



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 1919 OF 2011**

**LEANDRO WABWIRE.....CLAIMANT**

**VS**

**SHENGLI ENGINEERING CONSTRUCTION GROUP LTD.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim which is brought by way of a Memorandum of Claim dated 14th November and filed in Court on 15th November 2011 is for unfair termination of employment and failure to pay terminal dues. The Respondent filed a Defence on 24th February 2012 and the matter was heard on 30th May and 19th July 2013, with Mr. Makokha appearing for the Claimant and Mrs. Ochieng appearing for the Respondent. The Claimant testified on his own behalf and the Respondent's Human Resource Manager, Justus Muema testified for the Respondent. Both parties filed written submissions.

**The Claimant's Case**

2. The Claimant was employed by the Respondent on 28th July 2010 in the position of Surveyor at a monthly salary of Kshs. 38,000. He testified that on 21st September 2011, he was at his assigned work site where his colleagues had abandoned their work. The Claimant's Supervisors came to the site and inquired why the workers had gone on strike. The Claimant told his Supervisors that the workers were complaining that they had not been given milk. The Claimant was subsequently ejected from the site on allegations that he was inciting the workers. On 22nd September 2011, the Claimant went back to work but was told by a Mr. Liu that his employment had come to an end and he was therefore to proceed to the Respondent's office. At the office, he was told to go away. It was the Claimant's case that he was not given an opportunity to defend himself.

3. The Claimant claims the following:

- a. A declaration that the termination of his employment was unlawful and unfair
- b. 12 months' salary in compensation for unfair termination.....456,000
- c. One month's salary in lieu of notice..... 38,000
- d. Unpaid salary for 16th-22nd September 2011.....8,866
- e. Pay in lieu of one year's leave.....38,000
- f. Certificate of service
- g. Costs and interest

**4. The Respondent's Case**

In its Defence, the Respondent admitted having employed the Claimant from 28th July 2010 to 21st September 2011 at an all inclusive salary of Kshs. 38,000. The Respondent denied terminating the Claimant's employment. Rather, the Claimant himself failed to report for duty on 22nd September 2011.

5. The Respondent's Human Resource Manager, Justus Muema told the Court that on 21st September 2011, the Claimant was found by the Respondent's Engineer on site but not working in spite of the fact the he had not completed his assignment for the day. Muema then summoned the Claimant to the office on 22nd September 2011 to explain why he had not worked on 21st September 2011. The Claimant did not honour Muema's summons and did not report back to work.

## 6. Findings and Determination

The main issue for determination in this case is whether the Claimant has proved a case for unfair termination of employment. The Claimant told the Court that he was ejected from his work site and was not allowed to go back. The Respondent on the other hand maintained that the Claimant absconded duty.

7. Section 43(1) 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.***

8. Section 45 (2) defines unfair termination as follows:

***(2) 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 employees conduct, capacity or compatibility; or***

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

***(c) That the employment was terminated in accordance with fair procedure.***

9. On 21st September 2011, there seems to have been some form of industrial action at the Respondent's site where the Claimant worked. The Claimant told the Court that the Respondent blamed him for inciting the workers and thereafter dismissed him verbally. On its part, the Respondent stated that the Claimant absconded duty after being asked to explain why he had not worked on 21st September 2011. After this, the Respondent tabulated the Claimant's final dues which he failed to collect.

10. The Respondent's averments were however not verified since Muema who testified on behalf of the Respondent was not at the site on 21st September 2011. There was also no evidence of any communication to the Claimant requiring him to report back to work or to collect his dues. The allegation that the Claimant absconded duty was therefore not proved and I find that the Respondent failed to demonstrate a valid reason for terminating the Claimant's employment.

11. I also find that in terminating the Claimant's employment, the Respondent did not observe the procedural requirements set out in Section 41 of the Employment Act, 2007. I consequently award the Claimant six (6) months' salary in compensation for unfair termination of employment. I also award him one month's salary in lieu of notice as well as salary for period between 16th and 22nd September 2011. The Respondent admitted that the Claimant had not gone on leave for his entire period of employment. The claim for leave therefore succeeds and is allowed.

12. The Claimant's salary as at the time he left the Respondent's employment was in contention. However, in paragraph 3 of the Respondent's Defence the Respondent gave the figure of Kshs. 38,000 as the Claimant's salary inclusive of allowances. I find no reason to depart from this figure and therefore adopt it as the Claimant's salary for purposes of this claim.

13. In the final analysis I make an award in favour of the Claimant as follows:-

- a) 6 months' salary in compensation for unfair termination.....228,000
  - b) One months' salary in lieu of notice.....38,000
  - c) Pay for 16th-22nd September 2011 (7 days).....8,867
  - d) Pay in lieu of leave (21+1.75) days.....28,817
- Total.....303,684**

14. I direct the Respondent to issue the Claimant with a certificate of service and award the costs of this case to the Claimant.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF NOVEMBER 2013**

**LINNET NDOLO**

**JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**