



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT MOMBASA**

**CAUSE NUMBER 269 OF 2013**

**BETWEEN**

**HESBON MOSE.....CLAIMANT**

**VERSUS**

**CIVICON LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mathew Nyabena & Company Advocates, for the Claimant*

*Munyao, Muthama & Kashindi, Advocates for the Respondent*

**JUDGMENT**

**Pleadings & Evidence**

1. The Claimant filed his Statement of Claim on 21<sup>st</sup> August 2013. He filed Amended Statement of Claim, on 30<sup>th</sup> October 2013. Lastly the Claimant filed Further Amended Statement of Claim, on 10<sup>th</sup> February 2016.
2. He avers he was employed by the Respondent as an Accountant, between 2004 and May 2012. He worked at Respondent's sites in Lokichar, South Sudan [SS], and in the Democratic Republic of Congo [DRC].
3. It was agreed between the Parties that the Claimant would be paid a monthly salary in US Dollars. He would receive basic salary of US Dollars 1,100, and an allowance of US Dollars 400- total US Dollars 1,500.
4. The Claimant states while he was in South Sudan, there was a discrepancy in conversion of the SS Pound, to US Dollar, effectively lowering the Claimant's salary to US Dollars 364.29.
5. The Claimant later was moved to the DRC. It was agreed he would be paid a net amount of US Dollars 1,500. This was reduced to US Dollars 743 without explanation. The Respondent was supposed to pay taxes directly to the authorities. The Claimant was to receive his entire salary free of any tax deduction.
6. When the Claimant returned to Mombasa and attempted to resolve the matter with the Respondent, his contract was immediately terminated.
7. His position is that termination was unfair. No letter of termination issued. He was not heard in accordance with Section 41 of the Employment Act 2007. He prays for Judgment against the Respondent, in the following terms:-
  - a. Underpaid salary for 19 months in Maridi SS at USD 1,100.
  - b. Refund in Maridi SS at USD 1,100.
  - c. Unpaid compulsory resting days worked in Maridi SS at USD 6,160.

- d. Claim against exchange rate in Rumbek SS at USD 3,279.
- e. Overtime worked in Yambio, Ezo, Yiral, all in SS, at USD 16,500.
- f. Underpayment in DRC at USD 5,285.
- g. Unpaid salary in the month of April in DRC USD 1,500.
- h. Unpaid annual leave of 11 months in DRC at USD 706.
- i. Travelling expenses from DRC to Kenya at USD 413.
- j. Service pay for 4 years worked outside Kenya, 2009-2012 at USD 2,640.
- k. 3 months' salary in lieu of notice at USD 3,000.
- l. Compensation equivalent of 12 months' salary at USD 13,200.

Total...USD 65,125.

- m. Certificate of Service to issue.
- n. Costs and Interest.

8. The Respondent filed its Response on 11<sup>th</sup> November 2013. It also filed a Reply to Further Amended Statement of Claim, on 10<sup>th</sup> February 2016. It is conceded that the Claimant was employed by the Respondent. He worked on contracts of employment, dated 1<sup>st</sup> May 2004, 1<sup>st</sup> October 2010 and 5<sup>th</sup> July 2011.

9. The contract for SS is dated 1<sup>st</sup> October 2010. Remuneration was denominated in SS currency, not USD as pleaded by the Claimant. The claimant was paid what was agreed. The contract terminated by way of lapse of time.

10. His stint in DRC was brief. Remuneration under the contract dated 5<sup>th</sup> July 2011, was in Kshs. not USD. The Respondent cannot be held liable for any foreign exchange losses, if any was sustained by the Claimant. He was paid what was given in his contract. He was not promised that his remuneration would be USD 1,500.

11. The Claimant's monthly remuneration was not reduced. If there was reduction, it was consensual based on reduction in the workload.

12. Termination was in accordance with the contract of 5<sup>th</sup> July 2011, which required notice of 1 month. The entire Claim lacks merit. The Respondent prays it is dismissed, with costs.

