

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER 1486 OF 2017

ANDREW

KIGATHI

WANJOHI.....CLAIMANT

VERSUS

ELLAMS

PRODUCTS

LIMITED.....RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. Vide a memorandum of claim dated the 28<sup>th</sup> of July 2017, the Claimant sued the Respondent and sought the following Orders:-
  - a. **A declaration that his termination was unfair and unlawful.**
  - b. **A declaration that the claimant was underpaid.**
  - c. **A declaration that the differential treatment by the respondent in the payment of the lumpsum, bus fare allowance, leave travelling allowance and bonus was discriminatory.**



Respondent had also filed a Supplementary List and Bundle of documents dated 11<sup>th</sup> September 2019.

### **Hearing and evidence**

4. The claimant's case was heard before Justice Ocharo Kebira on May 24, 2022, with the claimant as the only witness. He testified under oath, adopted his filed witness statement, and produced the documents he had filed. He was cross-examined by counsel for the respondent, Ms. Kavaji, and re-examined by his advocate, Mr. Juma. The respondent's case was heard before me on July 28, 2025. The respondent called Guyvira Nduma as its witness of fact, who testified under oath and stated he was the Human Resources Officer of the respondent. He adopted his witness statement dated April 20, 2023, as his evidence in chief and produced the respondent's documents listed in the document list dated June 30, 2023, as R-exhibits 1-8, along with documents from the list dated September 11, 2019. The witness was not cross-examined because the claimant was absent.

### **The Claimant's case in summary**

5. The Claimant's case is that he was first employed by the Respondent in an entry-level position as a general labourer in July 2009, earning a daily wage of Kshs 294.50, and assigned to the Respondent's Perforation Department. The claimant argued that, as a general labourer, he was entitled to a minimum daily wage of Kshs 470.00. Since his daily wage was lower than the minimum required, he claims he was underpaid. Additionally, he asserts he was entitled to pay on rest days because he earned a daily wage. The Claimant states that the Respondent failed to pay him from July 2009 until April 2011.

6. It is averred that in the year 2010, the Claimant joined the Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers (KUPRIPUPA), bringing the terms of his employment within the negotiated Collective Bargaining Agreement between the Respondent and trade union. In particular, he was entitled to a monthly salary of Kshs. 19,500/-, but the Respondent disregarded the provisions of the Collective Bargaining Agreement as to wage increase only paying the claimant Kshs. 15,368/-. As a consequence of underpayment of the basic salary, his house allowance was also underpaid being calculated at the rate of 15 per cent of the basic salary.
  
7. In April 2011, the Claimant entered into a fixed term contract of employment for one year at a monthly salary of Kshs 7, 643.11. It was a term of the said contract that it would expire automatically upon the lapse of one year, unless the Claimant received communication to the contrary. While the Respondent paid a lump sum allowance of Kshs 3,000 per month to all other employees working overtime, the Claimant did not receive this allowance in the nine years that he worked for the respondent. In addition to the lumpsum allowance, the Respondent provided bus fare allowance of Kshs. 50 to the other employees except the claimant; paid all employees Leave Travelling Allowance, payable to at the end of the year, except the Claimant; and refused to pay the Claimant his bonus pay which was an equivalent of one month salary and which was payable once at the end of each completed year, per the Collective Bargaining Agreement. The Claimant states that he never received his bonus, despite working for the Respondent for a total of nine years. In light of all the foregoing, the Claimant argues that he suffered discrimination at the

hands of the Respondent, as the Respondent employed differential treatment in the payment of the allowances.

8. The Claimant states that he continued working for the Respondent after his contract of employment expired, and never received communication of any intention to disengage the services of the Claimant. He states that his terms of engagement therefore automatically converted from fixed term to open ended.
9. The Claimant avers that in May, 2016, the Respondent terminated his employment without giving any reasons for such termination. He also did not receive any notice prior to his termination, nor was he accorded an opportunity to be heard. As such, he states that the termination of his employment was unfair and unlawful. At the time of his termination, the Claimant was earning Kshs15,368/- per month.

