



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT NAIROBI**  
**CAUSE NUMBER 2122 OF 2016**

**BETWEEN**

**GEOFFREY MONGARE ATIKA.....CLAIMANT**

**VERSUS**

**UZURI FOODS LIMITED [GOLDEN HARVEST MILLS].....RESPONDENT**

*Rika J*

*Court Assistant: Emmanuel Kiprono*

---

*Nyabena Nyakundi & Company Advocates for the Claimant*

*Macharia Waiganjo & Nyakoe Advocates for the Respondent*

---

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 14th October 2016. He avers, he was employed by the Respondent as a Casual Employee, on or about March 2013. It is not clear from the Pleadings what nature of casual work, the Claimant performed.
2. He avers, he was in September 2013, employed on permanent basis, on a monthly consolidated salary of Kshs. 19,573. On 24th February 2016, he was suspended on account of alleged insubordination. He avers this was occasioned by a Claim for work injury the Claimant was pursuing against the Respondent. He was eventually summarily dismissed on 15th March 2016, on the grounds that he had refused to work.
3. The Claimant explained that he was not able to work effectively because of the work injury, and that he could not resume work on 3rd March 2016, because he had travelled to attend the burial of a relative. The Respondent went ahead and dismissed the Claimant. He avers he was not given a disciplinary hearing, and was not paid terminal benefits.
4. He prays for Judgment against the Respondent for: -
  - a. Salary for 10 days in February 2016, at Kshs. 6,524.
  - b. Annual leave for 2013 and 2015, and pro-rata leave for 2016 at Kshs. 41,101.
  - c. 1-month salary in lieu of notice at Kshs. 19,573.
  - d. Service pay at 15 days' salary for 4 complete years of service, at Kshs. 39,144.
  - e. 12 months' salary in compensation for unfair termination at Kshs. 234,876.

f. Unremitted N.S.S.F and N.H.I.F for 4 years at Kshs. 38,400.

Total Kshs. 379,618.

g. Declaration that termination was unfair.

h. Certificate of Service.

i. Any other suitable order.

j. Costs.

k. Interest.

5. The Respondent filed its Statement of Response on 30th June 2017. It is conceded that the Claimant was employed by the Respondent. He was suspended by the Respondent lawfully, on 24th February 2016. Suspension had nothing to do with the Claimant's pursuit of work injury compensation against the Respondent. His contract was terminated by the Respondent lawfully, on 16th March 2016.

6. After suspension, the Claimant failed to return to work as scheduled. He was issued letter to show cause why, he should not face disciplinary action, dated 7th March 2016. He gave evasive answers. He was accorded sufficient time to respond to all the allegations against him. The Respondent terminated his contract on 16th March 2016. He was paid all his dues. N.S.S.F contributions were deducted and duly remitted. The Claimant went for annual leave from 9th November 2015 to 2nd December 2015. He was in fundamental breach of his contract, and summary dismissal was justified. The Respondent asks the Court to dismiss the Claim with costs.

7. The Claimant and Respondent's Personnel Manager Douglas Nyagaka, gave evidence on 11th February 2021, closing the hearing.

8. The Claimant told the Court he was employed by the Respondent on casual terms, on 6th September 2013. He left on 15th March 2016. He was injured on his hand and could not operate the machine. He was told the only light work available was office work, and he did not have adequate education, to work in an office. He was issued final warning on 14th March 2016. Suspension was on 24th February 2016. He was summarily dismissed on 15th March 2016. He was not taken through a disciplinary hearing. There was no letter to show cause. It is not true that he was given light duty which he declined. He was bereaved between 3rd and 6th of March 2016. He was not accorded an opportunity to explain his absence. He was treated at Metropolitan Hospital Nairobi. The Respondent financed his treatment, and was aware of his injury. He was paid Kshs. 6000 for 6 days worked. He demanded to be paid full salary. He was dismissed instead. He was not issued notice of termination. He never took annual leave.

