



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 257 OF 2017**

**ELIUD KIPLAGAT.....CLAIMANT**

**VERSUS**

**CHEPKINOYO AGRO SUPPLIER.....RESPONDENT**

**JUDGMENT**

1. Eliud Kiplagat (the Claimant) sued Chepkinoyo Agro Suppliers (the Respondent) on 9 July 2017, alleging that the Respondent unfairly terminated his employment in August 2016. He also alleged breach of contract.
2. The Respondent filed a Response on 13 July 2017 contending that the termination was fair because the Claimant was implicated in the loss of 4 units of belt worth Kshs 5,200/-.
3. The Claimant testified on 4 December 2018 and 3 March 2021 while the Respondent closed its case without leading evidence.
4. Pursuant to directions by the Court, the Claimant filed his submissions on 25 March 2021, and the Respondent filed its submissions on 10 May 2021.
5. The Court has considered the pleadings, evidence and submissions and will adopt the Issues as identified by the Claimant in his submissions.

**Employment relationship**

6. The Respondent admitted that the Claimant was its employee, and this is therefore not an issue for the Court's determination.

**Breach of contract**

**Overtime**

7. The Claimant pleaded that he was entitled to overtime (inclusive of work during public holidays) amounting to Kshs 40,376/- but he did not give any particulars in the written witness statement.
8. During examination-in-chief, the Claimant made no mention of how the overtime accrued.
9. It is only during cross-examination that the Claimant stated that he would report at 7.30 am and leave work from 6.00 pm or 7.00 pm depending on the business of the day.
10. He also stated that he worked during public holidays except for Christmas.
11. The Claimant, however, did not disclose the prescribed working hours in the sector the Respondent operated beyond which he would be entitled to overtime.
12. Even the formula used to compute the amount claimed was not declared. Relief is declined.

**Underpayments**

13. The Claimant claimed underpayments amounting to Kshs 51,236/0-. He testified that he was a Shop Assistant and should have been earning Kshs 13, 646/- instead of Kshs 10,000/- he was earning.

14. To support the head of the claim, the Claimant cited Legal Notice No. 117 of 1 May 2015. The Notice indicates that the prescribed minimum wage for a Shop Assistant was Kshs 13,646/- in the area, the Respondent had its business.

15. The Respondent did not rebut the Claimant's testimony that he was a Shop Assistant, and in consideration of section 10(7) of the Employment Act, 2007 and Legal Notice No 117 of 2015, the Court will allow this head of the claim.

#### **Pro-rata leave**

16. The Claimant served the Respondent from November 2015 to August 2016. Accordingly, he was entitled to pro-rata leave, and because the Respondent did not interrogate the amount claimed of Kshs 7,164/-, the Court will allow the head of the claim.

#### **House allowance**

17. Under section 31 of the Employment Act, 2007, the employer should provide housing to its employee or, in lieu, pay an allowance to cover rent.

18. The Respondent did not demonstrate that it provided the Claimant with housing or that it paid him a house allowance.

19. House allowance is by practice and tradition computed at 15% of the basic pay, and the Claimant used that formula to compute his house allowance.

20. The Court will allow the head of the claim.

#### **Unremitted National Social Security Fund contributions**

21. The Claimant did not provide any evidence that he was registered with the National Social Security Fund, and the Court declines to award Kshs 1,800/- stated to be unremitted contributions.

#### **Unfair termination of employment**

##### **Procedural fairness**

22. The Claimant challenged the procedural fairness of the termination of his employment on the grounds that he was not afforded an opportunity to be heard.

23. Section 41 of the Employment Act, 2007 requires the employer to inform the employee of the allegations for contemplated termination of employment and to allow the employee to make representations.

24. The Respondent did not lead any evidence to show when and who heard the Claimant on the allegations against him, and the Court finds that the termination of the Claimant's employment was procedurally unfair.

##### **Substantive fairness**

25. Sections 43 and 45 of the Employment Act, 2007 place a burden on the employer to prove the validity and fairness of the reasons for terminating an employment contract. This is so because it is the employer who knows the said reasons.

26. The Respondent failed to call any witness to discharge the burden, and the Court concludes that the reasons for the termination of the Claimant's employment were not valid or fair.

#### **Compensation**

27. The Claimant served the Respondent for less than 1-year and in consideration of the length of service, the Court is of the view that the equivalent of 1-month salary as compensation would be appropriate (the prescribed minimum wage for a Shop Assistant was Kshs 13,646/- monthly at the time of separation).

##### **Salary in lieu of notice**

28. The Claimant was not given written notice as envisaged by section 35(1) of the Employment Act, 2007. The Court will allow the equivalent of 1-month salary in lieu of notice.

#### **Standard of proof**

29. The Respondent urged the Court to find that the Claimant had failed to meet the standard of proof as set out in section 108 of the

Evidence Act.

30. Whilst the section sets out the general standard of proof in civil cases, the Employment Act, 2007 has outlined certain thresholds which must be met by the respective parties in an employment dispute. These include sections 41, 43, 45 and 47(5) of the Act.

31. By failing to lead evidence/call a witness, the Respondent did not discharge the burden expected of it under the Employment Act, 2007.

### **Conclusion and Orders**

32. The Court finds and declares that the termination of the Claimant's employment was unfair and further that the Respondent was in breach of contract.

33. The Claimant is awarded:

- |                               |               |
|-------------------------------|---------------|
| (i) Compensation              | Kshs 13,646/- |
| (ii) Salary in lieu of notice | Kshs 13,646/- |
| (iii) Underpayments           | Kshs 51,236/- |
| (iv) Pro-rata leave           | Kshs 7,164/-  |
| (v) House allowance           | Kshs 18,422/- |

**TOTAL                      Kshs 104,114/-**

34. Claimant to have costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 16<sup>th</sup> day of June 2021.**

**Radido Stephen, MCI Arb**

**Judge**

### **Appearances**

For Claimant	Chepkwony & Co Advocates
For Respondent	Ngigi Mbugua & Co Advocates
Court Assistant	Chrispo Aura