13. The Claimant gave evidence in part, on 10<sup>th</sup> December 2015. He was stood down upon his own request, and granted leave to amend his Claim. Thereafter the Parties sought adjournments for a variety of reasons. The matter was scheduled to be heard further on 22<sup>nd</sup> November 2018. The Court was asked to adjourn hearing to next year 2019, because Witnesses were held up in DRC. The Court ordered proceedings closed, and the Claim considered and determined under Rule 21 of the Employment and Labour Relations Court [Procedure] Rules 2016. The Judiciary is implementing a directive from its leadership, to conclude Claims filed in 2013 and before, by the end of 2018.

14. In his brief evidence on 10<sup>th</sup> December 2015, the Claimant restated the contents of his Pleadings, summarized as above. He clarified that he was first employed by the Respondent at Mombasa on 1<sup>st</sup> May 2004. He worked up to February 2009, before relocating to SS in March 2009. His gross monthly salary at Mombasa was Kshs. 41,000.

15. The salary changed in SS to USD 1,400. The change was not done in writing. He worked under his immediate boss Maria. His salary was deducted while in SS. He was paid USD 800. This was less by USD 600.

16. There were 2 other Accountants in SS - Mugo and Langat. They received the same rate of USD 1,400. The Respondent was involved in construction.

17. The Respondent undertook construction at another site in Rumbek. The Claimant worked for 9 months, from 1<sup>st</sup> October 2010, to 31<sup>st</sup> June 2011. The Claimant was to earn 13,500 USD. The Respondent adopted an exchange rate of 2.65 SS Pound per USD, instead of 3.5 SS Pound per USD, as per bank rate. The effect was that the Claimant's salary was reduced by 364 USD for 9 months.

18. He worked overtime in Nyambio, Nyangri and Eso. He was not compensated. He was to receive USD 11,000. He was promised bonus. It was not paid. He worked 14 hours a day. He came from SS to Mombasa in July 2011. He was sent to DRC on 1<sup>st</sup> November 2011. In DRC he was to be paid USD 1,500. He was instead paid USD 743. He was underpaid in DRC by USD 5,285.

19. He only took annual leave twice while in SS. He was not compensated for unpaid leave. He worked in SS for 2.5 years. He went home

only twice. He prays for annual leave as pleaded.

**Submissions: -**

20. The Claimant restates in his Submissions that he was to be paid in USD while in SS and DRC. The Respondent did not adhere to terms of remuneration and paid Claimant's salary in SS Pounds. He adopts his bundle of documents as exhibits, and his Witness Statement filed on 30<sup>th</sup> October 2013, as part of his evidence.

21. The reason which led to termination was that the Claimant sought to know why remuneration paid in SS and DRC was less than agreed at USD 1,500. Instead of looking into Claimant's grievance, the Respondent terminated his contract. Termination was not based on valid reason, under Section 43 of the Employment Act 2007.

22. He submits that in an e-mail dated 13<sup>th</sup> October 2010, from his immediate Supervisor Maria, it was stated that monthly basic salary was USD 1,100 and monthly allowance of USD 400. A contract exhibited by the Claimant, dated 2<sup>nd</sup> March 2009, shows Claimant's salary was USD 1,400.

23. The Claimant submits he is entitled to a total amount of USD 65,125, which is different from the last figure mentioned in the Further Amended Statement of Claim, at USD 59,683.

24. He prays the Court to find that termination was unfair and unlawful, based on ill-motive, and allow the Claim.

25. The Respondent submits that while in SS, Claimant's remuneration was in SS Pounds. While in DRC, it was to be paid in Kshs. At no time was the Claimant to be paid in USD.

26. There was no reduction in his salary, and if there, it was consensual, based on reduced workload.

27. Termination was in accordance with termination clause, which required notice of 1 month, or payment of 1 month salary in lieu on notice. The contract was not terminated unfairly and unlawfully.

28. The Respondent could not be held liable, for any loss occasioned to the Claimant through currency exchange rates. The Claimant's stint in DRC was in the course of his employment, with remuneration fully paid in Kshs.

29. The Respondent adopts Statements from the following Witnesses, as part its evidence – Respondent's Accountants Anthony Mutsu Zomolo and Lewis Saha Mukuzi. The Respondent also adopts its documents, filed before the Court, as exhibits.