9. Cross-examined, the Claimant told the Court that he was employed in March 2013, and became a regular Employee in September 2013. He earned a salary of approximately Kshs. 19,000 monthly. The pay slip shows basic salary of Kshs. 12,174, house allowance of Kshs. 1,826 – total Kshs. 14,000. Overtime was variable. The sum of Kshs. 19,000 as monthly salary included overtime.

10. He was asked by the Respondent to supply medical report on his injury. He did not supply any. He was to return from suspension on 1st March 2016. There was a hitch with transport on 2nd March 2016. He stayed away up to 3rd March 2016. He corrected this, saying that return was on 7th March 2016. He did not receive the letter to show cause.

He received Respondent's letter of 7th March 2016. It alleged he had absconded. He replied. He called his Supervisor on 3rd March 2016 advising he would not be able to return on time. The Supervisor did not pick Claimant's calls. He did not text his Supervisor. The Respondent wrote on 14th March 2016, giving the Claimant a warning. The Claimant seeks Kshs. 6,524 for 10 days worked in February 2016. He signed petty cash voucher showing receipt of Kshs. 6,700 under this item. He never took annual leave. Pay slip mentions leave encashment. The Claimant did not understand this term. The leave application form of 2015, indicates that the Claimant took annual leave of 21 days. Pay slip for November 2012 also contains leave encashment. N.S.S.F Statements show remittances made.

11. Redirected, the Claimant told the Court that he reported on 14th March 2016 and received a final warning letter. Dismissal was on 15th March 2016, based on the same allegations made in the letter of 14th March 2016. He was paid 10 days' salary for February 2016. He seeks annual leave for 2013, 2015 and 2016. Encashment was with respect to 2014. He applied for annual leave as shown in the application form, but did not go on leave.

12. Douglas Nyagaka told the Court that the Respondent had information from Claimant's Supervisor, that the Claimant did not want to perform assigned tasks. He was given light duties. He was to clean and pick wheat. He declined these. He was asked to supply the Respondent with medical report which he did not. He was to resume duty on 3rd March 2016. He returned on 7th March 2016. He was issued letter to show cause. He replied saying he was held back by a burial. There was no record from any hospital showing that the Claimant was being attended to, for the period of his absence. It is not true that the Claimant applied for annual leave, but did not take annual leave. He had been issued verbal warnings, before he was formally warned. He received pro-rata leave for 2016, as shown in his pay slip. N.S.S.F and N.H.I.F dues were paid, as shown in the pay slips and statements, on record.

13. Cross-examined, Nyagaka told the Court that the Claimant worked from 2013 to 2016. Nyagaka was aware that the Claimant was injured at work. He was treated at Metropolitan Hospital. The Respondent did not instruct the Hospital not to release Claimant's treatment records. He confirmed that the Claimant was injured.

14. Nyagaka was not aware of other disciplinary issues facing the Claimant, before the final warning of 14th March 2016. There were other warning letters before, which were not exhibited in Court. The Claimant had been warned over insubordination and absenteeism. After the

final warning of 14th March 2016, there was no letter to show cause. Reasons for dismissal were not the same reasons, over which the Claimant received a letter of final warning. Dismissal was based on insubordination. The Claimant refused to scoop wheat. There were different cases leading to dismissal. He was not heard on either date- 14th March 2016 and 15th March 2016. He was not entitled to full salary for February 2016. He had taken advances. He was paid annual leave of 2014. He applied for annual leave subsequently. Termination was not based on work injury. He was not heard because most disciplinary committee members were on their annual leave. The Claimant was not ready to work with the Respondent, and was blackmailing the Respondent.

15. The issues are whether the Claimant's contract was terminated fairly under Sections 41, 43, and 45 of the Employment Act 2007; and whether he merits terminal benefits and compensation as pleaded.

