



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 127 OF 2016**  
**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 [FKE] for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim, on 15<sup>th</sup> February 2016. He states he was employed by the Respondent Company as a Welder, on 2<sup>nd</sup> April 2008. He sustained injuries through a road accident on 20<sup>th</sup> February 2015. He was treated at various Health Institutions with the knowledge of the Respondent. He states that the Respondent removed him from the payroll in April 2015. His last salary was Kshs. 19,472 monthly. Attempts by the Claimant to resume duty were rebuffed by the Respondent. He was fully healed 8 months after the accident. He considered his contract to have been unfairly terminated, and prays for Judgment against the Respondent as follows:-

- a. General Damages.
- b. 1 month salary in lieu of notice at Kshs. 19,472.
- c. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 233,666.
- d. Salary from April 2015 to August 2015 at Kshs. 77,888.
- e. Costs of the Claim and interest thereon.

2. The Respondent filed its Statement of Response on 10<sup>th</sup> July 2017. It is conceded the Claimant was employed by the Respondent. He suffered injuries as a result of a road accident which took place on or around 20<sup>th</sup> February 2015. The Respondent continued to pay his salary up to mid- April 2015 despite the fact that the Claimant did not supply the Respondent with a Certificate of Incapacity, as required under Section 30 of the Employment Act 2007. In July 2015, he reported to work but was unable to account for his prolonged absence from work. The Respondent reported Claimant's absence to the Labour Office. The Respondent waited for the Claimant to supply Medical Report to the Respondent. Instead, the Claimant issued a demand letter through his Advocates, before initiating the Claim. On 30<sup>th</sup> September 2015, the Respondent received a letter from the Sub-County Medical Officer advising the Respondent that the Claimant was incapacitated and should be retired on medical ground. The Claimant supplied the above-stated letter to the Respondent. The Respondent sought second medical opinion from Avenue Healthcare. The opinion was that the Claimant would be in a position to resume duty once his right arm fracture healed. To-date, the Claimant has not resumed work. The Respondent did not terminate his contract of employment. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

3. The matter was scheduled for hearing by the Advocates for respective Parties, on 27<sup>th</sup> July 2017. Hearing was set for 5<sup>th</sup> February 2018. The Respondent and its Advocates did not attend Court on the hearing date. The Claimant gave evidence and rested his case on 5<sup>th</sup> February 2018, when in the unexplained absence of the Respondent, proceedings closed.

4. The Claimant restated his Evidence, his employment history with the Respondent, and his terms and conditions of employment, as outlined in his Pleadings and Witness Statement. He exhibited before the Court pay slips, medical treatment records from various hospitals, and a contract of employment dated 9<sup>th</sup> June 2010. He reiterated that the Respondent had promised to recall him after he had healed. He was never recalled. He was able to use his hands, and was ready to continue working. The Respondent did not recall him.

**The Court Finds:-**

5. The Claimant has, through his unchallenged evidence convinced the Court he was employed by the Respondent as a Welder, on 2<sup>nd</sup> April 2015. He was involved in a public vehicle road accident on 20<sup>th</sup> February 2015, occasioning the Claimant various injuries. He was treated at different hospitals. The Respondent was aware about Claimant's accident, injuries and treatment, but stopped paying Claimant's salary mid-April 2015. a Medical Report from Mombasa County Medical Officer Dr. Chiwaya, dated 30<sup>th</sup> December 2015, alleged the Claimant was impaired to a degree where he could no longer work, and advised the Respondent to retire the Claimant on medical ground. A second opinion from Avenue Healthcare was that, the Claimant would be able to resume duty once his fracture had healed.

6. The Respondent states it did not terminate the Claimant's contract, and that the Claimant absconded, and was not able to explain his absence to the Respondent when called upon to do so.

7. This statement by the Respondent is unpersuasive. The Respondent stopped payment of Claimant's salary in mid-April, just 1½ months after the Claimant was injured. Stoppage of salary effectively marked the end of Claimant's contract with the Respondent. The Respondent repudiated the contract, and showed clearly it was no longer willing to continue employing an impaired Welder.

8. It similarly is unconvincing to allege that the Claimant absented himself, and was not able to account for his absence. The Respondent was aware from day one that the Claimant was involved in an accident, and was injured. The Respondent in fact directed the Claimant to Avenue Healthcare. Even after the Respondent received second medical opinion on the Claimant's ability to go on working, there is nothing to show the Respondent made any attempt at recalling the Claimant. His salary was not reinstated. The Respondent effectively terminated Claimant's contract mid-April 2015, by stopping payment of salary.

9. Termination was not based on fair and valid reasons under Section 43 and 45 of the Employment Act.

It did not meet standards of fairness of procedure, under Section 41 and 45 of the Employment Act 2007. It was unfair. ***The Claimant is granted equivalent of 12 months' salary in compensation for unfair termination at Kshs. 233,664.***

**10. The Claimant is allowed the prayer for 1 month salary in lieu of notice at Kshs. 19,472.**

11. His prayer for salary arrears between April and August 2015 was not understood by the Court. He did not work after mid-April 2015, when his salary was stopped. There was no act of termination discernible in the month of August 2015. Why would he claim salary up to August 2015, and not any other month after August 2015? The prayer for arrears of salary is declined.

12. The Claimant has not established his prayer for general damages. Compensation has been granted to the Claimant as a measure of reparation for economic injury sustained, as a result of unfair termination. He has not shown that he merits additional reparation by way of general damages.

**13. He is granted costs and interest at 14% per annum from the date of Judgment till payment in full.**

IN SUM, IT IS ORDERED:-

**a. It is declared termination of the Claimant's contract was unfair.**

**b. The Respondent shall pay to the Claimant equivalent of 12 months' salary at Kshs. 233,664 and 1 month salary in lieu of notice at Kshs. 19,472- total- Kshs. 253,136.**

**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 8<sup>th</sup> day of March 2018.**

**James Rika**

**Judge**