



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 822 OF 2015**

**ALI OMAR MWANYUNI.....CLAIMANT**

**VS**

**KWALE INTERNATIONAL SUGAR COMPANY LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim dated 26<sup>th</sup> October 2015 and filed in court on 4<sup>th</sup> November 2015, the Claimant sued the Respondent for compensation for unfair termination of employment plus terminal dues. The Respondent filed a Reply on 5<sup>th</sup> November 2016.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Senior Human Resource Information Systems Officer, Kevin Mapesa Wamaya. Both parties further filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was engaged by the Respondent as a General Worker, from September 2009 until 18<sup>th</sup> September 2015 when his employment was terminated. He earned a daily wage of Kshs. 240.
4. The Claimant contends that he was underpaid. He adds that he worked overtime without compensation, was not allowed any rest day and did not go on leave.
5. Regarding the termination, the Claimant states that on 18<sup>th</sup> September 2015 he was dismissed without notice, valid reason or opportunity to be heard.
6. The Claimant now claims the following from the Respondent:

- a) Underpayment.....Kshs. 224,896.80
- b) Notice pay.....15,739.20
- c) Arrears.....2,908.80
- d) Overtime.....87,432.13
- e) Off duties.....208,979.41
- f) Public holidays.....42,534.37
- g) Leave pay.....119,660.77
- h) 12 months’ salary in compensation.....188,870.40

**The Respondent’s Case**

7. In its Reply dated 2<sup>nd</sup> February 2016 and filed in court on 5<sup>th</sup> February 2016, the Respondent denies having employed the Claimant as alleged in the Memorandum of Claim.
8. The Respondent states that even if employed, the Claimant was engaged on casual basis, from time to time since the Respondent employs workers on contracts that begin in the morning and end in the evening when the employee is paid.
9. Further, the Respondent denies that the Claimant was paid a daily wage of Kshs. 240 as alleged in the Memorandum of Claim.
10. The Respondent avers that being a casual employee, the Claimant's employment was terminable at the option of either party, without notice.
11. The Respondent further avers that the Claimant's employment was never terminated as he was still employed as a casual labourer.
12. The Respondent denies underpaying the Claimant and states that even if the Claimant was actually employed, he worked for 8 hours a day and was therefore not entitled to overtime payments.
13. Regarding the claims for leave and rest day pay, the Respondent states that the Claimant was not entitled to be given any leave as he was a casual employee and could rest without consulting the Respondent as another casual employee would be picked to replace him.
14. The Respondent maintains that the provisions of Section 41 on notification before termination and Sections 43, 44 and 45 on summary dismissal or unfair termination of employment under the Employment Act, 2007 did not apply to the Claimant.
15. The Respondent adds that the provisions of Section 41 of the Employment Act on hearing did not apply to the Claimant's case, as notice of intention to terminate a casual labourer was not necessary.

### **Findings and Determination**

16. There are two (2) issues for determination in this case:
  - a) Whether the Claimant has made out a case of unlawful termination of employment;
  - b) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

17. In his Memorandum of Claim, the Claimant states that his employment was unlawfully terminated on 18<sup>th</sup> September 2015. However, when he appeared before the Court, he testified that his employment was terminated in October 2015. The Claimant further stated in cross examination that in 2016, he was still working for the Respondent.
18. Which then was the actual date of termination of the Claimant's employment and therefore the accrual of the cause of action herein?
19. Under Section 47(5) of the Employment Act, an employee alleging unfair termination or wrongful dismissal bears the burden of proving their allegations. In its decision in *Bakari Abdalla Mwangazi v Kwale International Sugar Company Limited [2020] eKLR*, this Court held that an employee who prevaricates on the date of termination of employment cannot be said to have discharged the evidential burden placed by Section 47(5).
20. From the Claimant's contradictory testimony, the Court could not tell the date of termination and therefore accrual of the cause of action. Consequently, the claim for unfair termination cannot stand. The claims for compensation and notice pay are therefore rejected.

### **Other Claims**

21. Regarding the claim for leave pay, the Respondent conceded that the Claimant was not allowed annual leave, ostensibly because he was a casual employee. The Respondent did not however produce any employment records to prove its assertion that the Claimant was a casual employee. The claim for leave pay therefore succeeds and is allowed.
22. The Claimant claims to have been underpaid. However, a perusal of the respective Regulation of Wages (Agricultural Industry) (Amendment) Orders did not support this claim.
23. The claims for arrears, overtime, off duties and public holidays were not proved and are dismissed.
24. In the end, I enter judgment in favour of the Claimant in the sum of **Kshs. 30,240** being leave pay for six (6) years.
25. This amount will attract interest at court rates from the date of judgment until payment in full.
26. Each party will bear their own costs.

27. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF DECEMBER 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. Maragia for the Claimant

Mr. Kulecho for the Respondent