



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR  
RELATIONS COURT AT MOMBASA  
CAUSE NUMBER 305 OF 2016

BETWEEN

VITALIS OTIENO WANGA.....CLAIMANT

VERSUS

FARMGATE AFRICA [EPZ] LIMITED, KING'ORANI

[EPZ] CHANGAMWE.....RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Matete Mwelese & Company Advocates for the Claimant*

*Daly & Inamdar Advocates for the Respondent*

---

**JUDGMENT**

1. The Claimant filed his Statement of Claim, on 15<sup>th</sup> April 2016. He states he was employed by the Respondent Company as a Carpenter, Aluminum Works, on 10<sup>th</sup> December 2014, earning a daily rate of Kshs. 1,500, which was paid weekly. In a month, he earned Kshs 45,000. He was granted permission by Construction Manager Zaid Jassat from 12<sup>th</sup> March 2015 to 19<sup>th</sup> March 2015 to take his son to hospital. Upon return on 19<sup>th</sup> March 2015, he was told by Jassat that his contract had been terminated over his absence from work. He was later denied access to the workplace by Respondent's Guard. The Claimant's Son died in hospital on 17<sup>th</sup> May 2015. There was no notice, or valid reason, preceding termination. The Claimant asks the Court to find termination was unfair, and grant him the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 45,000.
- b) Pro-rata annual leave at Kshs. 12,000.
- c) 12 months' salary in compensation at 540,000.
- d) Unlawful deduction of wages of 45 days at Kshs. 22,500.
- e) Overtime hours at Kshs. 90,000.
- f) Unpaid N.S.S.F deductions at Kshs. 800.

**Total...Kshs. 710,300.**

2. The Respondent filed its Statement of Response, on 18<sup>th</sup> May 2016. Its position is that the Claimant was first employed by the Respondent

on casual terms, on or about 10<sup>th</sup> December 2014. He earned Kshs. 1,500 per day, which was later reduced to Kshs. 1,000 daily, on account of diminished work. Reduction was mutually agreed. On or about 11<sup>th</sup> May 2015, an unknown lady walked into Respondent's premises accompanied by a Child. She introduced herself as Claimant's Wife. She wanted to have sensitive information from the Respondent, relating to Claimant's salary. The Claimant saw the Lady, left work later in the day saying he was taking his Child to hospital. The Respondent did not see him again. He is not entitled to the prayers sought.

3. The Claimant gave evidence on 23<sup>rd</sup> November 2016 and 18<sup>th</sup> December 2017, when he rested his case. By consent of the Parties, the Statement filed by Respondent's Witness, Judith Kosgey, was admitted as Respondent's evidence, and Respondent's case closed on the same date as that of the Claimant's. Parties confirmed filing of Closing Submissions, at the last mention on 8<sup>th</sup> March 2018.

4. The Claimant confirmed he was initially employed as a Casual Employee on 10<sup>th</sup> December 2014. He left employment on 12<sup>th</sup> March 2015. He asked Jassat for permission to attend to his ailing Son, on 12<sup>th</sup> March 2015. He returned to work on 19<sup>th</sup> March 2015, to inform Jassat that his Son was getting worse. He found Security Guards had been instructed to lock him out. He saw Jassat on 20<sup>th</sup> March 2015, he was advised his contract was terminated on 12<sup>th</sup> March 2015 for absenteeism. The Claimant was paid a daily rate of Kshs. 1,000. Initially he was paid a daily rate of Kshs. 1,500. He did not agree to be deducted. It is not true that work had diminished. Another Carpenter was recruited in Claimant's place. The Claimant's Wife was expectant at the time. His Son died as shown in the exhibited burial permit. His Wife delivered 3 days after his Son died. She was not in a position to give care to their Son. The Claimant worked from 7.30 a.m. to 7.00 p.m. The work register attached to the Statement of Response, was done by Judith Kosgey. Claimant's name is not in the register of 12<sup>th</sup> March 2015 because he had taken his Son to hospital. The Claimant was not at work on 11<sup>th</sup> March 2015. Respondent states as much, while at the same time, it alleges a Lady alleging to be Claimant's Wife visited the workplace on this date. It is alleged that the Claimant left the workplace on the same date, never to return. The Claimant reported dispute to the Labour Office. The Labour Office wrote to the Respondent demanding settlement. The Respondent ignored conciliation process.

5. Cross-examined, the Claimant restated he was employed in December 2014. He was paid weekly. He sought permission to take his Son to hospital. His last day at work was 12<sup>th</sup> March 2015. He never went on annual leave. Complaint at the Labour Office indicates termination was on 13<sup>th</sup> March 2015. This must have been an error. Redirected, the Claimant told the Court it was not mandatory to seek permission in writing. He was duped his terms would be converted to permanent terms, when his salary was reduced. He signed the register on 11<sup>th</sup> March 2015 in the morning and left.

