



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NUMBER 841 OF 2016**  
**BETWEEN**  
**PATRICK MUTUKU KAMAMI.....CLAIMANT**  
**VERSUS**  
**KENYA TONER & INK SUPPLIERS LTD.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Munee Katu & Associates, Advocates for the Claimant*

*C.K. Mwero Advocates for the Respondent*

**JUDGMENT**

1. In his Statement of Claim filed on 27<sup>th</sup> October 2016, the Claimant seeks Judgment against the Respondent herein, his former Employer, in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 23, 608.
- b) Underpayment of salary under legal notice number 197 of 2013, from 1<sup>st</sup> November 2013 to 30<sup>th</sup> April 2018 at Kshs. 161,614.
- c) Underpayment of salary under legal notice number 117 of 2015 from 1<sup>st</sup> May 2015 to 30<sup>th</sup> May 2016 at Kshs. 126,589.
- d) Salary for 20 days worked in June 2016 at Kshs. 15,738.
- e) 12 months' salary in compensation for unfair termination at Kshs. 145,200.

**Total.....Kshs. 472,750.**

- f) Certificate of Service to issue.
- g) Costs.
- h) Interest.

2. The Claimant avers he was employed by the Respondent on 18<sup>th</sup> July 2005 as a Shop Attendant. His contract was unfairly terminated by the Respondent, on 20<sup>th</sup> June 2015. His last salary was Kshs. 12,100 monthly. His salary did not meet the requirement of the applicable Wages Order. He was not given notice. There was no reason justifying termination. He was not heard. He was advised his terminal benefits would be paid 90 days from the date of termination. Nothing was paid, necessitating the filing of this Claim

3. The Respondent filed its Response on 2<sup>nd</sup> February 2017. Its position is that the Claimant was a Messenger, not a Shop Attendant. His

contract was not terminated by the Respondent. He was transferred from Mombasa to Nairobi because the business in Mombasa was ailing. He deserted. He did not report to Nairobi as instructed. The Claimant is not entitled to the reliefs sought, having deserted. He is not entitled to wages for work not done. The Respondent urges the Court to dismiss the Claim with costs. There are other prayers in the Statement of Response, under paragraphs b, c, d, which do not merit consideration of the Court.

4. The Claimant testified, and rested his case, on 17<sup>th</sup> September 2018. Respondent's Director, Richard Mwanja Musau, testified and rested Respondent's case, on 29<sup>th</sup> October 2018. The matter was last mentioned in Court on 14<sup>th</sup> December 2018, when Parties confirmed the filing of their Submissions.

5. The Claimant retold the contents of his Statement of Claim, in his oral evidence. He added that he was not issued a written contract. He was employed as a Shop Attendant on 18<sup>th</sup> July 2005, not as a Messenger. He worked in Nairobi until 7<sup>th</sup> May 2008, when the Respondent opened a Branch in Mombasa, and the Claimant transferred to Mombasa. It is not true that the Claimant deserted. He was not warned or heard on any allegation. He was not advised that the Respondent intended to close its Mombasa Branch. He was not told to transfer to Nairobi.

6. Cross-examined, he testified that he did sales and marketing for the Respondent. He was never a Messenger. He was paid Kshs. 12,100 monthly. He asked for increment from the Respondent. No increment was granted. He was also a Cashier, as shown in a copy of Respondent's receipt exhibited in Court. Rent for the premises was about Kshs. 80,000. The Claimant was not involved in payment of rent. He was not aware about poor performance of the business. He recalled that business was low. He was not aware that the Respondent gave the Landlord notice of termination of the lease in 2014. He was not aware that the Respondent was in arrears of rent. The Respondent closed business in Mombasa around the year 2016, not 2014. Redirected, the Claimant told the Court there was no contract designating him as a Messenger. He undertook multiple functions, including that of a Cashier.

7. Musau testified that the Claimant was a Messenger. He was employed at Nairobi and later transferred to Mombasa. The Mombasa Branch was not sustainable. The Claimant was transferred to Nairobi. He did not accept transfer. He deserted. Musau learnt later that the Claimant was running a similar business as that of the Respondent, in Mombasa, hence his reluctance to go back to Nairobi. Cross-examined, Musau confirmed that he did not issue the Claimant with a letter of employment. He was referred to as a Cashier in the receipt exhibited in Court. Respondent's receipts did not resemble the receipt in Court. He must have received the letter of transfer. Redirected, Musau told the Court the receipt produced by the Claimant is not signed by the Claimant.

8. The primary issues in dispute are:

- What position the Claimant held at the Respondent.
- Whether his contract was terminated by the Respondent unfairly, or at all.
- Whether he was paid the legal wage applicable to his position.

