



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MALINDI**  
**CAUSE NUMBER 25 OF 2017**

[Formerly Mombasa E&LRC Cause No. 238 of 2017]

**BETWEEN**

**NARAN VEKARIYA .....CLAIMANT**

**VERSUS**

**KRYSTALLINE SALT LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Owang & Associates, Advocates for the Claimant Arwa & Change, Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 30<sup>th</sup> March 2017. He avers he was employed by the Respondent as a Workshop Manager, in February 2011. He earned a monthly net salary of Kshs. 185,000.

2. He was charged with a criminal offence at the instigation of the Respondent, in Malindi Chief Magistrate's Criminal Case Number 355 of 2014. He was acquitted for lack of evidence, on 10<sup>th</sup> December 2015. The Respondent filed against the Claimant, Malindi Civil Suit Number 269 of 2014, *Krystalline Salt Limited v. Naran Vekaria & Guldir Singh*, asking for among others, an order for general damages. The Civil Suit has not been prosecuted.

3. On 18<sup>th</sup> April 2016, the Respondent wrote to the Claimant, inviting the Claimant for a disciplinary hearing. At the same time the Respondent issued the Claimant a letter to show cause why, he should not be disciplined. The Respondent then issued a letter of summary dismissal dated 18<sup>th</sup> June 2016, alleging that the Claimant had absented himself from work without leave or other lawful cause. The Claimant states that these letters issued 2 years after he was dismissed by the Respondent. The Claimant avers he was arraigned in the Criminal Court, before the Respondent exhausted the internal disciplinary mechanism. He prays for Judgment against the Respondent, in the following terms:-

- a) Employment benefits, Kshs. 185,000 x 6 years, at Kshs. 1,110,000.
- b) Half salary from May 2014 to June 2016 at Kshs. 2,312,000.
- c) Damages at Kshs. 5,900,000.

Total... Kshs. 9,312,000.

- d) Costs.
- e) Interest.

4. The Respondent filed its Statement of Response on 12<sup>th</sup> July 2017. Its position is that the Claimant acted contrary to Respondent's policy, by using his position to confer upon himself a benefit unjustly. He requisitioned for his own benefit various goods including tyres and assorted car spare parts.

5. The Respondent made a complaint at Marereni Police Station. Police made independent investigations, and arraigned the Claimant before the Court at Malindi. The Respondent conceded having filed Civil Claim against the Claimant, but denies it has failed to prosecute. The Claimant was invited to disciplinary hearing. He blatantly refused to subject himself to the process. He was dismissed on 18<sup>th</sup> June 2016, after absconding for 2 years. The Respondent prays the Court to dismiss the Claim with costs.

6. The Claim was scheduled to be heard on 27<sup>th</sup> November 2018. Medical evidence was placed before the Court by Claimant's Advocate, showing the Claimant suffered a debilitating stroke, and was incapable of giving evidence. It was agreed by the Advocates that the Claimant's case is considered on the strength of his Pleadings, Witness Statement and Documents on record. The Claimant's position, is as summarized at paragraphs 1, 2, 3 and 4 of this Judgment.

7. The Respondent gave evidence through its Human Resource Manager, Ann Wanja Karanja. Hearing closed on 27<sup>th</sup> November 2018.

8. Karanja explained that on 20<sup>th</sup> May 2014, the Respondent discovered there was fraud, in Respondent's spare parts department. The department was headed by the Claimant. Police Officers were called in. The Respondent issued letter to show cause to the Claimant. The Claimant replied through his Advocates alleging that the letter was illegal, as the matter was under police investigation. He did not submit to the disciplinary process, saying that he was waiting for the outcome of the criminal process. He did not work from the year 2014. He was not earning his salary. He was treated fairly.

9. Cross-examined, Karanja told the Court that she was employed on 14<sup>th</sup> May 2014. She found the Claimant already working. The Claimant did not have a bad employment record. Termination was on 18<sup>th</sup> June 2016. Last pay slip shows terminal dues paid. There was no other document tabulating terminal dues. Karanja wrote in her Witness Statement, that the Respondent engaged the Police. She did say what the outcome of the criminal process was. She did not know if the State appealed against acquittal of the Claimant. The Respondent initiated civil proceedings against the Claimant. The Claimant has not been paid terminal dues because the case is pending in Court. He ought to be paid terminal dues if there is anything to be paid. Redirected the Witness told the Court that the Claimant was not the only Employee charged with the offence. He was invited for disciplinary hearing. He did not work from the year 2014.

**The Court Finds:-**

10. The Claimant was employed by the Respondent as a Warehouse Manager, in February 2011, earning a monthly salary of Kshs. 185,000.

11. He was arrested, and charged in Court, on allegations of involvement in theft of Respondent's motor vehicle spare parts. This happened in May 2014.

12. He was acquitted on 10<sup>th</sup> December 2015.

13. 2 years after the Claimant was arraigned in Court and after he ceased working, the Respondent wrote to him a letter on 18<sup>th</sup> April 2016, inviting the Claimant to a disciplinary hearing. The Claimant wrote back on 10<sup>th</sup> May 2016, declining the invitation. He reasoned that there was no sense in subjecting himself to the disciplinary process, as the Respondent had decided to take him to Court in the first place. *"I would like to say that further matters will now be clarified and decided by the Courts, as this was what you decided to do from the beginning,"* states the Claimant.

