



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 15 OF 2018**

**HENRY OLUOCH ONYANGO.....CLAIMANT**

**VRSUS**

**ANVI EMPORIUM LIMITED.....RESPONDENT**

**JUDGMENT**

1. Henry Oluoch Onyango (the Claimant) was employed by Anvi Emporium Ltd (the Respondent) as a machine operator.
2. On 15 January 2018, the Claimant sued the Respondent, alleging *constructive dismissal* and breach of contract.
3. In a Response filed on 25 March 2018, the Respondent contended that the Claimant had deserted duty.
4. The Cause was heard on 30 April 2019 and 4 December 2019, after which the Claimant filed his submissions on 20 February 2020. The Respondent filed its submissions on 17 June 2020.
5. The Court will adopt the Issues as identified by the parties in their written submissions.

**Underpayments**

6. Underpayment of wages arises as a result of payment of wages below the prescribed minimum rates or contractually agreed wages.
7. The Claimant herein did not disclose the particular Regulation of Wages (Amendment) Orders which applied in his case. Without the disclosure, the Court is unable to find there was an underpayment of wages below the gazetted minimums.

**Nature of contract**

8. The Respondent's case was that the Claimant was a casual worker.
9. Section 2 of the Employment Act, 2007 defines a casual employee.
10. The Claimant served the Respondent for more than one month continuously, and by dint of sections 9 and 37 of the Employment Act, 2007 became a term employee and not a casual employee.

**Unfair termination of employment**

11. The parties gave conflicting testimony on the circumstances leading to the separation.
12. The Claimant testified that his problems started upon him and other employees joining a trade union. He stated that some employees and himself were called and given 10 days leave purportedly on account of reduced work and that upon reporting back, they were sent on another 11 days leave and that the further attempts to resume work were not successful until he moved to Court.
13. The Claimant produced communication to evidence a dispute between the trade union and the Respondent.
14. The Respondent's Managing Director testimony was that the Claimant left employment in June 2016 and never returned back.

15. If the narration by the Respondent is true, then it means that the Claimant was guilty of misconduct by failing to report to work (absence without permission or lawful cause).

16. In such a case, the Respondent ought to have given an ultimatum/show-cause to the Claimant to explain why he was not reporting to work before exercising its right as the innocent party to accept the Claimant's repudiation of contract (see *Societe General, London Branch v Geys* (2012) UKSC 63).

17. In the view of the Court, the testimony by the Claimant that the separation was due to his joining the trade union appears plausible as there is documentary evidence.

18. The Court finds that this was a case of unfair termination of employment.

#### **Compensation and salary in lieu of notice**

19. The Claimant served the Respondent from 2005 to around 2016, even if intermittently.

20. Considering the length of service, the Court is of the view that compensation equivalent to 5-months wages would be appropriate (the last wage was Kshs 280/- per day and this multiplied with 22 days in a month gives an average monthly wage of Kshs 6,160/-).

21. By dint of section 35(1) of the Employment Act, 2007, the Court will allow the equivalent of 1-month salary in lieu of notice.

#### **Severance pay**

22. The separation herein was not on account of redundancy, and therefore, severance pay is not due.

#### **Conclusion and Orders**

23. The Court finds and declares that the Claimant's employment was unfairly terminated, and he is awarded:

(i) Compensation           Kshs 30,800/-

(ii) Pay in lieu of notice   Kshs 6,160/-

TOTAL                       **Kshs 36,960/-**

24. Claimant to have costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 3<sup>rd</sup> day of March 2021.**

**Radido Stephen, MCI Arb**

**Judge**

#### **Appearances**

For Claimant     Nyanga & Co. Advocates

For Respondent   K'Owino & Co. Advocates

Court Assistant   Chrispo Aura