



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 693 OF 2015**

**GABRIEL PHILIP RUMBA.....CLAIMANT**

**VERSUS**

**KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant’s claim brought by Memorandum of Claim dated 5<sup>th</sup> September 2015 and filed in court on 8<sup>th</sup> September 2015 is for compensation for unlawful termination and payment of terminal dues.
2. The Respondent responded to the Claimant’s claim by way of a Memorandum of Response dated 6<sup>th</sup> September 2016, to which the Claimant responded on 7<sup>th</sup> March 2017.
3. The matter went to full trial where the Claimant testified on his own behalf. The Respondent called its Senior Human Resource and Information Systems Officer, Kevin Mapesa Wamaya and Zone Manager, Paul Mulinge. The parties also filed written submissions.

**The Claimant’s Case**

4. The Claimant states that he was employed by the Respondent on 5<sup>th</sup> May 2008, in the position of Manager, earning a monthly salary of Kshs. 13,200. He was not issued with a written employment contract. The Claimant claims to have worked until 14<sup>th</sup> July 2015, when his employment was terminated.
5. The Claimant contends that he used to work from 6.00 am to 6.00 pm. He further contends that the he worked every day from Monday to Sunday, including public holidays, without any off day and without leave.
6. Regarding the termination of employment, the Claimant states that on the material day, there was an allegation of over application of fertilizer at the Respondent’s sugar plantation.
7. The Claimant states that he was dismissed verbally, without any opportunity for a hearing and without notice.
8. The Claimant lays a claim for unlawful and unfair termination and seeks the following remedies:

- a) Salary in lieu of notice.....Kshs. 13,200.00
- b) Accrued overtime pay.....628,726.15
- c) Accrued off duty pay.....512,295.39
- d) Accrued public holiday pay.....114,670.77
- e) Leave pay for 7 years.....64,680.00
- f) 12 months’ salary in compensation.....158,400.00

## **The Respondent's Case**

9. In its Memorandum of Response dated 6<sup>th</sup> September 2016, and filed in court on 7<sup>th</sup> September 2016, the Respondent denies the Claimant's claim and states that the Claimant was suspended from duty after he was given an opportunity to show cause why he should not be dismissed. The Respondent adds that the reasons for suspension were clearly explained to the Claimant.

10. The Respondent further states that the Claimant was employed on casual basis and was paid for the hours worked and as such was not entitled to unpaid leave, overtime and all other reliefs claimed.

11. The Respondent accuses the Claimant of engaging in malpractices and/or misconduct to the detriment of the interests of the Respondent and its resources, contrary to the Claimant's terms of employment.

12. The Respondent states that on 10<sup>th</sup> June 2015, the Company Manager, while on field check, noticed that the fields assigned to the Claimant were in a very bad state as there were weeds in some of them and fertilizer had been applied haphazardly. The Respondent alleges that some bags of fertilizer were missing and were later recovered by the police.

13. The Respondent avers that after investigations, the Claimant was called before a disciplinary committee on 14<sup>th</sup> June 2015, and was given an opportunity to explain the circumstances under which the incident had happened. The Respondent states that minutes of the said meeting were taken.

14. The Respondent further avers that during the meeting, the Claimant on his own volition admitted to:

- a) Reporting to work late;
- b) Failing to apply fertilizer in several fields;
- c) Absconding work and instead opting to go rest under a tree;
- d) Application of fertilizer on a field with weeds;
- e) Wilfully neglecting to ensure the fertilizer was applied;
- f) Not applying any fertilizer at all in several fields;
- g) Neglecting his duties.

15. The Respondent admits that the Claimant's services were terminated but denies that the termination was unlawful and/or unfair.

16. The Respondent goes on to state that the Claimant admitted to wrongdoing and the General Manager directed that the case be heard before the disciplinary committee on 24<sup>th</sup> June 2015.

17. The Respondent avers that during the disciplinary hearing, the Claimant was found to have failed to perform his duties as required and was therefore summarily dismissed.

## **Findings and Determination**

18. There are three (3) issues for determination in this case:

- a) The nature and status of the Claimant's employment with the Respondent;
- b) Whether the termination of the Claimant's employment was lawful and fair;
- c) Whether the Claimant is entitled to the remedies sought.

## **Nature and Status of the Claimant's Employment**

19. The Respondent states that the Claimant was a casual employee and is therefore not entitled to the remedies sought. Section 2 of the Employment Act, defines a casual employee as:

***“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”***

20. According to this provision, casual employment is not defined by the frequency of pay, which is often a decision by the employer, but more importantly, by the duration of employment.

21. In its final submissions, the Respondent spent a lot of time trying to convince the Court that the Claimant was a casual employee, and in doing so the Respondent stressed the point that the Claimant did not produce any employment records.

22. With tremendous respect, this submission is misplaced. I say so because unlike in ordinary civil litigation, the burden of proof in employment claims is not always on the alleging party. This conclusion is based on Sections 10 and 74 of the Employment Act which places the obligation of keeping and availing employment records on the employer.

23. In this regard, Section 10(7) of the Act turns the principle of burden of proof on its head by stating:

***(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.***

24. It follows therefore that for the Respondent to succeed in its line of defence that the Claimant was a casual employee, it needed to produce employment records, such as attendance or payment sheets to show that the Claimant was indeed a casual employee. Having failed to do so, its assertion remains unsupported and is rejected.

### **The Termination**

25. That settled, I now turn to the question whether the termination of the Claimant's employment was lawful and fair. The Respondent's Senior Human Resource and Information Systems Officer, Kevin Mapesa Wamaya admitted that the Claimant was not issued with a termination letter. Mapesa further admitted that the Claimant was not issued with a show cause letter nor was he formally invited to a disciplinary meeting.

26. The Claimant himself denied attending any disciplinary meeting. The Court looked at minutes of a disciplinary meeting allegedly held on 24<sup>th</sup> June 2015. Page 1 of these minutes shows the Claimant and Juma Salim Mronda as accused persons.

27. There are however many things wrong with this record; first, it appears that the Claimant and Mronda were subjected to a joint disciplinary forum, second, the Claimant did not sign the minutes and his assertion that he did not attend the meeting is therefore believable and third, there were no specific charges put to the Claimant for his response.

28. In the fullness of the foregoing, the only conclusion to make is that the Respondent failed to prove a valid reason for terminating the Claimant's employment as required by Section 43 of the Employment Act. The Respondent also failed the procedural fairness test set by Section 41 of the Act.

### **Remedies**

29. As a result, I award the Claimant eight (8) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's unlawful conduct in terminating the employment.

30. I further award the Claimant one (1) month's salary in lieu of notice as provided in Section 35 of the Employment Act.

31. The Respondent's response to the claim for leave pay is that the Claimant was not entitled to leave because he was a casual employee. In view of my finding on the nature and status of the Claimant's employment, the claim for leave pay succeeds and is allowed.

32. The Claimant told the Court that he did not work on Sundays. The claim for off days is therefore misplaced.

33. The claims for overtime and public holiday pay, being in the nature of special damages, were not proved to the required standard and therefore fail.

34. Finally, I enter judgment in favour of the Claimant as follows:

- a) 8 months' salary in compensation.....Kshs. 105,600
- b) 1 month's salary in lieu of notice.....13,200
- c) Leave pay for 7 years \*13,200/30\*21\*7).....64,680
- Total.....183,480**

35. This amount will attract interest at court rates from the date of judgment until payment in full.

36. The Claimant will have the costs of the case.

37. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 15<sup>TH</sup> DAY JULY 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Maragia for the Claimant

Ms. Abdi for the Respondent