**The Court Finds:-**

30. The Claimant was employed by the Respondent Construction Company as an Accountant. He worked under various contracts, from the year 2004 to May 2012.

31. He worked in Kenya, in South Sudan and briefly, in the Democratic Republic of Congo. The main issue in dispute is on the amount of salary paid to the Claimant, and the currency used, in paying the Claimant, while he worked outside Kenya.

32. He states he was entitled under contract, to be paid in USD. He was to receive a basic monthly salary of USD 1,100, and an unspecified allowance of USD 400. His total monthly salary was USD 1,500.

33. He has exhibited several documents to support his position, among them a contract signed by him, on 1<sup>st</sup> June 2010. This contract was in relation to a project described as Yei-Juba Road.

34. Another contract dated 2<sup>nd</sup> March 2009, in relation to Faraksika-Maridi- Yambio road, states Claimant's basic salary is USD 1,000, with an allowance of USD 400.

35. An e-mail from Claimant's immediate supervisor Maria, to the Claimant, dated 13<sup>th</sup> October 2010, states that Maria had decided, that the Claimant would be paid basic salary of USD 1,100 and monthly allowance of USD 400 with effect from 1<sup>st</sup> October 2010.

36. The Claimant exhibits payrolls showing salaries were USD denominated. When assigned duty in DRC, he was assured by Respondent's Director Mike Huth, in an e-mail dated 16<sup>th</sup> November 2011, that he would be receiving the same basic salary he was receiving in SS, at USD 1,100. The payrolls in DRC are shown to have been USD denominated.

37. In the Statement of Response filed on 11<sup>th</sup> November 2013, the Respondent takes the position that: the Claimant's remuneration was denominated in SS Pounds; it was paid in full under the contract dated 1<sup>st</sup> October 2010; his salary while in DRC under the contract dated 5<sup>th</sup> July 2011, was in Kshs; and was paid in full. The Respondent is categorical that the Claimant's salary was not payable at any time, in USD.

38. The Respondent exhibits a contract dated 1<sup>st</sup> October 2010, showing that the Claimant was to earn SS Pounds 2,915 monthly.

39. An e-mail dated 19<sup>th</sup> January 2010, from the Site Manager Keith Murrer to Maria and other Officers, states that SS Pounds are in, and USD no longer in use for Civicon [Respondent] sites. Sites, whose payrolls were USD denominated, were advised to pay in SS Pounds, at a fixed exchange rate of 2.65. There was a major problem disclosed, in a series of Management e-mails, revolving around the currency and rate to use, in remunerating Employees.

40. The Claimant was instructed to pay staff at his site in SS Pounds. The Employees were aggrieved and the matter was, according to the e-mails on record, reported to the Ministry of Labour in SS.

41. The Claimant continued to agitate for all his Colleagues. His position was that all remuneration was negotiated in USD. The Respondent had directed shift to SS Pound, and adopted a fixed rate of 2.65. The Claimant states Employees wanted to have their pay based on USD. Even if paid in SS Pound, it was not explained why the rate given by the Respondent, should remain hedged, at 2.65. Bargaining leading to employment, was not in SS Pound; it was in USD, the Employees argued.

42. Maria while reacting to the position taken by the Employees, states in her e-mail of 26<sup>th</sup> May 2011, that the issue of fluctuating rate in Africa, is well known, and “ *that is why all the contracts are in SDG [SS Pounds].*”

43. The Claimant and the Respondent were not able to agree on this, and the Claimant’s contract was terminated.

44. The position taken by the Respondent, on the currency to apply in meeting its obligations to Employees, and in particular the Claimant, was the wrong position.

45. The contracts initially executed between the Parties, denominated Claimant’s remuneration in USD. E-mails to the Claimant from Maria and Mike, discussed above, state the Claimant was to be paid USD 1,100 and an allowance of USD 400. The pay rolls in SS and DRC are not in SS Pound or Kshs. They are in USD. Keith would not be advising pay roll administrators to change from USD, to SS Pound, if remuneration was never USD denominated. The intention of the Parties, right from the beginning of the contracts involving SS and DRC, was that the Claimant would be paid in USD, not SS Pound, or Kshs. This is confirmed by Maria and Keith. It was the wrong approach for the Respondent to impose the South Sudanese Pound on the Claimant, to meet the challenges of currency fluctuation.

