



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**CAUSE NO. 58 OF 2012**  
**(Originally Nairobi Cause No. 1500 of 2012)**

<b>JAMES CHEGE</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>STEPHEN WAMAI</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>ALEX KAZUNGU</b>	<b>3<sup>RD</sup> CLAIMANT</b>
<b>WYCLIFF MUSUNGU</b>	<b>4<sup>TH</sup> CLAIMANT</b>
<b>JAFREY BUCHELE</b>	<b>5<sup>TH</sup> CLAIMANT</b>
<b>GODFREY MUKAISI</b>	<b>6<sup>TH</sup> CLAIMANT</b>
<b>KAI NGUJO TUVA</b>	<b>7<sup>TH</sup> CLAIMANT</b>

v

<b>AQUA PLUMBING COMPANY LIMITED</b>	<b>RESPONDENT</b>
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**JUDGMENT**

1. The Claimants' filed a Statement of Claim against Aqua Plumbing Company Ltd (Respondent) on 29 August 2012 and the issue in dispute was stated as *the unfair dismissal from duties of the Claimants'*.
2. The Respondent was served and on 11 October 2012 it filed a Memorandum of Appearance through the law firm of J.M. Makau & Co. Advocates.
3. On 15 November 2012 the Cause was placed before Justice Abuodha and he ordered that the file be transferred to Mombasa for hearing and determination. On 14 December 2012 the file was placed before me but none of the parties appeared. I directed the Deputy Registrar to notify the parties to appear in Court on 5 February 2013 for directions. The Deputy Registrar notified the parties through her letter dated 31 December 2012.
4. On 5 February 2013 the Claimants' appeared but there was no appearance/attendance on behalf of the Respondent. On perusing the file, I could not find any evidence that the Respondent had been served and I directed the Claimants' to serve Summons and the Statement of Claim upon it. I set a mention date of 21 February 2013.

5. On 21 February 2013 the Claimants' appeared on their behalf and Ms. Kariuki appeared on behalf of the Respondent. Ms. Kariuki informed me that they were attempting an out of court settlement and that it was the amount owing to each Claimant which was disputed.
6. I directed that the Cause be mentioned on 12 March 2013 to confirm whether a settlement had been reached.
7. On this day, the Claimants' were in attendance but there was no attendance on behalf of the Respondent. Justice Makau, before whom the file was placed, was informed by the Claimants' that no agreement had been reached and therefore they were seeking a hearing date. The Judge fixed hearing for 16 April 2013 and directed the Claimants' to serve the Respondent with a hearing notice.
8. Because both judges were not sitting on 16 April 2013, the Deputy Registrar wrote to the parties on 19 March 2013 to attend Court on 12 April 2013 for purposes of setting a new hearing date. Only the Claimants' attended and I fixed the hearing for 8 May 2013 and directed the Claimants' to serve a hearing notice upon the Respondent's Advocate on record.
9. When the Cause came up for hearing on 8 May 2013, there was no evidence that the Respondent had been served with a hearing notice and, I therefore adjourned the hearing to 29 May 2013 and directed the Claimants' to serve the Respondent with a hearing notice.
10. On 29 May 2013 the Cause was called and only the Claimants' were in attendance. The Claimants' informed me that they had served a hearing notice upon the Respondent's Advocate and that they had filed an affidavit of service. I confirmed that an affidavit of service sworn by one Boniface Musyoka Joseph on 28 May 2013 was in the file and that the Respondent's Advocate had acknowledged service by stamping at the back of the hearing notice. I allowed the hearing to proceed. All the Claimants' gave sworn testimony except the 6<sup>th</sup> Claimant.

### **Claimants' pleadings and case**

11. The Claimants' pleaded and testified that they were employed by the Respondent at different times but were not issued with appointment/contract letters. The 1<sup>st</sup> Claimant was employed on September 2004 as a plumber and was earning Kshs 12,792/- at time of dismissal, 2<sup>nd</sup> Claimant on September 2004 as a plumber and was earning Kshs 12,792/- at time of dismissal, 3<sup>rd</sup> Claimant employed on 7 May 2005 as a mason/plumber and earning Kshs 13,279/- at time of dismissal, 4<sup>th</sup> Claimant employed on 27 March 2006 as a welder and earning Kshs 12,792/- at time of dismissal, 5<sup>th</sup> Claimant employed on 17 February 2006 as a plumber and earning Kshs 12,792/- at time of dismissal and 7<sup>th</sup> Claimant was employed on 24 July 2006 as a plumber and was earning Kshs 12,792/- at time of dismissal. The 6<sup>th</sup> Claimant did not testify but according to the pleadings and Exh 1 he was employed on 3 July 2006 and was earning Kshs 9,412/- at the time of dismissal.
12. All the Claimants' testified that the Respondent changed its name sometime in August 2011 to Aqualine Plumbing Ltd and that on the change of name some employees were laid off and paid their final dues while the Claimants' were retained under new terms with a promise to pay them the outstanding final dues under a staggered schedule, for the time served under the Respondent.
13. On their dismissal, the Claimants' attributed it to their demands to be paid the outstanding final dues and that on 5 March 2012 the Respondent's Director Hirji Dhanji verbally terminated their services.
14. On why they claimed the dismissal was unfair, the Claimants' pleading and testimony was that they were not given any notice or reasons for the dismissals.
15. The Claimants' produced several exhibits and these included a schedule indicating the Respondents employees and dates of employment (Exhibit 1). All the Claimants are in the list.
16. After the dismissals the Claimants' reported to the Ministry of Labour and conciliation letters dated 30 March 2012 (Exhibit 2), 10 April 2012 (Exhibit 3), 19 April 2012 (Exhibit 4) were written to the Respondent. Demand letters were also written by Kituo Cha Sheria to the Respondent (Exhibits 5 and 6).
17. The Claimants' pleaded and testified that they are seeking a declaration that their dismissal was unconstitutional (unfair) and the dues set out in paragraph 5 of the Statement of Claim.

