



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MALINDI**  
**CAUSE NUMBER 12 OF 2018**

[Previously E&LRC Mombasa, Cause No. 716 of 2017]

**BETWEEN**

**ROBERT NZAI.....CLAIMANT**

**VERSUS**

**MZURI SWEETS LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Omollo Onyango & Company Advocates for the Claimant*

*Federation of Kenya Employers for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 5<sup>th</sup> September 2017. He states he was employed by the Respondent as a Casual Labourer around January 2010. He subsequently was taken in as a Machine Operator, earning Kshs. 253 daily. He was placed on 3 months' contract in 2013, which was renewed without fail, until 15<sup>th</sup> November 2016. At this time his salary was Kshs. 9,400 monthly.

2. On 14<sup>th</sup> November 2016, the Bunch Rapper Machine malfunctioned and eventually stopped working. Repairs were done by Respondent's Technicians, to no avail. The following day, it was alleged by Respondent's Director, that it was the Claimant who damaged the Machine. The Director instructed the Claimant to hand over his uniform and leave. Before leaving, the Claimant was hastily issued a letter to show cause, why he should not be dismissed. He responded on 16<sup>th</sup> November 2016 but no action was taken. He prays the Court to declare that termination was unfair and unlawful, and grant other orders as follows:-

- a) Salary for 15 days worked in November 2016 at Kshs. 4,700.
- b) 1 month salary in lieu of notice at Kshs. 9,400.
- c) Annual leave of 3 years at Kshs. 28,200.
- d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 112,800.

Total...Kshs. 155,100.

e) Costs.

f) Any other suitable relief.

3. The Respondent filed its Statement of Response on 1<sup>st</sup> December 2017. It is conceded that the Claimant was engaged initially as a Casual Employee. This was later converted into fixed- term contract of 3 months. His last contract was for the period 31<sup>st</sup> August 2016 to 30<sup>th</sup> November 2016.

4. On 14<sup>th</sup> November 2016, a Machine operated by the Claimant broke down. The breakdown lasted for 2 days. The Respondent felt this was occasioned by the Claimant. It resulted in loss of man hours and financial loss to the Respondent. The Claimant was asked to show cause why he should not face disciplinary action, through a letter dated 16<sup>th</sup> November 2016. He responded the same date, denying liability. He was invited in writing, to attend disciplinary hearing in the company of his Representative, on 22<sup>nd</sup> November 2016. Invitation was made in the presence of the Shop Steward, but the Claimant declined to sign the letter, or receive a copy, compelling the Shop Steward to sign on his behalf. He did not show up for the hearing. The Respondent wrote to the Labour Office on 26<sup>th</sup> November 2016, expressing its intention to declare the Claimant a deserter. His contract expired on 30<sup>th</sup> November 2016 and could not be renewed in his absence. He had warning letters in his record. He was paid salary for the month of November 2016 as shown in the relevant pay slip. His contract was not terminated by the Respondent, and he does not merit notice pay therefore. He sold his annual leave days, as shown in his pay slips. His contract expired while under disciplinary process, and he does not merit compensation for unfair termination.

5. The Claimant, and Respondent's Human Resource Manager George Omondi Ong'any, gave evidence on 24<sup>th</sup> June 2019, when hearing closed. They both replicated the contents of the Parties' Pleadings in their evidence.

6. Cross-examined, the Claimant told the Court he was paid for days worked in November 2016. He was not issued notice of the disciplinary hearing. Abraham Mwambalu was the Shop Steward. The Claimant never met Mwambalu, and was never notified about the disciplinary hearing. The Claimant told the Court he seeks annual leave pay over a period of 6 years worked. His last contract was for 3 months, ending December 2016. He did not know how much leave would accrue over the 3 months. He confirmed on redirection that he received the letter to show cause, and responded on 19<sup>th</sup> November 2016, not 16<sup>th</sup> November 2016. He reiterated that he seeks leave over a period of 6 years.

