



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MALINDI**  
**CAUSE NUMBER 8 OF 2019**

[Previously Cause No. 127 of 2016, E&LRC Mombasa]

**BETWEEN**

**MWACHUPA HARANGA NDURYA.....CLAIMANT**

**VERSUS**

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

*Rika J*

*Court Assistant: Benjamin Kombe*

*Oduor Siminyu & Company, Advocates for the Claimant Federation of Kenya Employers for the Respondent*

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**JUDGMENT**

1. *Ex-parte* Judgment was entered for the Claimant, on 8<sup>th</sup> March 2018. The Claimant was granted equivalent of 12 months' salary in compensation for unfair termination and 1 month salary in lieu of notice, totaling Kshs. 253,136.
2. In a Ruling made on 27<sup>th</sup> July 2018, Judgment was set aside, and the Respondent granted leave to respond to the Claim.
3. The Claim was heard afresh, in the presence of both Parties, on 27<sup>th</sup> June 2019. The Claimant gave evidence, as did Respondent's Human Resource Manager, Ann Wanja Karanja.
4. The Claimant's evidence is that, he worked for the Respondent as a Welder from 2008. He maintained production machines. He was designated Senior Welder. He last earned a monthly salary of Kshs. 20,766.
5. He was in a traffic accident and was injured, on 20<sup>th</sup> February 2015. He was treated at Coast General Hospital. On the 2<sup>nd</sup> day he was advised by the Respondent to seek medical attention at Respondent's appointed healthcare service provider, Avenue Healthcare. He did that and was given 5 days sick off at this facility. This was extended by 5 days. On resumption, the Human Resource Office called the Claimant, asking him why he was working while injured. He was asked to go home and resume when healed. He was out for 3 months. He was paid full salary for the 1<sup>st</sup> 2 months. On the 3<sup>rd</sup> he was paid half salary. He received nothing after this. He was advised by the Respondent this was his entitlement under the law. He did not abscond. In July 2015, he had been recalled to assist in some work with another Colleague. He worked for 1 month and was told there was no more work. After Claimant's Advocates wrote a letter of demand, the Respondent obtained a medical report from Avenue Healthcare. The Doctor recommended the Claimant should have a metal implant. The Respondent was requested to render financial assistance to the Claimant. The Respondent did not offer such assistance but instead alleged that the Claimant had deserted.
6. After the accident, the Claimant returned to work 5 days later, the Claimant testified on cross-examination. He reported to the Human Resource Office and worked 5 more days. The Human Resource Manager told him Human Rights Activists would cause the Respondent problems, if they found him working while injured. He did not include this evidence in his Witness Statement. He went again in July 2015 upon the invitation of the Human Resource Manager. She told the Claimant there was some pending welding work, and the Claimant should look for another Welder, to complete the work. He found another Welder, John. The 2 Welders performed the task. The Claimant was paid

for the work done through a payment voucher. He did not have the voucher in Court. This position is not captured in Claimant's Witness Statement. The Human Resource Manager terminated Claimant's contract, saying the Respondent could not work with an Employee with a broken arm. Redirected, the Claimant told the Court not everything said between him and the Human Resource Manager was in writing. He did not desert. He worked in July 2015.

7. Karanja confirmed that the Claimant was employed by the Respondent as a Welder. He was involved in a traffic accident as stated. He was paid salary for 30 days in March 2015 and 15 days in April 2015. He was not paid salary subsequently. He was asked by the Respondent to go home and recuperate. He returned in July 2015 asking for his salary. He was advised his contract had not been terminated but he should go and recuperate. He did not supply the Respondent with medical reports. He only supplied these on 30<sup>th</sup> September 2015. The Respondent referred him to Avenue Healthcare for 2<sup>nd</sup> Opinion. The Claimant said he did not have the money for implant. He asked for terminal dues to enable him seek further treatment. The Respondent advised it would compute these after the Claimant exhausted his sick leave. It could not continue paying him full salary. Cross-examined, Karanja told the Court the Claimant said he could not work, after he returned from hospital. The Respondent had been writing to the Claimant through his last known address at Mazeras. She did not have the letters. The Claimant was called through his mobile phone number. The Receptionist called him. She was not available as a Witness. The Claimant went to Respondent's Offices in July 2015 to claim unpaid salary. The Respondent wrote to the Labour Office, reporting that the Claimant had disappeared. He brought the 2<sup>nd</sup> medical opinion from Avenue Healthcare to the Respondent. He was advised he could resume after healing. He did not resume. Redirected Karanja told the Court that the Claimant still had a plaster in July 2015. He was not called and assigned any work, in July 2015.

8. At the hearing, the Claimant withdrew prayers 1 and 2 of the Claim- relating to general damages and salary for April to August 2015.

9. The remaining prayers are: 1 month salary in lieu of notice at Kshs. 19,472; 12 months' salary in compensation for unfair termination; costs; and interest.

**The Court Finds:-**

10. The Claimant was employed by the Respondent as a Welder from the year 2008 to 2015. His last gross monthly salary was Kshs. 22,393, as shown in his last pay slips on record.

11. It is accepted that he was injured in a traffic accident in February 2015. The Respondent became aware of the accident, through informal contacts, but also, from the Claimant himself. It was the Respondent who advised the Claimant to seek treatment at the designated service provider, Avenue Health Service.

