



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR**

**RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 907 OF 2016**

**BETWEEN**

**JANVAN GATHARA NGUNDA.....CLAIMANT**

**VERSUS**

**READY CONSULTANCY COMPANY LTD.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

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*Mulwa Nduva & Company Advocates for the Claimant*

*Birir & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 29<sup>th</sup> November 2016. He states he was employed by the Respondent as a General Manager, on 1<sup>st</sup> June 2013. His salary was Kshs. 33,600 monthly. He was to work for 48 hours a week, with excess hours worked, compensated at 1.5 % of the basic rate. He was entitled to 21 days of paid annual leave. He worked on Public Holidays and Rest Days without compensation. He was summarily dismissed on 13<sup>th</sup> June 2016 without justification. He prays for Judgment against the Respondent in the following terms:-

- a) Damages for unlawful termination at Kshs. 2,000,000.
- b) 1 month salary in lieu of notice at Kshs. 33,600.
- c) 1 month salary in lieu of notice [again] at Kshs. 33,600.
- d) June, July and 3 days of August worked with no pay at Kshs. 71,076.
- e) Service pay for 3 years and 2 months at Kshs. 58,184.
- f) Unpaid annual leave from June 2013 to August 2016 at Kshs. 54,277.
- g) 33 Public Holidays worked at Kshs. 127,882.
- h) 152 Sundays worked at Kshs. 589,030.
- i) Overtime of 5184 hours from June 2013 to 6<sup>th</sup> July 2016 at Kshs. 1,255,565.

j) Refund of unremitted N.H.I.F of 38 months at Kshs. 21,120.

k) Refund of unremitted N.S.S.F deductions of 38 months at Kshs. 34,200.

l) Penalty accrued for unremitted N.H.I.F payments at Kshs. 24,320.

m) Penalty accrued for unremitted N.S.S.F payments at Kshs. 760.

n) Compensation for unlawful dismissal at Kshs. 403,200.

Total...Kshs. 4,017,200.

o) Declaration that termination was unfair.

p) The Respondent to pay the Claimant compensation and damages for unfair and unlawful termination at Kshs. 4,017,200.

q) The Respondent to pay the Claimant damages for unfair and unlawful termination.

r) Interest.

s) Costs.

t) Any other relief.

2. The Court has formed the view from the outset that some of the prayers above are needlessly repetitious. Prayer [n] above, which is prayer [b] in the Statement of Claim, is the totality of compensation, damages and terminal dues sought by the Claimant. What is the purpose of prayer [q] above, which is prayer [c] in the Statement of Claim? Prayer [c] in the Statement of Claim is expunged from the record, with prayers [a] [b] [d] [e] and [f] left for the consideration of the Court.

3. The Respondent filed its Statement of Response on 14<sup>th</sup> March 2017. Its position is that the Claimant was employed as a Supervisor, not General Manager, assigned duty at Respondent's Client, Mombasa Maize Millers, Milly Branch. He was summarily dismissed on account of gross misconduct. He was summoned to show cause why, he should not be disciplined. He was given a chance to defend himself. He failed to answer to the allegations facing him. He was therefore summarily dismissed fairly and lawfully. The Respondent prays the Court to dismiss the Claim with costs.

4. The Claimant testified on 1<sup>st</sup> October 2018. He called 2 other Witnesses, Electrician Patrick Musyoka, and Casual Employee Ali Mramba, who both testified on 4<sup>th</sup> December 2018. Manager Gloria Endekwa Moses testified for the Respondent on the same date, bringing the hearing to a close.

5. **The Claimant** told the Court that the Respondent is a Labour Outsourcing Company. The Respondent employed him as its General Manager. He was alleged to be in the habit of absenteeism. He was issued a letter to show cause why, he should not face disciplinary action. At no time was he absent without leave. The Claimant was always available at the workplace. He dealt with persistent strike actions involving Respondent's Employees. He replied to the letter to show cause, and was called to a disciplinary hearing. He was heard in the presence of 1 of the Directors. He wished to be heard in the presence of the 2 Directors of the Respondent. He was issued letter of summary dismissal.

