



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 448 OF 2017**

**BETWEEN**

**ISAACK MWAISAKA MNYASA.....CLAIMANT**

**VERSUS**

**KENSALT LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Kennedy Ngaira & Associates, Advocates for the Claimant*

*Mogaka, Omwenga & Mabeya, Advocates for the Respondent*

---

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 9<sup>th</sup> May 2017. He states he was employed by the Respondent as a Slitting Machine Operator on 2<sup>nd</sup> January 2013. He was summarily dismissed by the Respondent on 9<sup>th</sup> December 2016. There was no valid reason given to him, justifying the decision. There was no notice. He was paid a daily rate of Kshs. 527, amounting to Kshs. 12,648 monthly. He persistently demanded that the Respondent converts his terms to regular employment. The Respondent threatened to terminate Claimant's employment, if he did not desist from such demands. He prays for Judgment against the Respondent for:-

- a) 3 months' salary in lieu of notice at Kshs. 37,944.
- b) Annual leave over a period of 4 years at Kshs. 50,592.
- c) Overtime at Kshs. 41,506.
- d) House allowance in arrears at Kshs. 91, 065.
- e) Benefits for 4 years worked at Kshs. 25,296.
- f) 12 months' salary in damages at Kshs. 151,776.

Total...Kshs. 389,179.

- g) Damages and aggravated damages.
- h) Reinstatement.
- i) Declaration that the Respondent engaged in illegal and unfair labour practices.
- j) Costs and interest.

2. The Respondent filed its Statement of Response on 4<sup>th</sup> July 2017. Its position is that the Claimant was, if at all employed by the Respondent, a Casual Employee. He was paid terminal dues in the sum of Kshs. 46,384. He does not have further claims against the Respondent. The Claim is frivolous and vexatious. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant testified, and closed his case, on 19<sup>th</sup> November 2018. Plant Manager Ray Rajan, and Human Resource Manager Caleb Kamote Mbuku, testified for the Respondent on 6<sup>th</sup> February 2019, bringing the hearing to a close.

4. The Claimant told the Court he was employed as a Casual Employee. He was told by the Respondent that the Respondent was downsizing. He was not paid notice and never took annual leave. He asked to be employed on regular terms. His request was declined. His Supervisor was abusive. Rajan was his Supervisor. He removed the Claimant from Machine Operation to Cleaning. He was paid terminal dues shown in the Response, at Kshs. 46,384. He signed discharge. There were other Employees whose contracts were terminated on the same day as the Claimant's.

5. Cross-examined, the Claimant confirmed he was paid Kshs. 46,384 as terminal benefits. He received a warning letter from the Respondent alleging that he had fought his Supervisor. He replied denying the accusation. Redirected, the Claimant testified that the Respondent should have placed him on contract after 3 years. He was told that the sum paid by the Respondent to him, was the totality of his terminal benefits.

6. Ray Rajan told the Court that the Claimant refused to work on 24<sup>th</sup> November 2016. Cross-examined, he told the Court he was not present when the incident happened. It was not true that Employees, as a whole, had a problem with Rajan.

7. Caleb Kamote Mbuku told the Court that the Claimant was employed in 2013 as a Casual Employee. He earned a daily wage of Kshs. 527 by the time he left. The Respondent terminated his services alongside those of 3 other Employees, and paid terminal dues. He was paid salary for days worked, notice and leave, added up at Kshs. 46,384. He threatened to beat up his Supervisor. Mbuku called the Claimant and informed him he would be declared redundant, alongside other Employees. He worked in continuity for 1 year. In other years he worked inconsistently. Excess hours worked were compensated. The daily rate included house allowance. His contract was not terminated unfairly.

8. Cross-examined, Mbuku testified that the Claimant joined in 2013 and left in 2016. The Respondent did not exhibit the attendance register. A Casual Employee can be declared redundant. Nothing happens if an Employee works 3 months in continuity. The Witness did not indicate in his Statement filed in Court, that, the Claimant worked intermittently. Termination was based on gross misconduct. Redirected, Mbuku testified that the Claimant confirmed he was paid a daily rate. He did not work in continuity.