**The Court Finds: -**

16. The Claimant was employed by the Respondent on casual terms, on or around March 2013. He was not clear what work he performed. He was absorbed into regular employment in September 2013.

17. He suffered work injury prior to 24th February 2016. Again there is a gap in his evidence on the details of the workplace accident and injury. There are no medical records availed the Court, clarifying the nature of the accident and injury or injuries sustained by the Claimant.

18. He was suspended through a letter from the Respondent, dated 24th February 2016. The letter states that since the Claimant suffered work injury, there were many complaints made by his Supervisor, concerning the Claimant's readiness to work, despite having been assigned light duties. He had been assigned cleaning role, which he declined. He was suspended for 7 days without pay. He was advised to return on 3rd March 2016.

19. On 7th March 2016, the Respondent issued the Claimant a letter to show cause. It is said that the Claimant had failed to report back on 3rd March 2016 as instructed. He did not communicate with the Respondent on his whereabouts. He returned on 7th March 2016. He asked Personnel Office to give him a letter to take to the doctor for a medical report. He was asked to show cause why his contract should not be terminated for failing to report back to work on 3rd March 2016.

20. He replied, explaining that he had earlier in the year, been asked to collect grains from the elevator into bags, and pull them up using ropes. He told his Supervisor he was not able to do this, due a medical condition. He was then forwarded to Douglas Nyagaka, who suspended him. He was told to report on 3rd March 2016. He explained that on this date, he attended the burial of a relative, and attempted to contact his Supervisor in vain. He stated also that he had wished to be supplied with a referral letter by the Respondent to enable him obtain a medical report, a wish that was not honoured by the Respondent.

21. This response elicited a letter from the Respondent referenced as, 'final warning,' dated 14th March 2016. The Respondent repeats the facts concerning Claimant's suspension; failure to report back on 3rd March 2016; Claimant's explanation that he was delayed by the burial of his relative; and added that the Claimant had been blackmailing the Respondent, since his workplace accident and injury. The Claimant was advised that if he did not improve, he would be dismissed without further warning.

22. He was dismissed the following day, 15th March 2016. The Respondent states in the letter of summary dismissal, that the Claimant reported for duty on 15th March 2016, but declined to work. He was asked to scoop wheat from the broken down conveyor to the bags. He declined saying he could not do that work. The Respondent states that the Claimant did not give any reason why he could not, and that the Respondent had assigned him various light duties, which he declined. He was advised that he had been dismissed under Section 44[4] [e] of the Employment Act 2007, because he had continually refused to work.

23. It is the evidence of the Respondent that between 14th March 2016 and 15th March 2016, there was no disciplinary hearing.

24. There were no charges presented to the Claimant, with a requirement that he responds to these charges, in the company of a colleague or a trade union representative if he was unionized. Section 41 of the Employment Act, was completely disregarded. Termination was unfair for lack of fair procedure.

25. Was termination based on valid reason or reasons under Section 43 of the Employment Act? There is evidence from both Parties that the Claimant suffered work injury, and was treated at Metropolitan Hospital. But as observed by the Court at the outset, medical evidence on this is unsatisfactory.

26. The Parties appear to agree that as a result of the work injury, there was need to place the Claimant on light duty. He was asked to scoop wheat from a broken conveyor belt, which the Respondent considered to be light duty, while the Claimant thought it was not. He declined to perform this work, which led to termination on 15th March 2016.

27. The Respondent did not establish that the nature of work availed to the Claimant, was light duty. The Respondent was in a position to obtain Claimant's medical records from Metropolitan Hospital to determine the extent of the Claimant's injury, and have medical advice on suitable role the Claimant could be assigned. On 24th February 2016, the Respondent complained that it could not understand why the Claimant, who was only injured on his finger, could not do cleaning. This assessment by the Respondent was not based on medical advice. It seems to the Court that the Respondent went on assigning the Claimant roles without the benefit of medical advice, which could have been readily available from Metropolitan Hospital. Unfortunately, the Respondent made no attempt to procure such advice, and even when the Claimant asked for a referral letter, the Respondent does not appear to have been willing to supply him the letter.