### **Legal burden upon a Claimant**

18. The legal burden placed upon an employee who complains of unfair termination or wrongful dismissal is found in section 47(5) of the Employment Act. The section provides that

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

19. In their endeavor to show that an unfair termination or wrongful dismissal had occurred the Claimants' pleaded and testified that they were given no notice. Section 35 of the Act provides for the giving of written notice before terminating an employment contract in respect of which wages are paid periodically.
20. Closely related to section 35 is section 41 of the Employment Act which requires that before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity, an employer should explain to the employee the reasons for the termination and hear any representations made by the employee.
21. Sections 43 and 45 of the Employment Act on the other hand obligate an employer to prove the reasons for the termination and that, the reasons were valid and fair.
22. The Claimants' were paid by the month and therefore should have been given written notice. This was not done by the Respondent. Further the Respondent was under an obligation to explain to the Claimants' the reasons why it was contemplating dismissing them. This was equally not done by the Respondent. I have no alternative than to conclude and find that the dismissal of the Claimants' was both procedurally and substantively unfair.
23. Even if the Respondent had complied with the provisions of sections 35 and 41 of the Employment Act, it still had a hurdle to overcome. The law required it, where the termination is challenged, to prove the reasons for termination and that the reasons were valid and fair. By failing to appear in court, the Respondent did not avail itself of the opportunity given to it by the statute.

### **Formula for calculating service pay**

24. Before discussing appropriate relief it is necessary that I set out the formula for calculating service pay. This is because nearly every Claim for service pay which has been presented before this Court has been seeking figures based on an unknown formula.
25. It is not correct to simply take the monthly wages/salary and divide the figure by two to get the equivalent of 15 days service pay for each completed year of service. This is the path which has been adopted and used by many employees/Claimants'.
26. To get the amount of service pay an employee is entitled, it is necessary to convert an employee/Claimant's monthly wages/salary into a daily rate by taking the basic salary and housing allowance and dividing the same with 26 to get the daily rate. The daily rate is then multiplied by the 15 days to get the yearly rate. The yearly rate is then again multiplied by the number of years an employee has served to get the total service pay. Alternatively the daily rate can be multiplied by the total aggregated days of service.
27. According to the practice and customs used by the Ministry of Labour, the correct formula is
- $$\text{Basic Salary} + \text{House Allowance} = \text{Daily Rate} \times y, (y)$$

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being the agreed number of days for each completed year of service. For example in the case of the 1<sup>st</sup> Claimant the workings would be Kshs 12,792/26 which is divided by 26 to get the daily rate of Kshs 492/-. This is then multiplied with 15 days to get the yearly sum which is again multiplied with the number of years served. Or one can calculate the aggregate number of days and multiply the same with the daily rate.

### **Appropriate relief**

28. Having found the dismissals unfair, I now must consider each of the heads of relief sought by the Claimants'. Each of the Claimants' sought service pay, pay in lieu of notice and accrued leave.

### ***Service pay***

29. Section 35(5) of the Employment Act entitles an employee whose services have been terminated to service pay at a rate as may be fixed. But the payment of service pay is ruled out for employees who are contributors/members of the National Social Security Fund, registered pension/provident fund, gratuity/service pay scheme set out in a collective bargaining agreement or a more favorable scheme run by an employer. No evidence was placed before me to show that the Claimants' fall under any of the exceptions.

30. The Employment Act has not fixed any rate. But in practice, service pay is normally calculated on the basis of 15 days pay for each completed year of service.

31. The Claimants' have claimed the service pay on the basis of 15 days pay for each completed year of service. I would award the amounts set out against the name of each Claimant in paragraph 39 here below. The figures have been reached using the formula I set out above.

### ***One month salary in lieu of Notice***

32. Having found the dismissals of the Claimants' unfair, it is in order for me to invoke the provisions of sections 35(1)(c) and 36 of the Employment Act and award each of the Claimants' the equivalent of one month salary each was earning at the time of termination, as set out in paragraph 39.

