



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

**AT NAIROBI**

**CAUSE NO. 2032 OF 2012**

*(Before D.K.N. Marete)*

**WILLIAM SAMMY MASILA .....CLAIMANT**

Versus

**TWIGA CONSTRUCTION COMPANY LIMITED .....RESPONDENT**

**JUDGEMENT**

By a memorandum of claim dated the 3rd October, 2012 this matter was brought to court. The issue in dispute is therein cited as,

- a. ***Unfair termination/dismissal***
- b. ***Non-payment of terminal dues & compensation damages***

The respondent in a defense dated 2nd November, 2012 admits part of the claim but denies the balance and prays that the same be dismissed with costs.

The claimant’s case is that at all material times to this claim and particularly on 22nd August, 2008 the claimant was employed by the respondent as a carpenter at a salary of Ksh.530.00 a day. The claimant further states that on or about 25th February, 2012 the claimant was in the course of duty at Baba Dogo when the respondent’s Site Manager, one, Mr. Harrish approached the claimant and told him to go back and not report back to work as his services had been terminated. This to him was unlawful, unfair and inhuman more so bearing in mind that the respondent also declined paying him his due terminal benefits and damages as hereunder;

- i. *One month’s salary in lieu of notice(Ksh.530/=X30 days)...Ksh. 15,900/=*
- ii. *Payment in lieu of untaken leave for entire duration of service being Kshs.15,900/=X 3 years .....Ksh. 47,700/=*
- iii. *Service/gratuity for 1 year(from August 2006 to August 2009) when N.S.S.F was not being remitted at 18 days salary per year being 18/30 X Kshs.15,900/= X 1 year ..... Ksh.9,540/=*

He therefore prays for;

- a. *A declaration that the Respondent’s dismissal of the claimant from employment was illegal,*

*unlawful, unfair and inhumane and that the Claimant is entitled to his terminal benefits and compensatory damages.*

b. *An order for the Respondent to pay the Claimant his terminal dues and compensatory damages totaling to Kshs.263,640/=*

c. *Costs of this case plus interest thereon.*

The respondent on the other hand submits that the termination of the employment of the claimant was on grounds of redundancy and that his union and the Ministry of Labour was informed of the same more than a month prior to the termination. He avers that he complied with S.40, Employment Act, 2007 and requested the claimant to pick his dues but the said claimant declined to heed the call. He concedes to the following entitlement of the claimant;

i. *One month salary in lieu of Notice being Ksh.530 x 26 days  
.....Ksh.13,780.00*

(ii) **Leave**

a. *In 2009 – 5 months x 1 ¾day = 7 days x 530= .....Ksh. 4,637.50*

b. *In 2010 & 2011-21 days each year = 42 days x 530=..... Ksh.22,260.00*

c. *In 2012= 2 months x 1 ¾ day = 3.5 days x 530= ..... Ksh. 1,855.00*

**Total**

**Ksh.28,752.50**

He further contends that the claimant was paid all dues to all statutory bodies during the pendency of the employment and therefore the claimant has no further claim or entitlement.

The matter came for hearing on 5th June, 2012 when the claimant testified largely reiterating his case. The respondent did not call any witnesses and on 25th June, 2013 the parties agreed on disposal of the matter by way of written submissions.

The issues for determination in the circumstances are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant is entitled to the relief sought?
3. Who bears the costs of the suit?

The 1st issue for determination is the status of the claimant's employment termination by the respondent. The respondent in his defense seeks to rely on redundancy as the ground for termination. He does not however, adduce evidence in support of a case for redundancy. It is not proven at all. It is merely an allegation. The termination of the claimant on grounds of redundancy therefore fails and a case of unfair dismissal is established. S. 40, 43 and 45 of the Employment Act were flouted and this edifices a case of unfair termination. I therefore find that the claimant is entitled to the relief sought and award as follows;

i. *One month's salary in lieu of notice(Ksh.530/=X30 days)....Ksh.15,900.00*

ii. *Payment in lieu of untaken leave for entire duration of service being Kshs.15,900/=X3 years  
.....Ksh.47,700.00*

iii. *Service/gratuity for 1 year(from August 2006 to August 2009) when N.S.S.F was not being  
remitted at 18 days salary per year being 18/30 X Kshs.15,900/= X 1 year  
.....Ksh. 9,540.00*

iv. *Six months compensation for unfair termination of the employment = 15,900 X 6  
months Ksh.95,400.00*

**Total**

**Ksh.168,540.00**

The costs of this cause shall be borne by the respondent.

Dated, delivered and signed the 20th day of December, 2013.

**D.K. Njagi Marete**

**JUDGE**

Appearances:

1. Makokha instructed by Namada & Company Advocates for the claimant.
2. Muthaura instructed by Mutua Mathuva & Company Advocates for the Respondent.