



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.250 OF 2016**

**BENARD OGEMBO OBWOCHA.....CLAIMANT**

**VERSUS**

**JOHNSON MATHENGE T/A SUE GRAIN MILLERS.....RESPONDENT**

**JUDGEMENT**

The claimant filed the Memorandum of Claim on 18<sup>th</sup> July, 2016. The respondent was served and entered appearance on 9th November, 2016.

No defence was filed.

Parties attended to take hearing directions on 13<sup>th</sup> December, 2016 when the respondent was served with notice and returns filed to confirm service, but there was no attendance.

On 27<sup>th</sup> January, 2017 the court noted the respondent had been served with notice to attend but remained absent and therefore directed the claimant to proceed with formal proof of his case as no defence had been filed.

The claimant was employed by the respondent in March, 2007 in the position of cleaning maize and loading in sacks and staking in the stores at a wage of Kshs.600.00 per week. The claimant would be at work from 6.30 am to 8pm each day from Monday to Saturday and was never compensated for the overtime work. During the duration of employment the claimant was not allowed annual leave or paid in lieu thereof.

The claimant was employed on oral terms and was not issued with any payment statements or the entire duration of employment. Over time, the wages were increased with the claimant last earning Kshs.2, 200.00 per week.

On 19<sup>th</sup> April, 2016 the respondent's customers came to the business seeing to buy 73 bags of maize. Each bag was 90kgs each. The claimant measured 78 bags of 90kgs each and this error was only noted after the customer had left. The claimant was directed by the respondent to call the customer and ask for the return of the extra 5 bags or a payment thereof. As this was at the close of day the claimant called the customer the following day and the balance was paid for.

Despite the customer paying for the difference in 5 bags of maize, the respondent demanded that the balance had been for 6 bags and required the claimant to pay for the same. The claimant was directed to pay kshs.2, 250.00 and then followed and dismissed the claimant. The claimant pleaded to keep his employment noting for over 10 year he had served diligently without any incident, but the respondent did not oblige. Such resulted in unfair termination of employment.

The claimant is seeking his due underpayments at Kshs.514, 892.10; notice pay, overtime worked, payment for work during public holidays, payment for due annual leave and compensation for unfair termination of employment.

The claimant testified in support of his claims.

The claimant also filed his written submissions.

**Determination.**

Despite the respondent not filing defence and failing to attend at the hearing, the claims made by the claimant shall be assessed on their merits based on the pleadings, the evidence and the applicable law.

The claimant testified that on 19<sup>th</sup> April, 2016 while in the course of his duties, he erroneously caused to be issued 5 extra bags of maize weighing 90kgs to a customer of the respondent. Upon discovery of this error, the claimant was directed to call the customer and seek a return and or payment of the extra 5 bags of maize which he did and the customer accepted the same and paid. The claimant was however required to pay for an extra 1 bag of 90kgs at a cost of Kshs.2, 250.00 and to which he protested noting that the loss had been for 5 bags and not for 6 bags of maize. The customer who had been issued with the extra 5 bags had made a payment for the same via Mpesa to the respondent.

Section 44(4) of the Employment Act, 2007 allows an employer to summarily dismiss an employee for careless and negligent performance of duty. Section 44(4) (c) provides as follows;

*(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*

The claimant admits that indeed on 9<sup>th</sup> April, 2016 he made a mistake and issued a customer with extra goods. This was only noticed by the respondent at the close of business and the claimant directed to recall the same or have the customer pay for the extra goods.

The claimant, having been at work with the respondent for a period of over 9 years undertaking the same duties should have been conversant with his tasks and avoided such careless and negligence. The respondent as the employer had the right in law to dismiss the claimant.

The claimant was called to explain how the loss had occurred and by being directed to call the customer and ask for the payment of the extra bags of maize, I take it the respondent put into account the provisions of section 41(2) of the Employment Act, 2007. The claimant was given a hearing and made to make good for his mistake in a matter that justified summary dismissal.

Even where the respondent had the right to dismiss the claimant by summary action, the claimant was entitled to his terminal dues for work done and benefits accruing as at the time of his dismissal.

On the claims for underpayments, without defence and any submissions of work records by the respondent in terms of section 10(7) and 74 of the Employment Act, 2007 and the computations of the underpayments being based on the Wage orders applicable to the claimant these shall be addressed on their merits.

The claimant held duties of cleaning, loading and staking maize with the respondent. Such general duties under the Wage orders entitled the claimant to a daily wage of kshs.349.50 and a monthly wage of kshs.6, 896.15. The computations done setting out that the dues owing relates to an underpayment of kshs.514, 892.10 is premised on the wrong foundation. It is however clear to the court that since his employment in March, 2007 the claimant was underpaid.

The matter shall be placed before the County Labour Officer for computation of dues to the claimant as a general labourer with the respondent for the duration of employment.

Such assessment and computation shall also factor the non-payment of leave days due over the years. Service pay is also due to the claimant on the basis that there is no pay statement issued to him to confirm compliance with the provisions of section 35 of the Employment Act, 2007.

The figures accounted for in underpayment shall apply in the computation of the overtime hours worked.

Work during public holidays is well chronologised and shall be computed accordingly.

On the claim for gratuity, such is only due through a private treaty, agreement or in a contract of employment as part of the work terms. Gratuity payment is not similar to service payment which is well addressed under section 35 of the Employment Act, 2007.

**Accordingly, the matter herein is referred to the County Labour Officer, Nakuru for the computation of the dues owing to the claimant from March, 2007 to April, 2016 as a General Worker for the underpayments over the years; the overtime dues; annual leave; and public holidays. The claims for gratuity, notice pay and compensation are dismissed noting summary dismissal was justified. A report shall be filed on the computation in 30 days. No orders to costs.**

**Dated and delivered at Nakuru this 3<sup>rd</sup> day of October, 2018.**

**M. MBARU**

**JUDGE**

In the presence of: .....