**Respondent's case in brief**

10. The Respondent concedes that it engaged the Claimant albeit as a casual labourer on 14th July, 2009 and at a daily wage of Kshs. 470/- inclusive of house allowance, which was the recommended minimum daily wage as per the Regulation of Wages (General/Amendment Order). The Claimant and Respondent later entered into a fixed term contract of employment to work for the Respondent as a Packer with effect from 1st July 2011 to 30<sup>th</sup> June 2012, at a basic salary of Kshs.7,643/= plus 15% of the basic salary as house allowance. The Claimant's pay was higher than the set minimum wage guidelines for a packer at the time, namely Kshs.7,586/-. Subsequently, the Claimant was issued with

successive contracts of employment for 2012 to 2013, 2013 to 2014 and the last contract was to work for the Respondent as a General Labourer with effect from 1<sup>st</sup> July 2015 to 30<sup>th</sup> June 2016, at a basic salary of Kshs.11,450 plus 15% of the basic salary as house allowance. Again, this was higher than the set minimum wage guidelines at the for a Packer at the time, namely Kshs.11,085.70.

11. It is the Respondent's case that by signing the said contracts of employment, the Claimant understood the contents thereof and all benefits, dues and allowances were as stipulated therein. They state that there were no contractual provisions for a lump sum payment of Kshs. 3000 to employees working overtime as alleged by the Claimant - rather each employee received payment for the specific extra hours worked; and/or Leave Travelling allowance, Bonus and Bus Fare Allowances in lump sum.
12. On the issue of the Claimant's membership in the Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers (KUPRIPUPA), the Respondent denies being informed that the Claimant had joined the said Union, and deducting and remitting union dues on his behalf, as was its practice for employees who were members of unions. Accordingly, it denies that the Collective Bargaining Agreement (CBA) between the Respondent and the Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers (KUPRIPUPA) was applicable to the Claimant's salary.
13. The Respondent highlighted an incident when the Claimant used abusive and insulting language towards one of his colleagues culminating in the issuance of a warning letter dated 30th March 2015. Upon receipt of the said warning letter, the Claimant duly

responded on the same date admitting the misconduct and offering an apology for the same. The Claimant was also a habitual absentee as confirmed by his handwritten letters dated 5<sup>th</sup> August 2015 and 17<sup>th</sup> August 2015. They therefore contradict the Claimant's averment that there was no complaint about him during his period of service with the Respondent.

14. On the manner of separation between the Respondent and the Claimant, the Respondent explains that the Claimant deserted duty from 24<sup>th</sup> December 2015, making his final day as an employee 23<sup>rd</sup> December 2015. The Claimant never returned to work thereafter. Following the Claimant's failure to show up for work for a period exceeding thirty (30) days, the Respondent issued a letter dated 4<sup>th</sup> February 2016 terminating the Claimant's services on the premise of desertion of duty. The Claimant indeed acknowledged receipt of the letter dated 4<sup>th</sup> February 2016, but he never responded to the charges in the letter nor returned to work. As a result, he was considered by the Respondent as having deserted duty.

## **DETERMINATION**

### **Issues for determination**

15. The court in absence of written submissions by the parties, was of the considered opinion that the issues placed before the court for determination were as follows-
  - a. Whether the termination was lawful and fair

- b. Whether there was discrimination of the claimant in payment of lumpsum, bus fare allowance, leave travelling allowance and bonus.
- c. Whether the claimant was entitled to relief sought

**Whether the termination was lawful and fair**

- 16. The claimant contended that in May, 2016, the Respondent terminated his employment without giving any reasons for such termination. He also did not receive any notice prior to his termination, nor was he accorded an opportunity to be heard. As such, he argues that his termination was unfair and unlawful. At the time of his termination, the Claimant was earning Kshs15,368/- per month.
- 17. Conversely, the respondent stated that on the manner of separation between the Respondent and the Claimant, the Respondent explains that the Claimant deserted duty from 24th December 2015, making his final day as an employee 23<sup>rd</sup> December 2015. The Claimant never returned to work thereafter. Following the Claimant's failure to show up for work for a period exceeding thirty (30) days, the Respondent issued a letter dated 4<sup>th</sup> February 2016 terminating the Claimant's services on the premise of desertion of duty. The Claimant indeed acknowledged receipt of the letter dated 4th February 2016, but he neither responded to the charges therein nor returned to work. As a result, he was considered by the Respondent as having deserted duty.