28. The Claimant was absent from work, without the leave of the Respondent, between 3rd March 2016 and 7th March 2016. But this was not the reason which the Respondent gave him, in justifying termination on 15th March 2016. The absence culminated in a letter of final warning, dated 14th March 2016. The reason given on 15th March 2016, was that the Claimant, having reported for duty, refused to

undertake assigned duty that morning. The assigned duty of scooping wheat from the conveyor belt, and putting it into bags, was the same duty the Claimant had declined earlier on the ground of work injury. The Respondent did not have medical advice, on 15th March 2016, to conclude that the Claimant was being insubordinate.

29. Section 44[4][e] of the Employment Act, invoked by the Respondent presupposes that the command of the Employer to the Employee is lawful and proper. Was the command by the Respondent to the Claimant, to scoop wheat a proper command? The Court would think not. The Respondent needed to resolve the extent of the Claimant's injury, through medical advice, before persisting with assignment of what the Respondent perceived to be light duty to the Claimant.

30. The Respondent did not establish valid reason or reasons, justifying termination, under Section 43 and 45 of the Employment Act. On this score, termination was again unfair.

31. The Claimant's invariable monthly salary, as shown in the pay slips, was basic at Kshs. 12,174 and house allowance at Kshs. 1,826 – total Kshs. 14,000.

32. Overtime pay which the Claimant includes in computing his monthly gross, was variable.

33. He concedes he was paid salary for 10 days worked in February 2016. Prayer 10 [i] in the Statement of Claim has been met.

34. There is evidence in form of pay slips and leave application forms, that the Claimant utilized his annual leave entitlement. He has not proved that he was owed any leave, on termination.

35. ***Notice pay is granted at Kshs. 14,000, equivalent of a month's salary.***

36. The Claimant worked from March 2013 to March 2016, a period of 3 years. His record was untainted prior to 24th February 2016. He did not have any known warnings before this date. He did not tell the Court how long he expected he would go on working, had his contract not been terminated by the Respondent. He appears to have experienced the problems leading to termination, as a result of his work injury, and the inability of the Respondent to procure medical report and a suitable role for the Claimant based on medical advice. Termination was faulty in substance and procedure. The Claimant may have eventually set the mind of the Respondent against him, by his absenteeism. Although he was warned for this, the Respondent felt he had evolved into a problematic Employee. He cannot entirely be absolved of the circumstances leading to termination.

***He is granted equivalent of 3 months' salary in compensation for unfair termination at Kshs. 42,000.***

37. There is no evidence to show that N.S.S.F and N.H.I.F statutory obligations were unmet by the Respondent for the period of 3 years the Claimant worked. N.S.S.F Statement of Accounts and pay slips show deductions and remittances made. The Claimant did not present documentary or oral evidence from these statutory bodies, showing that the Respondent was in default. The prayer for refunds is declined.

38. ***Certificate of Service to issue.***

39. ***Costs to the Claimant.***

40. ***Interest allowed at court rates as prayed.***

**IN SUM, IT IS ORDERED: -**

***a. It is declared that termination was unfair.***

***b. The Respondent shall pay to the Claimant, compensation for unfair termination equivalent of 3 months' gross salary at Kshs. 42,000 and a month's salary in lieu of notice at Kshs. 14,000 – total Kshs. 56,000.***

***c. Certificate of Service to issue.***

***d. Costs to the Claimant.***

***e. Interest allowed at court rates as prayed, from the date of Judgment, till payment is made in full.***

**Dated, signed and released to the Parties, under Ministry of Health and Judiciary Covid-19 Guidelines at Nairobi, this 18th day of June 2021.**

**JAMES RIKA**

**JUDGE**