14. The result is that on 18<sup>th</sup> June 2016, the Respondent issued a letter of summary dismissal upon the Claimant. The reason for this decision was that the Claimant was said to have absented himself from work, without leave or other lawful cause, for the period of 2 years, between 2014 and 2016. The Respondent cited in the letter of summary dismissal, Section 44 [4] [a] of the Employment Act, in justifying its decision.

15. The Court has formed the view that the Claimant unreasonably failed to subject himself to the disciplinary process. He wrongly viewed his criminal trial and acquittal, to have absolved him from the allegations of involvement in an employment offence.

16. There is no evidence on record showing that, at the time of his arrest and arraignment in Court, at the time he last worked for the Respondent, the Claimant was advised by the Respondent, his fate as an Employee of the Respondent, rested with the outcome of the criminal case.

17. The Claimant ought to have submitted to the disciplinary process, even though the process was initiated after the criminal process had culminated in Claimant's acquittal, and 2 years after the Claimant last worked for the Respondent.

18. The effect of the Claimant's non-submission to the disciplinary process is that he cannot be heard to say, that termination was unfair under Sections 43 and 45 of the Employment Act. He was invited to a forum where the Respondent sought to prove the reason or reasons for its decision. He declined invitation. There would be no reason for the Court to agree with him that termination was unfair. He submits that the Respondent failed to establish its allegations against the Claimant both through the use of its internal mechanism and through public prosecution. The Claimant did not submit to the internal dispute resolution mechanism, while the second mechanism, was not a process driven by the Respondent. The internal mechanism was not defined by the process of public prosecution, and the outcomes in the respective processes did not depend on each other.

19. The Claimant is not entitled to compensation under statute or damages for breach of contract. He prays for damages without specificity,

at a staggering amount of Kshs. 5,900,000.

20. He prays also for employment benefits at Kshs. 1,100,000. He states that he is entitled to 1 month salary for every of the 6 years worked, as employment benefits. The Court does not understand him. Employment benefits, is a broad term, encompassing a whole range of statutory and contractual benefits that can be available to an Employee during and after employment. What employment benefits does the Claimant seek? The Claimant does not assist the Court in his Pleadings or Submissions, in understanding the nature of employment benefits sought. What is 1 month salary for each of the 6 years worked, based on? Which law or contractual clause is the prayer to be awarded? The prayer is declined.

21. There is evidence that the Claimant left employment as soon as he was charged in Court, in May 2014. He was invited for disciplinary hearing through a letter dated 18<sup>th</sup> April 2016. Dismissal was on 18<sup>th</sup> June 2016.

22. Between May 2014 and 18<sup>th</sup> June 2016, the Claimant was still an Employee of the Respondent. Technically he was on suspension. If he was not considered by the Respondent to be on suspension, the Respondent would have initiated the disciplinary process as soon as the Claimant was arrested and arraigned in Court. It cannot be said that the Claimant absconded. The Respondent knew the Claimant was involved with the criminal trial, in which the Respondent was the Complainant. For 2 years, the Respondent did not write to the Claimant, asking him to account for his absence. It was known to both Parties that the Claimant was undergoing criminal trial. The Respondent opted to wait for 2 years, before initiating the disciplinary process, and finally dismissing the Claimant on 18<sup>th</sup> June 2016. For the 2 years, the contract of employment remained in place. Dismissal letter is categorical, that the decision took effect on 18<sup>th</sup> June 2016. The Claimant ceased to be an Employee of the Respondent, on 18<sup>th</sup> June 2016.

23. The Claimant would be entitled to his salary over the period of 2 years. He prays for half salary over the period, which would suggest that he received the other half.

24. In *Peterson Ndung'u & 5 others v. Kenya Power & Lighting Company Limited, [2014]e-KLR*, it was held that the Employee is not to be denied his salary for the period he is under suspension. The contract is still alive, and denial of salary should not be taken as a form of disciplinary penalty. The risk that the Employer may end up paying salary for work not done, is a risk the Employer is in a position to avoid, by minimizing the period of suspension, and avoiding altogether indefinite suspensions. The Employer should certainly avoid pegging the period of suspension to the outcome of other processes, over which the Employer has no control, such as criminal trials. What the law does not contemplate, is that an Employee, whose contract is still in place, is punitively denied his salary. ***The Claimant is granted half salary in arrears, from 20<sup>th</sup> May 2014, to 18<sup>th</sup> June 2016 [25 months] at Kshs. 2, 312,000.***

25. The Court is not able to tell in what respect, civil proceedings elsewhere, between the Parties herein, are relevant to the present dispute.

26. ***No order on the costs.***

26. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

***[a] The Respondent shall pay to the Claimant arrears of salary at Kshs. 2,312,000.***

***[b] No order on the costs.***

***[c] Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

**Dated and delivered at Malindi this 28<sup>th</sup> day of February 2019.**

**James Rika**

**Judge**