### **The Court Finds:-**

#### **Position**

9. The Respondent did not issue the Claimant a written contract, upon employing him. Section 10[2] of the Employment Act 2007, required the Respondent to state details of employment in a written contract. The date of commencement of employment, and job description, are part of the terms and conditions of service, which must be included in a written contract of employment.

10. The common position is that the Claimant was not employed through a written contract. He was employed through an oral contract. In event there is a dispute on the terms and conditions of employment between an Employer and an Employee, it is always the duty of the Employer, to prove the Employer's position on the disputed terms and conditions of employment, or disprove the position held by the Employee, under Section 10(7) of the Employment Act.

11. The Claimant states he was employed on 18<sup>th</sup> July 2005. His contract was unwritten. There is no evidence to disprove this as the date of employment. There is no evidence given by the Respondent, to prove that the Claimant was employed in 2013. The Court upholds 18<sup>th</sup> July 2005 as the date of employment.

12. The designation of the Claimant is critical in resolving the prayer on underpayment of salary. He states he was a Shop Attendant. The Respondent states he was a Messenger. Again the Respondent failed to prove that the Claimant was a Messenger. There is no written contract designating the Claimant as a Messenger. The position held by the Claimant, which is, that he was a Shop Attendant must stand. He exhibited a receipt where he is stated to have been a Cashier. In small retail businesses, it is not uncommon to find Employees who discharge multiple, but related roles. Shop-Attendants are used as Cashiers. It is safe to conclude that the Claimant was a Shop-Attendant as stated by him.

#### **Termination**

13. There is sufficient evidence to establish that Respondent's business was not doing well at the Branch in Mombasa. There is correspondence exchanged between the Respondent and its Landlord at Mombasa, showing the Respondent was in arrears of rent. Demands were being made upon the Respondent to pay up, or face distress. The Respondent gave notice to the Landlord to terminate lease on 27<sup>th</sup> June 2014.

14. On 15<sup>th</sup> October 2014, the Respondent notified the Claimant that the business at Mombasa was closing down. An agreement for

termination of lease had been reached between the Respondent and the Landlord. The Claimant was asked to report to the Nairobi Office on transfer, within 4 months. The Claimant did not report, but opted to stay in Mombasa, where it is alleged by the Respondent, the Claimant had established a business similar to that of the Respondent.

15. The Court has no reason to disbelieve Respondent's evidence. The Claimant's contract was not terminated by the Respondent. The Claimant declined to return to Nairobi where he was first employed, after the Respondent's business in Mombasa collapsed, requiring the Claimant to relocate.

16. Termination having not been occasioned by the Respondent, there would be no reason to require the Respondent to demonstrate that termination was based on valid reason or reasons, and carried out fairly, under the Employment Act 2007.

17. The prayers for notice pay and compensation for unfair termination are groundless. They are declined.

#### **Unpaid salary**

18. Transfer was to take effect in June 2015. The Claimant prays for salary for 20 days worked in June 2016. He was not in employment in June 2016. The Court is not able to grant this item. Similarly, the prayer for underpayment of salary running from 1<sup>st</sup> May 2015, to 30<sup>th</sup> May 2016, cannot be valid. The Claimant was not in employment in 2016. He was required to report to Nairobi by June 2015. He did not. What support is there, for his claims based on a termination date of 20<sup>th</sup> June 2016?

19. The prayer for underpayment of salary for the period 1<sup>st</sup> November 2013, to 30<sup>th</sup> April 2015, is well founded. The Claimant relies on legal notice number 197 of 2013 He was earning Kshs. 12,100, which was clearly an understatement of the legal wage due to him. The default was probably based on Respondent's erroneous placement of the Claimant in the job category of a Messenger. Underpayment of salary cannot be denied to the Claimant on the ground that he deserted, as suggested by the Respondent. The figures quoted by the Claimant however, do not match those contained in the legal notice. The minimum wage for Shop Assistants under the relevant notice was Kshs. 13,205. This excluded housing allowance. Taking into account 15% of this figure as house allowance, the Claimant ought to have earned a consolidated amount of Kshs. 15,185 monthly. He was paid Kshs. 12,100 monthly. He was underpaid by Kshs. 3,085 monthly, which for 18 months claimed under prayer [b], amounts to Kshs. 55,543. ***He is granted underpayment of salary at Kshs. 55,543.***

20. ***Certificate of Service to issue.***

21. ***No order on the costs.***

22. ***Interest granted 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 underpaid salary at Kshs. 55,543.***

***b) Certificate of Service to issue.***

***c) No order on the costs.***

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

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of March 2019.**

**James Rika**

**Judge**