**Decision**

18. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- ‘45(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

(c) that the employment was terminated in accordance with fair procedure.’’ To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission [2013] eKLR).

19. The termination of the employment was not in dispute. The respondent produced before the court a letter addressed to the claimant and titled- ‘**Termination notice for desertion from duty**’ and stated-

‘Dear Andrew,

‘RE: TERMINATION NOTICE FOR DESERTION FROM DUTY

*You may note that you have absented yourself from duty as from Thursday, December 24, 2015 to date without any prior written permission or communication. Our efforts to reach you including through the above-mentioned cell phone line has proved futile.*

*This serves to inform you that failure to communicate or report back on duty within the next seven (7) days, will be left with no other option but take a stern disciplinary action against you without any further notice.*

*This notice is effective immediately and thus be informed accordingly.*

*Yours faithfully,*

*FOR & ON BEHALF OF ELLAMS PRODUCTS LTD*

*DOPHEL T. W. WERUNGA*

*HUMAN RESOURCE MANAGER*

*Cc. Sub-County Labour Office P.O. Box 18183-00500, NAIROBI.’’*

20. The above letter indicated it was received by the claimant (page 42 of the respondent’s trial bundle). During cross-examination, the claimant denied having received the termination letter. The claimant told the trial court that the reference to a termination letter in his list of documents was a mistake of his advocate. The court found that the respondent’s witness had indicated in his statement that the claimant received the termination letter. There was no reply to controvert the allegations. The claimant's list of documents referred to a termination letter. The court found the claimant was not being candid, as the advocate relies solely on documents provided by the client. The court was of the opinion that the claimant's signature on the area indicated as received on the termination letter resembled his signature on various documents before the court. The claimant ought to have called an expert to prove that was not his signature. The court found the claimant was further not candid on the termination for in the claim it was

indicated termination happened in May 2016 (para 19 of claim) while in witnesses statement he stated it was in December 2015. For the foregoing reasons, the court found that it was more probable than not that the claimant absconded duty, was issued with the letter dated 4th February 2016, and asked to communicate or report back to work, but failed to do so. Absconding from duty amounts to gross misconduct and is a valid ground to terminate the employment under section 44 of the Employment Act. In the case of absconding, the employer is obliged to make reasonable efforts to reach the employee, in compliance with the provisions of section 41 of the Employment Act. The court was satisfied that the letter dated 4<sup>th</sup> February 2016 was received by the claimant, who failed to return to work as directed, and that he had therefore terminated his employment. The court, in the circumstances, held the termination was lawful and fair.

**Whether there was discrimination of the claimant in payment of lumpsum, bus fare allowance, leave travelling allowance and bonus.**

21. The claimant contended that in the year 2010, he joined the Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers (KUPRIPUPA), bringing the terms of his employment within the negotiated Collective Bargaining Agreement between the Respondent and trade union. In particular, he was entitled to a monthly salary of Kshs. 19,500/-, but the Respondent disregarded the provisions of the Collective Bargaining Agreement as to wage increase only paying the claimant Kshs. 15,368/-. As a consequence of underpayment of the basic salary, his house allowance was also underpaid being calculated at the rate of 15 per cent of the basic salary. In addition to the lumpsum

allowance, the Respondent provided bus fare allowance of Kshs. 50 to the other employees except the claimant; paid all employees Leave Travelling Allowance, payable to at the end of the year, except the Claimant; and refused to pay the Claimant his bonus pay which was an equivalent of one month salary and which was payable once at the end of each completed year, per the Collective Bargaining Agreement. The Claimant states that he never received his bonus, despite working for the Respondent for a total of nine years. In light of all the foregoing, the Claimant argues that he suffered discrimination at the hands of the Respondent, as the Respondent employed differential treatment in the payment of the allowances.

