



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 235 OF 2016**  
**BENARD JESEE OBUCHAFU MUTOKA.....CLAIMANT**  
**VERSUS**  
**FOAM MATTRESS LIMITED.....RESPONDENT**

**JUDGMENT**

1. Benard Jese Obuchafu Mutoka (the Claimant) sued Foam Mattress Ltd (the Respondent), alleging unfair termination of employment and breach of contract.
2. The Respondent filed a Response on 26 August 2016, and the Cause was heard on 18 February 2020 and 9 March 2021. The Claimant and a Sales Manager with the Respondent testified.
3. The Claimant filed his submissions on 25 March 2021, and the Respondent filed its submissions on 10 May 2021.
4. The Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

5. The primary procedural protections assured to an employee before termination of employment is the right to be heard. The protections are provided in sections 35(1) and 41 of the Employment Act, 2007.
6. The Claimant testified that on 15 January 2015, he handed the days cash collections to the Accountant who banked the money but on reporting to work the next day, he was informed of a shortage of Kshs 70,000/- and instructed to go see the Director who directed him to hand over and leave.
7. However, the Respondent contended that the Claimant deserted work after a complaint was received on 3 January 2015 that the Claimant had received money from a customer to purchase a fridge but did not issue a receipt.
8. According to the Respondent, a report was made to the Police, and the Claimant was arrested on 5 January 2015, from which date the Claimant never reported back to work.
9. The Respondent further contended that the Claimant had written a letter admitting to misconduct and apologising on 5 January 2015.
10. The Court has looked at the Claimant's letter dated 5 January 2015. The Claimant was explaining what had transpired on 3 January 2015 in respect to the sale of a fridge to a customer.
11. The Claimant would not have written the letter if he did not know what the allegations against him were.
12. On the basis of the letter, the Court is satisfied that the Claimant knew the allegations to confront and that he made a written representation on the same.
13. The Court is satisfied that the Respondent was in substantial compliance with the statutory requirements of procedural fairness.

**Substantive fairness**

14. The Claimant wrote a letter to the Respondent on 5 January 2015. In the letter, the Claimant admitted that he had received Kshs 19,000/- from a customer for the purchase of a fridge but had not issued a receipt.
15. The Claimant also agreed to take full responsibility for his conduct.
16. The Claimant did not disclose in his witness statement or during examination in chief that he had been arrested by the Police. It was only on cross-examination that the Claimant acknowledged that he had been arrested over the incident.
17. The Claimant was aware of the Respondent's case that he did not report back to work after being arrested by the Police. He only made an admission during cross-examination.
18. The arrest of the Claimant was a significant occurrence in the separation. By the Claimant failing to disclose the fact in the witness statement or during examination-in-chief shows that he was not candid.
19. The lack of candour leads to an inference of doubts on the Claimant's creditworthiness as a witness.
20. The Court is inclined to believe the Respondent's evidence that the Claimant was not dismissed but stopped reporting to work after arrest by the Police.
21. The Court finds that the Claimant did not discharge the burden imposed on him by section 47(5) of the Employment Act, 2007 to demonstrate that an unfair termination of employment occurred.
22. Compensation and salary in lieu of notice are therefore not available as remedies to the Claimant.

### **Breach of contract**

### **Underpayment of wages**

23. The Claimant alleged underpayment of wages from 2010 to 2013. He also disclosed the relevant Legal Notices.
24. The Claimant testified that he was employed as a cashier on 1 October 1997. He was earning Kshs 14,000/- from 2010 to 2013 and Kshs 19,811/- from 2013 to 2015 per month according to the payslips produced in Court.
25. The Respondent admitted that the Claimant was a cashier and that he was underpaid by Kshs 48,894/- in 2013.
26. The Claimant did not address the question of underpayments in the submissions, and the Court will allow the admitted portion of this head of the claim in the sum of Kshs 48,894/-.

### **Overtime**

27. The Employment Act, 2007 has not prescribed working hours but has left it to party autonomy to agree on the working hours.
28. Various Regulation of Wages Orders prescribes working hours but specific to certain sectors of industry.
29. The Claimant did not disclose which particular Regulation of Wages Order applied to him or the sector the Respondent operated in, and relief is declined.

### **Wages of January 2015**

30. The Claimant sought Kshs 1,192/- being earned wages for January 2015.
31. The Court finds that he is entitled to the wages as of right.

### **Conclusion and Orders**

32. From the foregoing, save for Kshs 1,192/- being earned wages for January 2015 and Kshs 48,894/- underpayments, the Court finds no merit in the Cause, and it is dismissed. No order on costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 1<sup>st</sup> day of July 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Claimant Chepkwony & Co. Advocates

For Respondent Staussi & Asunah Advocates

Court Assistant Chrispo Aura