6. He was denied salary for June, July and 3 days of August, 2016. He had been promised overtime pay which was never paid. He worked on Sundays and Public Holidays. N.S.S.F and N.H.I.F contributions were deducted and not remitted. The Claimant's contract provided for overtime pay and notice. The Claimant worked for 3 years. He had many years of service left. He did not abscond. He was not accorded a fair hearing.

7. Cross-examined, Ngunda testified he was employed as a General Manager. His salary was Kshs. 30,000, inclusive of house allowance. The Respondent did not issue pay slips. The Claimant introduced pay slips at the workplace. He scheduled work shifts. He did not clock his excess hours of work anywhere. He did not record Holidays worked anywhere. He did not refuse to take the letter to show cause, and ask to be paid his terminal dues. He received the second letter. He was heard at the disciplinary meeting. Director Muna told the Claimant not to attend hearing accompanied by a Colleague. The other Director, Mohammed, advised the Claimant to sort out the issue with Director Muna. Redirected, the Claimant stated that his contract provided for overtime pay. N.S.S.F confirmed contributions were not remitted.

8. **Musyoka** told the Court he worked for the Respondent. He and other Employees knew the Claimant as the Director of the Respondent. The Claimant assisted the Respondent in resolving strike actions. He assisted Employees in implementation of N.S.S.F and N.H.I.F legal regimes at the workplace. Musyoka came to realize that the Claimant was not a Director, when the Claimant's contract was terminated. Cross-examined Musyoka testified he worked for the Respondent from 2000 to 2016. He knew the Claimant well and was conversant with the issues in dispute.

9. **Mramba** worked for the Respondent between 2011 and 2016. He was a Casual Employee. Casual Employees had a host of grievances. The Claimant, who was General Manager, was able to resolve these grievances. Mramba came to learn later that Claimant's contract was terminated. Termination was unfair as the Claimant was a diligent General Manager. Cross-examined, the Witness told the Court he came to Court to assist the Claimant. Mramba became a Supervisor at some point through the assistance of the Claimant. Mramba left work

voluntarily because of poor pay.

10. **Gloria Moses** informed the Court that she manages staff. The Respondent employs more than 3000 staff, who are outsourced to different Clients. She disputed the contract exhibited by the Claimant, indicating the Claimant was a General Manager. The contract was not signed by Respondent's Director. It was signed by Eric, Respondent's Supervisor.

11. The Claimant was a Supervisor mostly based at Milly Branch. The Respondent had been receiving e-mails from other Supervisors at Milly, complaining they were being overworked. The Respondent found the Claimant was not at his designated place of work. Moses was instructed to issue the Claimant a letter to show cause. She wrote. The Claimant declined service. He was called to a disciplinary hearing. He asked for time on the hearing date, 12<sup>th</sup> July 2016, up to 5.00 p.m. He did not respond, and was issued dismissal letter on 13<sup>th</sup> July 2016 for absconding. He collected money from Casual Employees for medical certificates. It never reached the Respondent. He took advantage of other Supervisors, claiming he was a General Manager. The Respondent paid all statutory dues. Termination was fair.

12. Moses conceded on cross-examination that the Claimant had produced a contract document showing he was employed as General Manager. The Claimant did not say why he rejected the letter to show cause. He was advised of his rights as an Employee involved in a disciplinary hearing. He was given an opportunity to attend hearing in the company of a Colleague. He did not respond to the allegations. There was no document showing he collected money from Casual Employees. He did not work overtime without compensation. It is not true that Supervisors ganged up against the Claimant at Milly. Redirected, Moses reaffirmed that the Claimant was given adequate time to respond to the allegations against him. There was no issue with Claimant's N.S.S.F contributions.