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

9. The Respondent admits in its evidence that the Claimant worked for at least 1 year in continuity. This concession settles the argument whether the Claimant was in casual or regular employment, in favour of the Claimant. If he was in employment for at least 1 year in continuity, it cannot be that he was still in casual employment at the time of termination.

10. There is sufficient evidence, not only to conclude that the Claimant was in regular employment, but that he worked from 2<sup>nd</sup> January 2013 to 9<sup>th</sup> December 2016. In fact, the document listed as Number 2, on the List filed by the Respondent on 4<sup>th</sup> July 2017, referenced 'Termination of Services- Casuals' states that the Claimant served for 4 years. Service pay was based on 4 years. How then can it be argued that he was in casual employment, or that he did not have 4 complete years of service on termination?

11. There is no clear reason why the Respondent terminated Claimant's contract of employment. The Respondent gave no reason in the Statement of Response. In the evidence given by the Respondent, various reasons were given. It was alleged that the Claimant threatened to beat up his Supervisor. He refused to work. Mbuku told the Court that he called the Claimant and told the Claimant he would be declared redundant. For reasons to do with discipline, it seems the Claimant was told he would be declared redundant. The Respondent does not allude to economic reasons justifying termination. Redundancy is a no-fault termination ground. The Claimant was nonetheless called by the Respondent, after allegedly refusing to work, and fighting or threatening to fight his Supervisor, and told he would be declared redundant. The Respondent did not show clear and valid reason, or reasons, justifying termination, under Sections 43 and 45 of the Employment Act 2007.

12. Notice was paid for 7 days. There is provision in law which allows Employees under probation, to be paid notice of 7 days. The Respondent seems to have confused the Claimant for a probationary Employee, who would be entitled to 7 days' notice of termination under Section 42 [4] of the Employment Act 2007. The Claimant seeks notice of 3 months. He does not state which provision of the law or clause in his contract, allowed him notice or 3 months, or notice pay of a similar period. He was on regular terms and would be entitled to 1 month notice or 1 month salary in lieu of notice. **He was paid 7 days' notice, and is granted the balance of 23 days' salary in lieu of notice at Kshs. 11,188.**

13. The Claimant has not persuaded the Court on his prayer for reinstatement. Although the remedy is pleaded, the Claimant said nothing about it in his evidence.

14. He has not established that he merits aggravated damages.

15. He worked for 4 years. His record was blemished. He had warning letters. He did not give evidence on how long he reasonably expected to go on working. He presently works in the jua kali [informal sector]. He did not give evidence on his attempt or ability to secure a job comparable to that of Slitting Machine Operator. He was paid terminal benefits in the sum of Kshs. 46,384. **80. The Court grants to the Claimant compensation for unfair termination, equivalent to 3 months' salary, at Kshs. 37,944.**

16. On terminal benefits, pleaded to include overtime, house allowance and unspecified benefits of 4 years worked, the Court notes that the

Claimant was paid a sum of Kshs. 46,384. This included notice, service and annual leave. The Claimant accepted the sum. He signed a document titled 'Settlement Acceptance.' He states in this document, " I have no further claims whatsoever against the said [Employer]." He did not complain at the time he signed this document, that he was owed other terminal benefits. The Court understands him to say in the discharge that he was satisfied with what he received as terminal benefits. His prayer for additional terminal benefits is rejected.

17. No order on the costs.

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

IN SUM, IT IS ORDERED:-

***a) Its declared termination was unfair.***

***b) The Respondent shall pay to the Claimant: notice at Kshs. 11, 188 and equivalent of 3 months' salary in compensation for unfair termination at Kshs. 37,944- total Kshs. 49,132.***

***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 30<sup>th</sup> day of July 2019.**

**James Rika**

**Judge**