



Case Number:	Cause 747 of 2012
Date Delivered:	12 Mar 2014
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Joseph Kiplagat Sergon
Citation:	Chrisantus Barasa Munyekenye v Kenya Yuncheng Making Limited [2014] eKLR
Advocates:	Munene for Claimant Ms Kiragu holds brief for Muchoki for Respondent
Case Summary:	-
Court Division:	Industrial Court
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Claimant awarded
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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vi. Compensation for unfair termination of employment

Pursuant to Employment Act Cap 226 Section 49 (c)

(Kshs. 400 x 365 days)	Kshs. <u>146,000.00</u>
Total dues	Kshs. <u>264,223.08</u>

(b) The Claimant prays for costs of this cause.

(c) Interest on all monetary payment at court's rate.

The Respondent filed a Reply to the Memorandum of Claim on 27th June 2012 in which it denied the claim and urged the court to dismiss the claim with costs.

The case was heard on 23rd September 2013 when the Claimant testified on his own behalf and the Respondent called **HEZRON MUNANDA SAMUEL (DW2)** it's procurement Officer who testified on its behalf.

The Claimant's was represented by Mr. Munene instructed by Muriuki Njagagua & Associates Advocates while the Respondent was represented by Mr. Muchoki instructed by Muchoki Kangata Njenga & Co. Advocates.

The Claimant's case is that he was employed by the Respondent as a Machine Operator on 15th June 2009 on a 6 months contract at a daily wage of Shs. 400/-. The contract expired on 15th December 2009. He applied for renewal but was advised to go for Christmas break and discuss the matter in the new year. He approached his immediate supervisor after Christmas who informed him that the director was abroad but he could start working while waiting for the director's return. He therefore started working in January 2010 at a daily wage of Shs. 400/- per day. The Director came back in February and from March he started earning a basic Salary of Shs 11,000/- with house allowance of Shs 2000/-. He was not given an employment contract. He continued working without any complaint about his work until 18th August 2010 when he was called by the director to his office and given the letter of termination.

The director asked him to sign, take his money and leave the company. He was paid Shs. 26,076.90.

He seeks payment of balance of leave allowance, travelling allowance, unpaid salary, public holidays and 12 months' salary as compensation. He further prays for costs and interest.

RW1 testified that he works with the Respondent as the procurement officer. He was the one who invited the Claimant to work with the Respondent and was his immediate Supervisor. He knew the Claimant before as they had worked together at National Youth Service. The Claimant was terminated and paid terminal dues of

Shs 26,076.92/-. He was a good worker and there were no adverse reports against him. His termination was due to technology. The 5 lathe machines in the company had been modified to improve production so that one machine could do the work of 3 machines. There were 7 employees in the department which meant that 2 employees were excess. The Claimant was terminated while another

employee was transferred to another department. The Claimant was paid Shs. 13,000/- in lieu of notice.

RW1 did not know if the Claimant was informed of the reasons for termination of this employment. There was no provision for payment of travelling allowance.

I have considered the pleadings, the witness testimonies, the written submissions and the authority relied upon by the Respondent.

The issues for determination are whether the Claimant was unfairly terminated and if he is entitled to the prayers sought.

Was the Claimant's employment unfair"

On whether the termination of Claimant's employment was unfair, the applicable law is Section 41 of the Employment Act which requires that an employee is notified of the reasons for termination and be given a hearing.

The Claimant testified that he was called and issued with the letter of termination. He was not given the reason for termination or given an opportunity to defend himself.

The Respondent has not contested this allegation. The Respondent however alleges that the Claimant accepted the termination and the terminal dues without protest. The Respondent further submits that having not made his claim for more than 2 years after termination the claimant is guilty of laches.

I do not agree with the Respondent. The fact that the claimant accepted payment does not mean he compromised his right to make a claim for unfair termination. And the fact that the case was filed before expiry of the limitation period means that the Claimant is not guilty of laches.

Having failed to comply with the provisions of Section 41 of the Employment Act the Respondent is guilty of unfair termination of the Claimant.

Is the Claimant entitled to his prayers"

The Claimant prayed for the following:-

- a. i) Annual leave

- ii. Travelling allowance

- iii. Severance pay

- iv. Unpaid Salary

- v. Public holidays.

vi. Compensation

(b) Costs

(c) Interest

I will now consider each of the prayers.

i. **Annual leave**

The Claimant was in employment for 14 months. The Respondent did not contest his allegation that he never went on annual leave while in employment. He is therefore entitled to 24.5 days leave at the rate of 1.75 days leave for each completed month of service as provided in Section 28 of Employment Act. This works at Kshs. 12,250/-. Having been paid Kshs. 8,038.46 he is entitled to the balance of Kshs 4,211.54 which I hereby award him.

ii. **Travelling Allowance**

The Claimant's basis for claiming travelling allowance is what he travelled every day from his house to work and back. This is not provided for by law and was not provided for in his terms of employment.

The same has no legal basis and is dismissed.

iii. **Severance Pay**

Having been terminated for lack of work, the termination of the Claimant's employment would fall under the definition of redundancy. He is therefore entitled to severance pay at 15 days salary per completed year of service as provided under Section 40 of the Employment Act.

I award him Kshs. 7,500/- being severance pay for one year worked.

iv. **Unpaid Salary**

The Claimant has prayed for Salary for the period 26.7.10 to 18.8.2010 less Shs. 8,038.46 paid.

According to the letter of termination the Claimant was paid up to 18th August 2010. There is therefore no outstanding claim on account of days worked.

I accordingly dismiss the claim.

v. Public Holidays

The Claimant did not give evidence to the effect that he was required to work for any public holiday or that he worked on any public holiday for which he was not paid. He has therefore not proved this claim.

The claim is therefore dismissed.

vi. Compensation

Having been terminated unfairly, the Claimant is entitled to compensation.

Full compensation of 12 months' salary is however on the higher side considering the length of service of only 14 months. I have considered all the circumstances of the case and in my opinion two month's compensation is reasonable in the circumstances.

I therefore award the Claimant Kshs. 26,000/- being two months' salary as compensation.

vii. Costs

Having been only partially successful in his claim

I award the Claimant his Costs but the instructions fees will be assessed at 50% of scale fees.

viii. Interest

Interest will be payable at court rates after 30 days from today should the Respondent not have paid the decretal sum by then.

Orders accordingly.

READ IN OPEN COURT THIS 12TH DAY OF MARCH, 2014.

HON. LADY JUSTICE M. ONYANGO

JUDGE

In the presence of

Munene for Claimant

Ms Kiragu holds brief for Muchoki for Respondent



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