7. Ong'any told the Court that the Claimant last clocked biometrically on 18<sup>th</sup> November 2016. He cannot have left employment on 15<sup>th</sup> November 2016 as claimed. He used to sell his annual leave days. Cross-examined, Ong'any told the Court that the Claimant was given a chance to be heard, and secondly, his contract came to an end. He deserted, and was not unfairly dismissed. The Respondent wrote to the Labour Office expressing its intention to declare the Claimant a deserter. The Claimant stated in his response to the letter to show cause, that he did not sabotage the Machine. He received the letter to show cause, but declined to receive and sign the notice of disciplinary hearing. The Shop Steward signed. The Claimant walked out of the Human Resource Office, and refused to sign. He clocked in on 18<sup>th</sup> November 2016, but did not clock out. Failure to clock out was another disciplinary lapse. Redirected, Ong'any told the Court that the Respondent had not declared the Claimant guilty; the Claimant simply refused to submit to the disciplinary hearing.

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

8. The Claimant was employed by the Respondent on 3 months' contracts, the last which commenced on 31<sup>st</sup> August 2016, to expire 30<sup>th</sup> December 2016.

9. The contract did not mature. On 14<sup>th</sup> November 2016, the Claimant was suspected of sabotaging the Machine assigned to him. It broke down for 2 days and could not be mended.

10. The Claimant alleges he was called by the Respondent's Human Resource Department the following day, 15<sup>th</sup> November 2016, directed to the Director's Office, where the Director alleged the Claimant had sabotaged the Machine. The Claimant protested his innocence. He was instructed by the Director to surrender his work uniform and vacate the premises. He alleges also, that he was issued a letter to show cause, on 16<sup>th</sup> November 2016, which he was required to respond to, the same date. He responded, but received no further instruction. His contract was terminated, according to paragraph 5 of his Statement of Claim, on 15<sup>th</sup> November 2016. He was not given a chance to defend himself, and did not receive the notice of disciplinary hearing.

11. This account by the Claimant is less than truthful. On redirection by his Advocate, the Claimant first stated that he replied to the letter to show cause, on 16<sup>th</sup> November 2016, the same date it issued. He then corrected his evidence, saying it was on 19<sup>th</sup> November 2016. Why would the Respondent be asking the Claimant to show cause, after he had been ordered by the Director to return his uniform and make himself scarce? The biometric register shows he was at work until 18<sup>th</sup> November 2016, when he clocked in and did not clock out. This evidence strongly support's Respondent's position that the Claimant was not dismissed by the Respondent on either 15<sup>th</sup> or 16<sup>th</sup> of November 2016, as variously alleged by the Claimant. The Claimant appears to have intended to mislead the Court, in adopting his position that he was hastily dismissed, without a reasonable opportunity to be heard.

12. Respondent's annexure 3 is a notice of disciplinary hearing, issued upon the Claimant, dated 19<sup>th</sup> November 2016. It is signed by Abraham Mwambalu, Shop Steward. The Claimant did not sign. The Respondent alleges he declined service and stormed out of the Human Resource Manager's Office.

13. The Court is persuaded by the evidence of the Respondent. If by any chance the Court is wrong in its belief that the Claimant was served with the notice and declined service, the requirement of procedural fairness was met, by service of the notice upon the Shop Steward.

14. Shop Stewards assist and represent Employees at grievance and disciplinary proceedings. They monitor compliance by Employers with the requirements of procedural fairness at the disciplinary hearing. They are Employees' watchdogs at the workplace. If the notice was served upon the Shop Steward, it was as good as service upon the Claimant, just as much as service upon an Advocate instructed by a Client, is proper service. The Shop Steward would have been expected to share the notice with the Claimant.

15. It is the Court's view that the Claimant declined the opportunity to be heard. The allegations against him were therefore not tested and found untrue, through a disciplinary hearing.

16. His contract was set to expire on 30<sup>th</sup> December 2016. It was not possible for the Respondent to renew the contract of an Employee who had declined to subject himself to a disciplinary hearing, which was set in motion a month before the expiry date. It is unlikely that the Claimant's contract would have been renewed after 30<sup>th</sup> December 2016, without the Claimant having cleared himself through the disciplinary hearing that was put at his disposal.

17. The Claimant admits he was paid his salary for November 2016. His pay slips show annual leave was paid. He said nothing of annual leave captured to have been paid in his pay slips. The Respondent did not dismiss the Claimant, or terminate his contract. He was invited to disciplinary hearing, rejected invitation, and left employment about a month before he was set to formally leave. There is no justification for payment of compensation and notice. ***This Claim is dismissed with no order on the costs.***

**Dated and delivered at Mombasa this 1<sup>st</sup> day of November 2019.**

**James Rika**

**Judge**