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

13. There is a contract dated 1<sup>st</sup> June 2013, designating the Claimant as General Manager. The contract is indicated to have been signed by 3 Persons: Director; Human Resources Manager; and the Claimant. The document satisfies the requirements for formal validity, under Section 9 [3] of the Employment Act 2007. Other than the contract, there are other pieces of evidence affirming the Claimant's assertion that he was General Manager. There is the testimony of Mramba; there is an Off- days/Holidays Form dated 3<sup>rd</sup> December 2015 [Respondent's document]; and there a Return-to-Work Formula document, all indicating the Claimant was General Manager. The evidence from Respondent's Human Resource Manager Moses, downgrading the Claimant to a Supervisor has no foundation and is rejected. It can be concluded that the Claimant was employed as General Manager by the Respondent, for the period between 1<sup>st</sup> June 2013 and 13<sup>th</sup> July 2016. His gross salary under contract is given at Kshs. 30,000 monthly. This is the same figure given by the Claimant in his evidence. Why does he plead a monthly salary of Kshs. 33,600?

14. Having been the General Manager, the Claimant conceded on cross-examination that he scheduled work shifts. He did not clock any Overtime he worked, anywhere. He did not record Public Holidays he worked anywhere. It is insufficient to say that the contract had a clause providing for payment of overtime. The question is whether the Claimant worked excess hours. Without these records, his prayers for Public Holidays worked, Sundays worked, Overtime of 5184 hours, have no foundation and are rejected.

15. He testified that he introduced pay slips at the workplace, a legal requirement which the Respondent had hitherto, not put in place. However, he has not produced any of the pay slips he introduced, which would assist the Court in determining if there were statutory deductions made from his salary, and in what amounts. The records from the N.S.S.F and N.H.I.F which the Claimant relies on do not explain or tally the amounts he claims in refund. They do not confirm any penalties paid. When did the Claimant pay the penalties he seeks to be refunded? The best approach would be for the Claimant to pursue the Respondent at the N.S.S.F and N.H.I.F to enforce the statutory obligations he claims the Respondent failed to meet. The prayers for refund of statutory payments and penalties are rejected.

16. The Leave Form is signed by all the Parties. There is no evidence that the application was declined. The Claimant must have proceeded on annual leave of 21 days. The balance recorded as at the time of the application was 42 days – 2013/2014 and 2014/2015. Having utilized 21 days, the balance at the time of termination would be another 42 days, representing the period 2014/2015 and 2015/2016. **He is granted annual leave pay equivalent to 42 days' salary at Kshs. 48,461.**

17. There was no clear evidence presented by the Respondent, to show that the Claimant was actively and fully paid-up member of the N.S.S.F. In the absence of evidence showing this, the Claimant would not be disentitled to service pay under Section 35 [6] of the Employment Act 2007. Gloria Moses testified that the Respondent had issues with N.S.S.F which at the time of her Court appearance, the Respondent was still sorting out. She at the same time testified that there was no issue with the Claimant's N.S.S.F account. The Claimant was said to have given the Respondent a specific number to use in payment of N.S.S.F. This evidence, while it does not permit the Claimant to claim refunds and penalties, it does not allow the Respondent to deny the Claimant service pay on account of Section 35[6] of the Employment Act. It is not evidence of active subscription to N.S.S.F, giving the Claimant a useful social security plan. The Court held in ***Elijah Kipkoros Tonui v. Ngara Opticians T/A Bright Eyes Limited [2014] e-KLR*** that, bare registration to N.S.S.F, does not make an Employee ineligible for service pay. Registration must be active, and carry superior social security benefits compared to the service pay regime. This decision has been the subject of gross legal misinterpretation by some Labour Law Practitioners. The Respondent's evidence ***firms the Claimant's prayer for service pay which the Court allows based on 15 days' salary for 3 complete years of service, 1<sup>st</sup> June 2013 to 30<sup>th</sup> May 2016, at Kshs. 51,923.***

18. The Respondent did not produce pay advice or bank statements showing the Claimant was paid his salary for June, July and August 2016. He stated he worked for 3 days in August 2016, which added onto his 2 months' unpaid salary of Kshs. 60,000, would allow him salary arrears of Kshs. 61,153. **He is granted Kshs. 61,153 in arrears of salary.**

19. The remaining issues are whether termination was unfair; whether the Claimant merits notice pay and compensation; whether he deserves general damages in addition to compensation; and whether he should have costs and interest.

20. The Claimant was issued a letter to show cause on 30<sup>th</sup> June 2016, which he is said to have declined to receive. The letter alleged that the

Claimant had absconded duty repeatedly, causing dissatisfaction amongst Respondent's Clients.