12. The Respondent also advised the Claimant to stay out, alleging that his being on duty while still nursing a broken arm, would rouse the wrath of Human Rights Activists. The Claimant confirms he was advised by the Human Resource Manager to keep off.

13. The Court does not think it is necessary to examine if the Claimant was entitled to, and paid his salary after April 2015. He has withdrawn the prayer for unpaid salary. Suffice it to say that Section 30 of the Employment Act states that after 2 consecutive months of service, an Employee is entitled to sick leave of 7 days with full pay, and thereafter to sick leave of 7 days with half pay, for each period of 12 consecutive months. The Respondent does not appear to have followed this law. The Claimant received full salary for March, and half salary for April 2015 and no more. Clause 9 of the contract exhibited by the Claimant replicates Section 30 of the Act above. As stated above, there is no prayer for unpaid salary. Nothing turns on the item.

14. The Respondent asked the Claimant to seek treatment at Avenue Healthcare, well before April 2015. It is not conceivable that the Respondent did not have access to medical records, of an Employee who had been directed to the designated Healthcare facility by the Employer. The x-ray report by Dr. Umara is dated 23<sup>rd</sup> February 2015, some 3 days after the accident. Reference to Dr. Umara was made by Avenue Healthcare. It is not conceivable that the Respondent did not have access to Claimant's medical records to assist the Respondent in making an informed decision on how to treat the Claimant. Why would the Respondent write to the Labour Office on 31<sup>st</sup> July 2015, complaining about non-availability of medical evidence from the Claimant's Doctor, and not write to Avenue Healthcare, Respondent's own designated service provider?

15. There is believable evidence from the Claimant that he was called for a month-long assignment by the Respondent, in July 2015. He did this assignment with a Colleague. In its letter of 7<sup>th</sup> September 2015, the Respondent acknowledged that the Claimant had been to Respondent's premises in July 2015. Again the Respondent asked the Claimant's Advocates to make available Doctor's evidence, to enable the Respondent account for the period the Claimant was away. The letter was not copied directly to Avenue Healthcare. There was no letter seen by the Court, from the Respondent to Avenue Healthcare, calling for medical records of the Claimant. There is however a letter addressed to 'whom it may concern' from Mvita Healthcare, advising that the Claimant should be retired on medical ground. The letter is dated 30<sup>th</sup> September 2015. Another report is dated 14<sup>th</sup> October 2015, from Avenue Healthcare, specifically addressed to Ann Karanja. The report confirms that the Claimant was treated at the facility on 22<sup>nd</sup> February 2015. It was recommended he has insertion of screws on his right arm, which was not done. It was recommended the Claimant gets an implant to help his fracture heal completely. Once healed, he would be able to resume duty. There are 2 medical reports, exhibited by the Respondent, the 1<sup>st</sup> recommending retirement, the other recommending further treatment to enable the Claimant resume.

16. From there things got murky. The Claimant states he was not afforded financial assistance by the Respondent, to enable him get an implant. The Respondent told the Court that the Claimant asked to be paid terminal benefits, to enable him get treatment.

17. It is unclear why at this point reference was made to terminal benefits. Was there a decision made to terminate? And if the Claimant asked to be paid his dues, to enable him to undergo further treatment, was this considered by the Respondent? The Claimant had worked for 7 years.

18. The Court is persuaded on the balance of probability, and upon careful consideration of Respondent's conduct, from February 2015 to October 2015, that the Respondent was no longer patient to see the Claimant go through further treatment, and possibly resume duty. There was a desire to do away with the Claimant. There was no attempt made by the Respondent to extend any degree of reasonable accommodation to the Claimant. Ultimately, termination was at the instance of the Respondent. The Claimant did not desert. The Respondent knew all along that he was under treatment, at a healthcare facility designated by the Respondent. The last medical report suggested there was possibility of the Claimant resuming duty. The Respondent did not take further action after this medical report, but kept faith in its position that the Claimant was a deserter, because he had not healed, to enable him resume. The Claimant was left to his own devices, without a last word about his contract, from the Respondent. His inability to meet the cost of further treatment, and heal sufficiently to return to work, was used against him by the Respondent to end his contract employment. He left employment with a broken limb, a broken spirit and without a coin in terminal benefits, after years of toil. The Respondent did not show valid reason justifying termination, as required under Section 43 of the Employment Act 2007.

19. The Claimant worked for 7 years and was 44 years at the time of the accident. His contract had repeatedly been renewed, and there is no reason to show it would not have been renewed, except for the accident and injury. His employment record was unblemished. He left employment because he was injured. He was not reasonably accommodated.

20. ***He merits and is granted the prayer for 12 months' salary in compensation for unfair termination at Kshs. 268,716.***

21. ***He is allowed 1 month salary in lieu of notice at Kshs. 22,393.***

22. ***Costs to the Claimant.***

23. ***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 equivalent of 12 months' salary in compensation for unfair termination at Kshs. 268,716; and 1 month salary in lieu of notice at Kshs. 22,393 – total Kshs. 291,109.***

***b) Costs to the Claimant.***

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

**Dated and delivered at Mombasa this 31<sup>st</sup> day of October 2019.**

**James Rika**

**Judge**