



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 707 OF 2013**

**ELIUD KINYUA TIRIBU.....CLAIMANT**

**v**

**MASTERMIND TOBACCO LIMITED.....RESPONDENT**

**JUDGMENT**

1. This Cause was heard on 13 October 2015 and on 31 October 2018 (hearing could not be concluded expeditiously because of applications made in the course of trial, and the Court had to set aside orders of 14 November 2017 to unlock the stalemate).

2. Eliud Kinyua Tiribu (Claimant) filed submissions on 30 November 2018 while Mastermind Tobacco Ltd (Respondent) submissions were not on file by this morning.

3. The Court has considered the pleadings, evidence and submissions.

**Employment relationship**

4. The Claimant was employed by the Respondent in February 2006 and he served the Respondent until 27 October 2011 when he was involved in an accident in the course of duties.

5. The Claimant testified that he was signing contracts every 3 months, but the Respondent retained all copies, and that he was also issued with a job card which remained with the Respondent.

6. On his duties, the Claimant stated that he used to operate a compressor machine during construction of warehouses/go downs for the Respondent. He also stated that the Respondent paid his medical bills after the workplace injury (copy of discharge summary was produced in Court).

7. The Respondent's pleaded defence was that the Claimant was not its employee.

8. The Respondent's Assistant Human Resources & Administration Manager who testified and produced a contract of employment between the Claimant and a company called NGM Co. Ltd (a sister company to the Respondent).

9. The Claimant had denied signing the contract (and it is the document that the Court had directed to be taken for forensic examination by the Police, which was never done).

10. However, the Respondent's witness admitted that the Respondent had a construction department and that the Claimant's supervisors were Wambua Munguti and Ramji.

11. The Respondent's witness stated that the two supervisors were employees of NGM Co. Ltd.

12. In view of the testimony by the Respondent's witness that the Claimant was employed by a sister company and considering that the employer has the obligation to keep employment records which were not filed/produced in Court, and in further consideration of the definition of *employer* in section 2 of the Employment Act, 2007, the Court finds that the Respondent was legally an employer of the Claimant.

**Unfair termination of employment**

13. According to the Claimant he sued the Respondent seeking compensation for the injuries and that the suit riled the Respondent as a result of which a Manager called him on 15 February 2013 and told him that he had been dismissed.

14. The Claimant contended that the dismissal was unfair because he was not informed of allegations against him and because he was not afforded an opportunity to be heard.

15. Because of the line of defence taken by the Respondent, the Claimant's testimony remained uncontroverted, and in consideration of sections 35 and 41 of the Employment Act, 2007, the Court finds that there was unfair termination of employment.

#### **Salary in lieu of notice**

16. With the conclusion, the Court finds that the Claimant is entitled to 1 month salary in lieu of notice (Claimant pleaded monthly salary of Kshs 11,400/- though testified he was on a daily rate of Kshs 380/-).

#### **Compensation**

17. The Claimant served the Respondent for about 7 years and in consideration of the length of service, the Court is of the view that 7 months gross wages as compensation would be appropriate.

#### **Leave**

18. The Claimant sought leave accrued over 7 years of employment.

19. In the view of the Court, this head of claim is caught by the provisions of section 28(4) of the Employment Act, 2007 and is thus declined.

#### **Loss of income**

20. The Claimant did not prove or satisfy the Court that he is entitled to lost income.

#### **Conclusion and Orders**

21. The Court finds and holds that the Claimant was legally an employee of the Respondent and that his employment was unfairly terminated and awards him

(a) Salary in lieu of notice Kshs 11,400/-

(b) Compensation Kshs 79,800/-

TOTAL **Kshs 91,200/-**

22. Claimant to have costs on half scale.

**Delivered, dated and signed in Nairobi on this 1<sup>st</sup> day of February 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Mulaku instructed by Namada & Co. Advocates

For Respondent Mr. Omuganda instructed by Mbugua, Atudo & Macharia Advocates

Court Assistant Lindsey