21. The 2<sup>nd</sup> letter issued on 6<sup>th</sup> July 2016. It states that the Claimant had failed to respond to the 1<sup>st</sup> letter. The 2<sup>nd</sup> letter gave the Claimant another chance to show cause. The default the Claimant was called upon to answer is the same one contained in the earlier letter - absconding.

22. Although the Respondent alleges the Claimant did not respond, there is a response in Claimant's documents filed in Court, complete with the stamp of the Respondent. The response was received by the Respondent on 8<sup>th</sup> July 2016. The Claimant basically states that he was not given any specific date when he is said to have absented himself. He rejected the accusation about insubordination, arguing it was not in the 1<sup>st</sup> letter to show cause.

23. He was invited to a disciplinary hearing through a letter dated 9<sup>th</sup> July 2016. The hearing was set for 12<sup>th</sup> July 2016. He was issued a letter of summary dismissal dated 13<sup>th</sup> July 2016. The letter states that the Claimant had been found guilty of absconding.

24. The Claimant conceded in his evidence that he was heard. He had the benefit of 2 letters asking him to show cause why, he should not be disciplined. At the disciplinary hearing, he asked for time to respond which was granted. He did not respond, to even say he was relying on the letter he had earlier issued upon the Respondent, in responding to the letter to show cause. The Court does not see any defect in the procedure adopted by the Respondent. The Claimant was granted an opportunity to explain his position at the disciplinary hearing. Procedure met the minimum standards of fairness, imposed on Employers under Section 41 and 45 of the Employment Act.

25. This still leaves the question whether the decision by the Respondent, to summarily dismiss the Claimant, was based on valid grounds. The Court has not seen details of absconding. The accusation was that the Claimant absented himself on various occasions, causing Respondent's Clients to complain. There is no evidence of absence from the place of work, presented by the Respondent. The dates when the Claimant was absent, are not given anywhere. There is no Client of the Claimant, Supervisor or other Employee, beside Gloria Moses, who was availed to the Court to substantiate the allegation that the Claimant was a frequent absentee. The Employees who worked with the Claimant, who gave evidence on his behalf, told of a dutiful General Manager, who was given to putting out the fires of industrial strikes and other grievances at the workplace regularly. The picture of the Claimant, painted by the Employees is that of a Manager who was frequently there for them. This is not consistent with the claim that the Claimant was a regular absentee. The Respondent ought to have called some of its Clients, Supervisors or Employees who were conversant with Claimant's absenteeism. The Director may too, have been in a position to give details of absenteeism. The Respondent did not establish valid reason or reasons justifying termination, under Section 43, 45 and 47 of the Employment Act.

26. Termination was unfair for want of substantive justification. In assessing the level of compensation the Court has taken into account Section 49 of the Employment Act. The Claimant had served for 3 years. He was a dutiful General Manager, providing the Respondent with the useful service of quelling industrial strikes, and calming Employee grievances. He negotiated Return-to-Work arrangements. He expected to go on serving the Respondent until retirement. He was accorded procedural fairness, but denied substantive justice. **He is allowed equivalent of 6½ months' salary in compensation for unfair termination at Kshs. 195,000.**

27. No charge of gross misconduct on the part of the Claimant was established, to justify termination without notice. **He is allowed the prayer for 1 month salary in lieu of notice at Kshs. 30,000.**

28. The repeated prayer for notice pay has no basis.

29. There is no evidence or legal justification for a grant of damages for unlawful termination, in addition to the remedy of statutory compensation for unfair termination.

30. **Costs to the Claimant.**

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

IN SUM, IT IS ORDERED: -

**a) It is declared that termination was unfair for want of valid reason or reasons.**

**b) The Respondent shall pay to the Claimant: annual leave at Kshs. 48,461; service at Kshs. 51,923; salary arrears at Kshs. 61,153; equivalent of 6½ months' salary in compensation for unfair termination at Kshs. 195,000; and notice at Kshs. 30,000- total Kshs. 386,537.**

**c) Costs to the Claimant.**

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

**Dated and delivered at Mombasa this 13<sup>th</sup> day of June 2019.**

**James Rika**

**Judge**