



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 688 OF 2016**

**BETWEEN**

**JANET MWACHA MWABOLI.....CLAIMANT**

**VERSUS**

**MODERN SOAP FACTORY LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*IRB Mbuya & Company Advocates for the Claimant A.B. Patel & Patel Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed her Statement of Claim, on 22<sup>nd</sup> September 2016. She avers she was employed by the Respondent as a General Labourer, between July 2007 and 21<sup>st</sup> March 2015. She worked continuously. She was paid Kshs. 250 daily upon recruitment and Kshs. 470 daily, on termination. Her contract was terminated by the Respondent abruptly, without justifiable cause, on 21<sup>st</sup> March 2015. The Respondent alleged the Claimant had joined a Trade Union without Respondent's approval. She never went on annual leave. She prays for Judgment against the Respondent in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 12,235.
- b) Annual leave pay at Kshs. 22,235.
- c) Leave traveling allowance at Kshs. 9,900.
- d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 146,827.
- e) Any other suitable relief.
- f) Costs.
- g) Interest.

2. The Respondent filed its Statement of Response on 1<sup>st</sup> March 2017. Its position is that, it employed the Claimant initially on casual terms. Her employment was later converted to fixed-term contract. At no time was she employed continuously for 3 to 4 months. After 2013, she was engaged on casual terms. She was paid all her dues in full. She reported the dispute to the Ministry of Labour. The Conciliator rejected the Claimant's position, recommending that she is only supplied with a Certificate of Service. The Respondent prays the Court to find that the Claim is abuse of Court process, and the Claim is dismissed with costs to the Respondent.

3. The Claimant testified and rested her case, on 4<sup>th</sup> June 2018. Respondent's Director, Foojan Kanabar, testified on 24<sup>th</sup> July 2018, when hearing closed. The matter was last mentioned on 23<sup>rd</sup> October 2018, when Parties confirmed the filing of their Closing Submissions.

4. The Claimant restated the contents of her Statement of Claim, and her Witness Statement, in her oral evidence. Cross-examined, she told

the Court she did not know that the dispute was reported to the Labour Office by her Trade Union, Kenya Shoe and Leather Workers Union.

5. Foojan Kanabar told the Court that the dispute was reported to the Labour Office, Mombasa. It was taken through conciliation. Both Parties were represented. The Claimant was fully represented by her Trade Union. It was recommended that the Claimant's prayers, except for the prayer on Certificate of Service, had no merit. 2 Employees, who included the Claimant, were the Grievants before the Conciliator. The other Employee did not bring any Claim to the Court. Cross-examined, the Witness testified that he did not know, that Conciliator's recommendation was not binding.

**The Court Finds:-**

6. The dispute was reported to the Ministry of Labour by Claimant's Trade Union, Kenya Shoe and Leather Workers Union. The issue in dispute was reported as "*Unlawful termination of Loice Mwavua and Janet Mwaboli.*"

7. The Union sought to have the Respondent pay to the Grievants notice; annual leave; gratuity; and compensation for unfair termination. The Parties made their representations before the Conciliator.

8. The Conciliator found that the Grievants were initially employed as Casual Employees. Afterwards they were placed on different fixed term contracts. They were paid terminal dues at end of each contract. They were reverted to casual engagement in December 2013. They did not work in continuity. From 2014, the Grievants were hired whenever there was need for their services.

9. In the end, the Conciliator rejected the prayers for compensation and terminal dues, recommending that the Grievants are issued Certificates of Service.

10. The Court agrees with the Claimant that, conciliation findings and recommendations do not bind the Court. A Party is not prevented from pursuit of her Claim in Court, on the ground that the issue in dispute has been considered and determined through conciliation. Section 47[3] of the Employment Act 2007, states that the right of an Employee to present a complaint to the Labour Officer, is in addition to the Employee's right, to complain to the Employment and Labour Relations Court, on the same issue, and to complain on any other infringement of her statutory rights.