6. Judith Kosgey states she is a Supervisor with the Respondent Company. She confirms the contents of the Statement of Response, summarized at paragraph 2 above. She explains that the Claimant left, after a Lady who introduced herself as Claimant's Wife visited the workplace, and enquired from Judith, about Claimant's daily wage. The Claimant never returned to work after this, despite the Respondent's attempts to get the Claimant back to work. He abandoned his post. The Claimant reported the dispute to the Labour Office. A conciliation meeting was called. A Representative of the Respondent attended the meeting. The Claimant did not show up. His Claim has no merit.

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

7. The Claimant was employed by the Respondent as Carpenter, Aluminum Works, on 10<sup>th</sup> December 2014. He initially earned a daily rate of Kshs. 1,500 which was paid weekly. He was employed as a Casual Employee. His daily rate was later reduced to Kshs. 1,000, which was the rate applicable at the time the Claimant left employment, on 12<sup>th</sup> March 2015.

8. There is no agreement on the circumstances of reduction of Claimant's pay from Kshs. 1,500 daily to Kshs. 1,000. The Claimant states he was duped that he would be employed on regular terms, once he accepted Kshs. 1,000 per day. The Respondent states work had diminished, necessitating the lower rate of pay.

9. The Respondent did not prove that the Claimant was consulted, and consented to, the reduction in the rate payable to him. There is no support for the position that work had diminished to justify pay cut. The Claimant continued to perform the same role from the date of employment. The Court agrees with the Claimant that reduction was not legally permissible. The correct rate of pay for purposes of this Claim should therefore be a daily rate of Kshs. 1,500.

10. There was no evidence that the Claimant worked excess hours. He did not supply the Court with details of the hours worked in excess. He did not show that he was authorized or directed to work excess hours. He does not specify how many excess hours he worked, and at what hourly rate he seeks compensation. He just quotes an amount of Kshs. 90,000 without showing the Court how the sum has been worked out and arrived at. The prayer for overtime pay is declined.

11. The Claimant worked for a period of about 4 months- from December 2014, to March 2015. He had not completed 12 consecutive months, to be deemed to be in annual leave-earning period. Pro-rata annual leave or any other annual leave is not available to the Claimant, as he had not met the qualifying period. Pro-rata annual leave would only be earned, proportionate to a leave earning period.

12. The Respondent was not able to show the reason or reasons justifying termination. The idea that the Claimant deserted work, after a certain Lady alleging to be his Wife visited the workplace, and enquired about Claimant's pay, sounds to the Court, like a classic cock and bull story. Why would an Employee abandon employment simply because his Wife has visited his workplace?

13. The narrative given by the Claimant sounds more persuasive. He exhibited a burial permit relating to his Son. His Son died on 17<sup>th</sup> May 2015. It is believable that he was unwell on the 12<sup>th</sup> March 2015, the date the Claimant states he asked for permission to attend to his Son. Permission was granted by Jassat. Upon return on 19<sup>th</sup> March 2015, the Claimant expected to inform Jassat that his Son's health was deteriorating. The Respondent knew about its Employee's domestic misfortune, but instead of being compassionate, the Respondent dealt with the Claimant hardheartedly. The result was that the Claimant's career with the Respondent was cut short in its infancy.

14. The Court is persuaded termination was instigated by the Respondent. It was not based on valid reason or fair procedure under Sections 41, 43 and 45 of the Employment Act 2007. The Claimant having worked for only 4 months however, cannot expect compensation the equivalent of 12 months' salary. He had worked for one-third of 12 months. **He is allowed 1 month salary in compensation for unfair termination at Kshs. 1,500 x 26 working days = Kshs. 39,000.**

15. **He is allowed a similar amount of Kshs. 39,000 in notice pay.**

16. There is no record from the N.S.S.F, showing Claimant's membership, and the status of his account, to enable the Court issue any orders relating to N.S.S.F.

IN SUM, IT IS ORDERED:-

**a) Termination was unfair.**

**b) The Respondent shall pay to the Claimant compensation for unfair termination the equivalent of 1 month salary at Kshs. 39,000 and notice pay of a similar amount, total Kshs. 78,000.**

**c) There is no prayer for costs and interest, and there shall be no order in that regard.**

**Dated and delivered at Mombasa this 6<sup>th</sup> day of July 2018.**

**JAMES RIKA**

**JUDGE**