### ***Pending leave days***

33. Each of the Claimants' sought accrued leave for the period they were engaged by the Respondent. Their case was that during the course of the employment relationship they did not go on leave.

34. Section 10 of the Employment Act has placed a duty on employers to specify certain prescribed particulars of the employment in writing including entitlement to annual leave, the particulars being sufficient enough for precise calculation on termination of employment. Section 10(7) of the Act on its part provide that when an employer fails to produce a written contract or particulars of the employment, the burden of proving or disproving any alleged term of the employment will fall on the employer.

35. Section 74(1)(f) of the Act also reinforces the responsibility of an employer to keep a record of the annual leave entitlement of every employee, days taken and due. An employee is entitled to as a minimum, to 21 days annual leave with full pay after every twelve months of consecutive service.

36. The Respondent was served and must have known of its legal obligations as far as legal proceedings are concerned and because it never bothered to participate in the legal proceedings, and considering the obligations placed upon it by statute, I do find that the Claimants' are each entitled to payment of accrued/pending leave in the sums stated against each Claimants' name in paragraph 39.

### ***Compensation***

37. The Claimants' were lay persons with no legal training, skills or knowledge of the nitty-gritties of the law. They did not seek compensation. Compensation for unfair termination is a statutory remedy. It is one of the primary remedies for unfair termination provided by the statute at section 49(1)(c) of the Employment Act. The others being reinstatement or reengagement. The fact that the Claimants' did not plead for compensation should be no bar to an award of compensation where the Court has reached the conclusion that the termination was unfair.

38. The Court is only required to consider the thirteen factors set out in section 49(4) of the Employment Act. It is my view that each of the Claimants' merits an award of compensation. I award each one of them the equivalent of one month gross wages at the time of termination.

### ***Conclusion and Orders***

39. In conclusion I do find, hold and declare that the termination of each of the Claimants' was unfair and make awards as follows:

**James Chege**

**1<sup>st</sup> Claimant**

a. Service pay for 7 1/2 years (105 days)	Kshs 51,660/-
b. One month pay in lieu of Notice	Kshs 12,792/-
c. 7 months accrued leave	Kshs 89,544/-
d. One month compensation	Kshs 12,792/-
<b>TOTAL</b>	<b>Kshs 166,788/-</b>

**Stephen Wamai**

**2<sup>nd</sup> Claimant**

a. Service pay for 8 years (120 days)	Kshs 59,040/-
b. One month pay in lieu of Notice	Kshs 12,792/-
c. 8 months accrued leave	Kshs 102,336/-
d. One month compensation	Kshs 12,792/-
<b>TOTAL</b>	<b>Kshs 186,960/-</b>

**Alex Kazungu**

**3<sup>rd</sup> Claimant**

a. Service pay for 6 years (90 days)	Kshs 45,965/-
b. One month pay in lieu of Notice	Kshs 13,279/-
c. 6 months accrued leave	Kshs 79,674/-
d. One month compensation	Kshs 13,279/-
<b>TOTAL</b>	<b>Kshs 152,197/-</b>

**Wycliff Musungu**

**4<sup>th</sup> Claimant**

a. Service for 6 years (90 days)	Kshs 44,280/-
b. One month pay in lieu of Notice	Kshs 12,792/-
c. 6 months accrued leave	Kshs 76,752/-
d. One month compensation	Kshs 12,792/-
<b>TOTAL</b>	<b>Kshs 146,616/-</b>

**Jafrey Buchele**

**5<sup>th</sup> Claimant**

a. Service for 6 years (90 days)	Kshs 44,280/-
b. One month pay in lieu of Notice	Kshs 12,792/-
c. 6 months accrued leave	Kshs 76,752/-
d. One month compensation	Kshs 12,792/-
<b>TOTAL</b>	<b>Kshs 146,616/-</b>

**Godfrey Mukaisi**

**6<sup>th</sup> Claimant**

a. Service for 5 years 8 months (90 days)	Kshs 32,580/-
b. One month pay in lieu of Notice	Kshs 9,412/-
c. 5 month accrued leave	Kshs 47,060/-
d. One month compensation	Kshs 9,412/-

TOTAL

**Kshs 98,464/-**

**Kai Ngujo Tuva**

**7<sup>th</sup> Claimant**

a. Service pay for 5 years 8 months (90 days)	Kshs 44,280/-
b. One month pay in lieu of Notice	Kshs 12,792/-
c. 5 months accrued leave	Kshs 63,960/-
d. One month compensation	Kshs 12,792/-

TOTAL

**Kshs 133,824/-**

40. There is a statutory obligation on an employer to issue employees with a Certificate of Service on separation. The Respondent is ordered to issue each Claimant with a Certificate of Service within the next 10 days.

41. There will be no order as to costs.

**Delivered, dated and signed in open Court in Mombasa on this 12<sup>th</sup> day of July 2013.**

**Justice Radido Stephen**

**Judge**

**Appearances**

**Claimants'        in person**

**Respondent        Entered appearance but did not file Response or appear at hearing**