



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1591 OF 2017**

**JACOB MUTHUI IVIA.....CLAIMANT**

**VERSUS**

**PEMBE FLOUR MILLS.....RESPONDENT**

**JUDGMENT**

1. The suit was filed on 15/8/2017, by the Claimant seeking a declaration that the dismissal of the claimant from work was unlawful and unfair.
2. The claimant prays for compensation, punitive and aggravated damages; fine for failure to comply with mandatory statutory provisions and payment of terminal benefits set out in the Memorandum of Claim.
3. The respondent filed a belated statement of response to the claim on 14/9/2018 with leave of Court.
4. The parties agreed to proceed by way of Affidavit evidence and dispensed with cross examination of the witnesses. The parties also relied on the pleadings and list of documents filed in support of their respective cases.
5. The claimant filed a witness statement sworn to on 26<sup>th</sup> November, 2020.
6. The claimant deposed that he was employed by the respondent at Pembe Flour Mills Limited in the month of March, 2015 up to June, 2015. That upon expiry of the contract in June 2015 the term was extended to September, 2015. That this letter of contract was not extended but the claimant continued to work until March, 2016 when the respondent terminated the employment of the claimant. That during that period, the claimant worked for 7 days a week including Sundays.
7. The claimant produced a bundle of pay slips from the month of March, 2015 to February, 2016. The pay slips indicate the basic pay paid; house allowance; leave dues awarded; overtime paid; Pay As You Earn (P.A.Y.E.) National Social Security Fund and (N.S.S.F), and National Hospital Insurance Fund (N.H.I.F) deductions. The pay slips also show the claimant's contribution to the union to Central Organisation of Trade Union. (C.O.T.U)
8. The claimant also produced the Collective Bargaining Agreement between Kenya Union of Commercial Food and Allied Workers Union and the respondent for the period 1<sup>st</sup> July, 2014 to 30<sup>th</sup> June, 2016 which governed terms and conditions of service for unionisable employees.
9. The reliefs sought by the claimant are premised on the said Collective Bargaining Agreement. The Claimant states that the termination of his employment was unlawful in that it was without notice, no fault at all on his part and for no valid reason. The claimant states that conciliation effort to resolve the dispute failed hence the suit. That the claimant had converted to a permanent employee from the time the fixed contract was not renewed and he had continued working up to March, 2016.
10. The claimant testified that in December, 2016, he received equivalent of one month's salary in lieu of notice. The claimant denies that this was the amount agreed upon after conciliation proceedings. The claimant prays to be paid as claimed.
11. The respondent filed a witness statement by Hamisi S. Bwika in which he states that the claimant was employed on a three month fixed term contract which was renewed, depending on the availability of raw materials and the market for maize flour. That the last fixed term contract came to an end on 29/2/2016.
12. That the respondent did not employ the claimant on permanent terms.

13. That the dispute was conciliated upon by department of labour and it was resolved that the respondent to pay the claimant one-month salary in lieu of notice as evidenced by the communication between the respondent and the union. The respondent prays that the suit be dismissed with costs since all the terminal dues claimed by the claimant were paid as evidenced by the pay slips before Court.

### **Determination**

14. The parties filed written submissions dated 26/5/2021 and 14<sup>th</sup> June, 2021 respectively. The issues for determinations are:-

(a) Whether the employment of the claimant was unlawfully terminated or it ended on effluxion of time.

(b) Whether the claimant is entitled to the reliefs sought.

15. The claimant testified that he served the respondent on two fixed term contracts of three months from March to June 2015 and from June 2015 to September, 2015. The claimant then served the respondent without a written contract up to end of February, 2016. This testimony is corroborated by the pay slips produced by the claimant for the entire period served being March, 2015 up to February, 2016.

16. The respondent does not dispute that the claimant worked for it on fixed term contracts up to September, 2015. The respondent however offers no explanation for the period September, 2015 up to end of February, 2016, which period the claimant served the respondent without a fixed term written contract.

17. The claimant in his sworn witness statement does not explain under what circumstances, by who, was his employment terminated.

18. In terms of Section 47(5), the claimant has the onus of demonstrating that the employment was wrongfully terminated. The respondent then bears the evidential burden of justifying the termination by demonstrating that it had a valid reason to terminate the employment of the claimant in terms of Section 43(1) and (2) read with Sections 45 and 47 (5) of the Act.

19. The respondent states that the employment of the claimant lapsed by effluxion of time and, that it paid one-month salary in lieu of notice to the claimant in December, 2016, following conciliation effort between the parties led by the Ministry of Labour.

20. The claimant produced a payslip dated December, 2016, in which it is indicated that the claimant was paid Kshs 16,114, being one-month salary in lieu of notice. The statutory dues were also deducted upon that payment.

21. Equally, the claimant produced pay slips which contradicts his own testimony that he worked and was not paid overtime. The respondent stated that overtime was paid at end of every month. The pay slips produced by the claimant clearly demonstrate that overtime (O.T) was paid on a monthly basis at the rate of 1.5 of the hourly salary. Clearly the claim by the claimant for payment of overtime lacks basis. The pay slips produced by the claimant also contradict his claim for payment in lieu of leave days not taken. The slips show that payment was made in respect of untaken leave days. This is seen in the pay slips for February, 2016, September, 2015 and April, 2015.

22. All pay slips produced also indicate that the respondent deducted Pay As You Earn (P.A.Y.E.); National Social Security Fund (N.S.S.F) and National Hospital Insurance Fund (N.H.I.F) in respect of the claimant. The claimant did not adduce any evidence to show that these dues were not remitted by the respondent on his behalf.

23. The claimant has not prayed to be furnished with a certificate of service but instead prays that the respondent be fined Kshs 100,000 for failure to comply with Section 51(3) of the Employment Act, 2007. Criminal jurisdiction under Employment Act is held by the magistracy but not Employment and Labour Relations Court. This prayer is therefore misconceived.

24. In the final analysis, the testimony by the claimant is not candid and credible and is contradicted by his own documentary evidence.

25. The claimant has failed to prove that his employment was unlawfully and or unfairly terminated by the respondent. Equally, the claimant has failed to prove that he is entitled to any of the reliefs sought.

26. Accordingly, the suit is dismissed with no order as to costs.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 30TH DAY OF SEPTEMBER, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

### **Appearances**

Mr. Manyara for the claimant

Mr. Masese for FKE for Respondent

Ekale – Court clerk