had obtained permission from his Foreman to go and see his mother who was unwell. He resumed duty after three days and was told by his supervisor that his job had come to an end. The Claimant further testified that he had not failed to report for duty at any other time.

5. The Claimant claimed the following:

- a) A declaration that his dismissal was wrongful and unlawful
- b) One month's salary in lieu of notice.....shs. 14,419
- c) Prorata leave for 9 months.....9,612
- d) Prorata gratuity @ 15 days for each completed year of service.....4,806

- e) 12 months' salary in compensation for unfair termination.....173,026
- f) Certificate of service
- g) Costs
- h) Any other relief the Court may deem just to grant

### **The Respondent's Case**

6. In its Memorandum of Reply the Respondent admitted having employed the Claimant as a Labourer at a minimum salary of Kshs. 6,773.40 exclusive of a house allowance of Kshs. 1,498.

7. The Respondent maintained that the Claimant's dismissal was lawful because the Claimant was a chronic absentee and at the time of his dismissal he had deserted duty without any reasonable cause. The Respondent followed the required procedure and the Claimant was paid all his dues. The Claimant had worked with the Respondent for about six months as at the time of his dismissal. It was the Respondent's case that no peculiar disciplinary proceedings were required to be taken other than those found in the Respondent's Terms and Conditions of Employment.

### **Findings and Determination**

8. Before proceeding to determine the main issue in this case, being whether the Respondent had a justifiable reason to terminate the Claimant's employment by way of summary dismissal, I need to establish the Claimant's salary as at the time of his termination.

9. The Claimant produced two payslips one for February 2010 showing a gross salary of 14,419 another for April 2010 showing a gross salary of Kshs. 13,131. An analysis of these payslips shows the variable as the number of hours worked. The Respondent on the other hand stated that the Claimant was earning a minimum salary of Kshs. 6,773.40 exclusive of a house allowance of Kshs. 1,498 but failed to provide any conclusive documentary evidence to support this averment. Section 20 of the Employment Act, 2007 requires employers to provide an itemised pay statement for their employees while Section 10 of the Act requires employers to keep employee records. In the absence of such records, the Court will adopt the particulars provided by the Claimant. I have therefore adopted the figure of Kshs. 14,419 as the Claimant's salary.

10. I will now deal with the question whether the Respondent's action of terminating the Claimant's employment by way of summary dismissal fell within the range of reasonable responses.

11. Section 45 (2) of the Act provides that:

**(1) A termination of employment by an employer is unfair if the employer**

***fails to prove-***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason -***

***(I) related to the employee's conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair Procedure***

12. Section 43 of the Employment Act, 2007 provides that:

**(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

13. The Respondent claimed that the Claimant was a habitual absentee and that prior to his dismissal he had deserted duty without any lawful cause. The Claimant on the other hand denied this allegation and testified that he had secured permission from his Foreman to go and see his mother who was unwell.

14. Section 44(4) of the Employment Act provides for summary dismissal where an employee absents himself from work without leave or other lawful cause. Apart from his own word the Claimant did not adduce any corroborative evidence to support his claim that he had been granted permission to be away from work. The Claimant's claim in this regard was controverted by the Respondent and the Court could not therefore rely on the Claimant's word as proof that his absence from work was excused. I therefore find that the Respondent had a substantive justification for terminating the Claimant's employment on the ground of desertion of duty.

15. The next question is whether in terminating the Claimant's employment the Respondent employed fair procedure. The Respondent took the view that no peculiar disciplinary proceedings were required to be taken other than those found in the Respondent's Terms and Conditions of Employment.

16. Section 41 of the Employment Act sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:

**(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make**

17. Even in cases of summary dismissal, the right to be heard is unassailable. There is no such a thing as summary disciplinary procedure. While employers are encouraged to establish internal disciplinary and grievance handling procedures, these procedures must be in tandem with the law and where there is a conflict the law prevails.

18. In this respect I agree with the position taken by Justice Rika in the case of **Anne Atieno Sadieda Vs Lavage Laundrette & Drycleaners (2011 eKLR)** in which he held that:

***“Substantive justification does not take away the duty by employers to avail procedural fairness to affected employees.”***

19. There was no evidence that the Claimant was ever offered an opportunity to show cause why he should not be dismissed from employment. For this reason I find that his termination was unfair for want of due process. I therefore award him two months' salary in compensation. I also award him one month's salary in lieu of notice. The Claimant is also entitled to leave at the rate of 1.75 days for each completed month of service as provided under Section 28(1)(b) of the Employment Act .

20. From the payslips supplied by the Claimant, it was evident that he was a contributing member of the National Social Security Fund. He is therefore not entitled to service gratuity.

21. The final effect of this Award is as follows:

- a) Two months' salary in compensation for unfair termination.....Kshs. 28,838
- b) One month's salary in lieu of notice.....14,419
- c) Prorata leave @ 1.75 days for 7 months of service.....5,888

**Total.....49,145**

The Respondent is directed to issue the Claimant with a Certificate of Service.

Each party will bear their own costs.

Orders accordingly.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MAY  
2013**

**LINNET NDOLO  
JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**