#### **The Respondent's case**

22. It is the Respondent's case that by signing the fixed-term contracts of employment, the Claimant understood the contents thereof and all benefits, dues, and allowances as stipulated therein. The Respondent contended that there were no contractual provisions for a lump sum payment of Kshs. 3000 to employees working overtime as alleged by the Claimant and rather each employee received payment for the specific extra hours worked; and/or Leave Travelling allowance, Bonus and Bus Fare Allowances in lump sum.
23. On the issue of the Claimant's membership in the Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers (KUPRIPUPA), the Respondent denies being informed that the Claimant had joined the said Union, or deducting and remitting union dues on his behalf, as was its practice for employees who were members of unions. Accordingly, it denies that the Collective Bargaining Agreement (CBA) between the

Respondent and the Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers (KUPRIPUPA) was applicable to the Claimant's salary.

### **Decision**

24. During cross-examination, the claimant told the court he had produced a union card, but it had no date. The court found a union card was produced. On perusal of the payslips produced by the claimant the part for union was blank. The court then concluded the claimant was not unionised as the payment of union dues is a prerequisite to union membership under the Labour Relations Act. The court found no evidence to support the claim of discrimination. There has to be a comparison with another employee who is treated more favourably for the court to establish discrimination. The claimant had a burden to prove the discrimination and failed to do so.

### **Whether the claimant is entitled to relief sought**

25. The claimant sought for various Orders of which the court considered on merit as follows-
- a. Kshs 52,132 being payment for Rest days from July 2009 to April 2011- The court found that the claimant was a casual worker in the period and was paid wages for days worked including Saturday and Sundays. No evidence was placed before the court that the amount paid was below what is prescribed under the Wages Order.
  - b. Kshs 184,416 being the difference in underpayment in the basic salary- In 2011, the claimant was placed on fixed-term contracts. In 2011, the court found the claimant was paid wages in accordance with the Wages Order. The claimant produced payslip of

December 2013 where the basic salary was indicated as Kshs. 10150 plus house allowance of Kshs. 4000. The minimum wages for category of general labourer under the 2013 Order was Kshs 9780.95(Nairobi). The court held that the wages paid to the claimant were in compliance with the minimum wage Orders. The claim for underpayment is held as baseless and is disallowed

- c. Kshs 67, 500 being the equivalent of the underpayment in house allowance.- The court found the claimant was paid in compliance with the regulations on minimum wages.
- d. Kshs 216,000 being the Lumpsum allowance for six years- The basis of the same was not proved. The payslips produced by the claimant had an item of overtime. For example, in the month of November 2011, the payslip had an item of overtime for Kshs. 6054 and in December 2012 Kshs. 2575. The claim of flat rate of Kshs 3000 per month for overtime work is thus baseless and is disallowed.
- e. Kshs 108,000 being the equivalent of bus fare allowance for six years-The basis of the same was not proved.
- f. Kshs 37,323 being the equivalent of a bonus from 2011 to 2014- The claimant admitted at the hearing that he had no document to support his claim for a bonus. The court found no basis of the same.

- g. Kshs 15,600 being the equivalent of Leave Travelling Allowance for nine years-The payment for the month of December 2015 had item of travel. The claim was not proved.
- h. Kshs 53,196 being the equivalent of untaken leave days-The period when leave was alleged as not taken was not particularised. The basis of the amount sought was not pleaded or proved.
- i. Kshs 19,500 being the equivalent of one month's salary in lieu of notice- The claimant absconded from work and refused the offer to return to work. The claimant is not entitled to notice pay.

**CONCLUSION**

26. In the upshot the entire claim was held to lack merit and is dismissed with costs to the respondent.
27. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27<sup>TH</sup>  
DAY OF NOVEMBER, 2025.**

**J.W. KELI,**

**JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Claimant: absent

Respondent: absent

ORIGINAL