



**REPUBLIC OF KENYA**

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

**CAUSE NO 413 OF 2016**

**JUMAA CHOME NDILO.....CLAIMANT**

**VS**

**KALUWORKS LIMITED.....RESPONDENT**

**JUDGMENT**

1. This is an employment dispute between Jumaa Chome Ndilo and Kaluworks Limited.
2. The Claimant has documented his claim in a Memorandum of Claim dated 30<sup>th</sup> May 2016 and filed in court on 31<sup>st</sup> May 2016. The Respondent filed a Reply on 6<sup>th</sup> May 2019.
3. The matter proceeded to full hearing where the Claimant testified on his own behalf and the Respondent called its Human Resource Consultant, Hezrone Rachilo.

**The Claimant’s Case**

4. The Claimant pleads that he was employed by the Respondent as a Clerk from early September 2010 to 20<sup>th</sup> April 2014. He claims to have been retained continuously and uninterrupted though employed on casual basis.
5. At the time of termination, the Claimant earned a daily rate of Kshs. 264.
6. The Claimant states that about the year 2013 or 2014, the Respondent forced all its workers, including the Claimant to execute a document showing that they held lower positions than the ones they actually held.
7. The Claimant further states that the Respondent continued paying him on the basis of the lower position as opposed to the work done and actual position held.
8. The Claimant avers that his employment was wrongfully and unfairly terminated when he was asked to leave the company premises as his name did not appear in the daily manpower list of employees allowed to work for the Respondent. The Claimant further avers that the Respondent ordered him to vacate its premises effectively terminating his employment.
9. The Claimant adds that no proper reason was given for the termination of his employment and he was not given any opportunity for dialogue. The Claimant further claims to have been underpaid.
10. The Claimant summarises his claim as follows:

- a) One month’s notice pay.....Kshs. 14,636.70
- b) Underpayment for 3 years.....279,817.20
- c) Leave pay for 3 years & 8 months.....43,386.56
- d) 12 months’ salary in compensation.....175,640.40
- e) Costs plus interest

## **The Respondent's Case**

11. In its Memorandum of Reply dated 3<sup>rd</sup> May 2019 and filed in court on 6<sup>th</sup> May 2019, the Respondent admits having employed the Claimant as a Packing Helper from 9<sup>th</sup> September 2010 until 16<sup>th</sup> April 2014.
12. The Respondent adds that the Claimant was employed as a casual labourer earning a daily wage and that the employment was heavily dependent on availability of work.
13. The Respondent denies that the Claimant was employed as a Clerk. The Respondent further denies that the Claimant retained continuous or uninterrupted employment.
14. The Respondent states that as at 6<sup>th</sup> April 2014, the Claimant earned a consolidated daily wage of Kshs. 264, inclusive of house allowance and that the Claimant opted to collect his pay on weekly basis.
15. The Respondent further states that at all material times, it remunerated the Claimant as agreed upon between the parties and as guided by the prevailing Minimum Wages Order.
16. The Respondent claims to have issued the Claimant with casual payment sheets which itemised the particulars of his wages and applicable deductions, which the Claimant executed in acknowledgement of his weekly wages.
17. The Respondent denies forcing the Claimant to execute a document showing that he held a lower position than the one he actually held or paying the Claimant on the basis of a lower position.
18. The Respondent also denies wrongfully or unlawfully terminating the Claimant's employment and states that on 5<sup>th</sup> April 2014, the Claimant was planned for and worked in the night shift, reporting at 1749 hours and leaving the next day at 0610 hours. The Respondent adds that the Claimant failed to resume duty thereafter in spite of having been planned for shift duties on the succeeding days.
19. The Respondent avers that the Claimant had no permission nor any known valid cause to be away from work and that on 15<sup>th</sup> April 2014, the Respondent prepared a show cause letter, making inquiries about the Claimant's continued unauthorised absenteeism, which the Claimant failed to collect.
20. The Respondent further avers that it notified the County Labour Office of the Claimant's separation from employment by letter dated 15<sup>th</sup> April 2016, in line with Section 78 of the Employment Act.
21. The Respondent denies the Claimant's entire claim and asks the Court to dismiss it with costs.

## **Findings and Determination**

22. Two (2) issues fall 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?**

23. In his testimony before the Court, the Claimant stated that on 20<sup>th</sup> April 2014, he reported to work as usual but was informed by the security guard at the gate that his name was not on the manpower register and that he should see the Assistant Human Resource Manager, Hezrone and his Supervisor, Kassim Kote.
24. The Claimant further testified that Kote informed him that the Company was sending him on compulsory off days and that was why his name was not on the manpower register for that day. The Claimant was told to wait for the Company to reintroduce his name in the register.
25. Upon going to Hezrone's office the Claimant was informed that the Company had reduced its work capacity and was sending most employees on compulsory off and that the Claimant was among those to be laid off. Hezrone told the Claimant to wait to be recalled. The Claimant was then told to leave the company premises.
26. Section 47(5) of the Employment Act states as follows:

***(5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.***
27. As held in *Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR* Section 47(5) of the Employment Act must be construed in accordance with the conventional law on the burden of proof.

28. In his Memorandum of Claim and Witness Statement both dated 30<sup>th</sup> May 2016, the Claimant gives the date of termination of his employment as 20<sup>th</sup> April 2014. When he appeared before the Court however, the Claimant changed tune and stated that his employment was terminated on 20<sup>th</sup> October 2014.

29. As stated by this Court in *Mohammed Bocha Gobu v BGP Kenya Limited [2020] eKLR* an employee who dithers on the date of termination of employment cannot be said to have discharged their burden of proof.

30. Additionally, according to a daily in-out report for period between 1<sup>st</sup> April 2014 and 30<sup>th</sup> April 2014, the Claimant last clocked in at work on 5<sup>th</sup> April 2014 at 17.49 and clocked out on 6<sup>th</sup> April 2014 at 06.10.

31. In light of the Claimant's ambivalent evidence, the Court found no reason to disbelieve the Respondent's averment that the Claimant left work on the morning of 6<sup>th</sup> April 2014 and did not return.

32. As a result, the Claimant's assertion that his employment was unfairly terminated is rejected. This dispenses with the claims for compensation and notice pay.

#### **Other Claims**

33. The Claimant's claim for underpayment is based on his plea that he was employed in the position of Clerk. The Claimant's statement on his employment position is however not supported by any evidence and is in fact at variance with his recruitment form produced by the Respondent.

34. The claim for underpayment was therefore unproved and is disallowed.

35. In his testimony before the Court, the Respondent's witness, Hezrone Rachilo admitted the claim for leave pay.

36. In the end, I enter judgment in favour of the Claimant in the sum of **Kshs. 19,404** being leave pay for 3 years and 6 months.

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

38. Each party will bear their own costs.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY 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:**

**Miss Mboku h/b Mr. Mbuya for the Claimant**

**Mr. Gathu h/b Mr. Nanji for the Respondent**