



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 408 OF 2018**

**JOHN CHERERA MGHENDI.....CLAIMANT**

**VS**

**REVITAL HEALTH CARE (EPZ) LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The disputed issues in this claim have to do with the Claimant’s separation from the Respondent’s employment. The claim is by way of a Memorandum of Claim dated 19<sup>th</sup> June 2018 and filed in court on 20<sup>th</sup> June 2018. The Respondent filed a Response on 20<sup>th</sup> July 2018.
2. The matter proceeded to full trial with the Claimant testifying on his own behalf. The Respondent called its Human Resource Head, Bridget Fatuma.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a Machine Operator on 1<sup>st</sup> August 2012. He earned a daily wage of Kshs. 922.
4. The Claimant claims to have worked from 7.00 am to 7.00 pm, 7 days a week.
5. In the month of October 2017, the Respondent started relocating its operations from Jomvu to Kikambala in Kilifi County.
6. The Claimant avers that the Respondent promised to call him and his colleagues to work at the Kanamai premises on condition that his daily wage would be reduced from Kshs. 922 to Kshs. 349. The Claimant claims that to date, the Respondent had not contacted him or his colleagues to return to work.
7. The Claimant avers that the decision to terminate his employment was unlawful and unfair as there was no genuine reason for it and he was not accorded an opportunity to be heard.
8. The Claimant adds that the Respondent deducted but did not remit his National Social Security Fund (NSSF) dues.
9. The Claimant’s claim is as follows:
  - a) One month’s salary in lieu of notice.....Kshs. 27,660
  - b) Leave pay for 5 years.....138,300
  - c) Unremitted NSSF dues for 67 months.....26,800
  - d) 12 months’ salary in compensation.....331,920
  - e) Certificate of service

f) Costs plus interest

### **The Respondent's Case**

10. In its Response dated 18<sup>th</sup> July 2018 and filed in court on 20<sup>th</sup> July 2018, the Respondent states that the Claimant was engaged as a casual worker in the Moulding Section on 1<sup>st</sup> August 2012. He was paid a daily wage computed on weekly basis for the days worked.

11. The Respondent adds that the Claimant was engaged on and off as and when there was work to do on casual basis.

12. The Respondent concedes that the Claimant worked from 7.00 am to 7.00 pm and adds that any overtime worked was duly compensated.

13. The Respondent admits that it relocated from Jomvu to Kikambala in Kilifi County, and states that there was prior communication to all employees by way of an internal memo dated 9<sup>th</sup> October 2017. The communication was meant to prepare employees who would wish to move with the Respondent to the new work location.

14. The Respondent states that all permanent staff and almost all casual workers reported to work at Kikambala and proceeded to work without any complaint.

15. The Respondent denies that the Claimant's employment was terminated since being a casual employee, who served with break in service, the Claimant was paid all his wages at the end of the week and would be re-engaged depending on availability of work.

16. The Respondent's case is that because the Claimant was a casual employee, he is not entitled to the remedies sought. The Respondent adds that the Claimant's NSSF dues were duly remitted.

### **Findings and Determination**

17. 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 Claimant has established a case of unlawful termination of employment;
- c) Whether the Claimant is entitled to the remedies sought.

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

18. The Respondent claims that the Claimant was a casual employee engaged on need basis. On his part, the Claimant maintains that he worked for the Respondent for a continuous period of five (5) years.

19. 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. In support of its assertion that the Claimant was a casual employee, the Respondent produced an abstract of attendance register prepared by Bridget Fatuma on 13<sup>th</sup> July 2018. The Respondent did not however avail the source document, being the original attendance register, for scrutiny by the Claimant and the Court.

21. Fatuma told the Court that the original attendance register carried the signature of each employee, showing the days worked. Because the issue of the nature and status of the Claimant's employment was in contest, the original attendance register was a critical piece of evidence that the Respondent ought to have availed to the Court. In its absence, the averment that the Claimant was a casual employee remained unverified and unproved.

22. Sections 10 and 74 of the Employment Act place the responsibility of keeping employment records on the employer and where an employer fails to provide employment particulars, Section 10(7) of the Act shifts the burden of proof of terms of employment to the employer.

23. In the circumstances of this case, the Court adopts the Claimant's testimony that he worked throughout from 1<sup>st</sup> August 2012 until October 2017.

### **Unfair Termination?**

24. The parties are agreed that sometime in the month of October 2017, the Respondent shifted its operations from Jomvu in Mombasa County to Kikambala in Kilifi County. In this regard, the Respondent produced an internal memo dated 9<sup>th</sup> October 2017 communicating that the Respondent would be relocating its factory, effective 1<sup>st</sup> November 2017.

25. The Claimant testified that following notification of the relocation from Jomvu to Kikambala, he was told by his supervisor that he would be given some money for relocation, a promise that was not kept. The Claimant further testified that he was not called to report for duty at Kikambala.

26. In her witness statement dated 27<sup>th</sup> July 2018, the Respondent's Human Resource Head, Bridget Fatuma states that the Claimant failed to report to work at Kikambala and since he was a casual, his engagement with the Respondent naturally came to an end.

27. There was however no evidence that the Claimant was facilitated to move to Kikambala as promised in the internal memo dated 9<sup>th</sup> October 2017. It would appear that the Respondent simply went quiet on the Claimant, ostensibly because he was a casual employee.

28. In any case, if the Claimant had deserted his work, then the Respondent was under a duty to reach out to him to find out why he had not reported to work (see *James Ashiemi Namayi v Menengai Oil Refineries Limited [2016] eKLR*).

29. Having determined that the Claimant was not in fact a casual employee, I hold that the Respondent's inaction and failure to facilitate the Claimant's relocation, alongside the other employees, amounted to termination of the Claimant's employment.

30. Consequently, I agree with the Claimant that his employment was unlawfully terminated and he is entitled to compensation.

**Remedies**

31. I therefore award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's violation of the law in terminating the employment.

32. I further award the Claimant one (1) month's salary in lieu of notice.

33. The Claimant told the Court that for the entire period of his employment with the Respondent, he was not allowed to go on leave. In the absence of leave records to show the contrary, the claim for leave pay succeeds and is allowed.

34. On the claim for unremitted NSSF dues, the only thing I will say is that any such dues would be payable to the statutory body not to the Claimant.

35. In the end, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....	Kshs. 165,960
b) 1 month's salary in lieu of notice.....	27,660
c) Leave pay for 5 years (27,660/30*21*5).....	<u>96,810</u>
<b>Total.....</b>	<b>290,430</b>

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

37. The Claimant is also entitled to a certificate of service plus costs of the case.

38. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF JULY 2020**

**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. Tolo for the Claimant