11. Where a complaint is made under Section 47 [3] of the Employment Act 2007, the procedure in processing such a complaint before the Court is as prescribed under Section 71 of the Employment Act. Principally, the Claim must be lodged within 3 months from the date of the decision by the Labour Office, or within such longer period as the Court considers reasonable.

12. The time limit placed by this law in moving from the Labour Office to Court, is meant to ensure there is no delay in settlement, and minimize the likelihood of frivolous Claims being escalated to Court for adjudication. The outcome of the non-adjudicatory process at the Labour Office ought to bind the Parties, unless Parties can show to the Court that there are good grounds to depart from conciliation findings and recommendations.

13. The Claimant did not lodge a complaint individually with the Labour Office under Section 47 of the Employment Act. She reported a dispute through her Trade Union, under Section 62 of the Labour Relations Act. She does not deny that she was a Member of the Union. She in fact testified that termination was on account of her association with the Trade Union. She however denied knowledge of the dispute report made to the Labour Office. She told the Court unconvincingly, that she did not know Julius Maina, the Trade Union Official who is recorded as having represented the Claimant at conciliation. The Claimant was not truthful in this aspect of her evidence.

14. Conciliation outcome, under the Labour Relations Act 2007, ought, like a complaint under Section 47 of the Employment Act, to be binding on the Parties, unless compelling reasons can be shown before the Court, justifying interference with the findings and recommendations of the Conciliator.

15. The Labour Relations Act attempts to make conciliation binding on the Parties, by establishing strict procedural standards with respect to moving from the Conciliator to the Court.

16. Section 69 of the Labour Relations Act requires the Conciliator to issue a certificate if the dispute is unresolved. Rule 5 of the Employment and Labour Relations Court [Procedure] Rules 2016, states that where the dispute has been the subject of conciliation, the Statement of Claim shall be accompanied by a report of the Conciliator on the conciliation process, supported by minutes of the conciliation meeting. It is mandatory also, to have the certificate of conciliation issued under Section 69, accompanying the Statement of Claim. Where there is no certificate of conciliation, the Claimant or his Representative shall swear and file an Affidavit, attesting to the reasons why the Conciliator has not issued the certificate. Where report has been made and conciliation has not taken place, the Claimant shall swear and file an Affidavit, attesting to reason why conciliation has not taken place.

17. Conciliation is therefore meant to be a binding and effective dispute resolution mechanism, with the Court's intervention sought, only when there are compelling reasons to do. Parties can only move to the Court under Rule 5 above. The Court needs to have the Conciliator's certificate, report and minutes of the conciliation meetings, to satisfy itself that conciliation has taken place; that the dispute is unresolved; that procedural requirements have been met; to assess if there are errors of law arising from conciliation process that require correction; and to satisfy itself that there are compelling reasons to hear the Parties afresh, and depart from, or affirm, the findings and recommendations of the Conciliator. Non-adjudicatory mechanisms are anchored on Article 159[2] [c] of the Constitution of Kenya. They must be taken as binding and effective dispute resolution mechanisms, not merely as stepping stones to the judicial forum.

18. The Claimant in this dispute does not acknowledge that the dispute was reported to the Labour Office. She denies that there was conciliation. She completely disavows conciliation. The record does not support her position. There was a report of the dispute made by her Union. A Conciliator was appointed. Parties appeared before the Conciliator and made their representations. There were findings and

recommendations made. The Claimant disavows conciliation perhaps because the outcome was not favourable to her. There are no issues raised by the Claimant, which were not dealt with, by the Conciliator. She does not question the findings and recommendations of the Conciliator. Instead she denies knowledge of conciliation. The Claimant is not being truthful on this. She has not complied with the mandatory procedure created by Rule 5, of this Court's Procedure Rules. Her Claim is incompetent and bad in law. She has not shown any reason, why the Court should depart from the findings and recommendations of the Conciliator.

IT IS ORDERED:-

*a) The Claim is rejected.*

*b) No order on the costs.*

**Dated and delivered at Mombasa this 25<sup>th</sup> day of January 2019.**

**James Rika**

**Judge**