46. The Respondent had the option of adopting the home country currency; the host country currency; or third country currency. The Respondent opted for USD on employing the Claimant in SS and DRC, but altered the currency to host country currency in SS. Employers who have businesses outside their home countries, and who employ staff outside their home countries, must make decisions about how these Employees’ salaries will be paid, before the assignment begins. The Respondent adopted the USD on sending the Claimant outside Kenya, and altered the applicable currency to SS Pound, while the Claimant was already performing the assignment. The effect was that the Claimant’s monthly package was devalued.

47. The Respondent had an obligation under Section 10 [1] and 10 [2] [h], of the Employment Act within 2 months after employment of the Claimant, to give to the Claimant details of his remuneration, scale or rate of remuneration, the method of calculating that remuneration, and details of any other benefits. There is no evidence showing that the Claimant was advised at anytime that his salary would be in SS Pounds or Kshs. A preponderance of evidence, particularly as shown in the e-mails of Maria, Mike and Keith, supports the position that remuneration was intended to be USD denominated from the beginning of the assignment outside Kenya. There is no explanation why any contract would adopt any other currency other than USD, while communication from Maria, Mike and Keith to the Claimant, clearly states remuneration would be in USD.

48. Based on the rate of currency exchange adopted by the Respondent, the Claimant has demonstrated he was denied a total USD 3,279 between 2<sup>nd</sup> March 2009 and 1<sup>st</sup> June 2011. ***He is granted the sum of USD 3,279 in underpayment of salary, occasioned through faulty currency exchange rate.***

49. The Court is not persuaded that the Claimant is owed underpayment of salary of 19 months at USD 1,100; refund of USD 1,100; overtime at USD 16,500; and compulsory resting days at USD 6,160. The Claimant did not submit to the Court details of 19 months’ underpayments, adding up to a similar amount he was due to receive as basic monthly salary at USD 1,100. USD 1,100 spread evenly over a period of 19 months, would result in monthly underpayment of USD 57.8. When was the Claimant, paid USD 1,100 less USD 57.8? Refund of USD 1,100, a similar amount to the basic salary, is based on what evidence? When did the Claimant accumulate excess hours warranting overtime pay of USD 16,500? The Claimant has not established his mode of computing overtime pay. He has not shown that overtime work was necessary and approved by the Site Agent. He has not exhibited any time-sheets. The Court does not have any material to uphold these prayers.

50. With regard to the DRC, communication made to the Claimant was that he would work there, on the same terms and conditions of service, as in SS. He was continuing in the same role. He was informed by Mike Huth that he was to earn a basic salary of USD 1,100. He was earning an allowance of USD 400 in SS. The Respondent submits that, the Claimant’s assignment to Congo was in the course of his employment, which the Court understands to mean, in the Claimant’s ordinary course of duty. It was not a fresh assignment, but continuing accounting work, shifted to another site, in another country. He was paid USD 743 between November 2011 and April 2012 while stationed in DRC. The Respondent justified reduction on the basis that taxation in DRC was high. The Claimant was told by Maria that the project in DRC was small, and the Respondent would recruit a Congolese Accountant, if the Claimant did not take up the assignment. Having been told by the Respondent that he would continue to earn what he was earning in SS, it would be expected that any tax obligation on Claimant’s remuneration in the DRC, would be met by the Respondent. The Respondent knew about the size of its project in DRC, and about taxation in DRC, when it advised the Claimant that his salary would be “ *the same take-home, as you were in South Sudan.*” ***His prayer for the difference of USD 5,285 is convincing and is hereby granted.***

51. The prayers for unpaid salary in the month of April 2012 and annual leave for 11 months while in DRC are not well-founded in fact, and are declined. Similarly, the Respondent has shown it catered for Claimant’s travel expenses to and from DRC. These prayers are declined.

52. The Claimant's contract was terminated without notice. The Claimant however does not state why he should have notice pay equivalent of 3 months' salary. He has not directed the mind of the Court to any clause in any of his contracts, giving 3 months' notice or 3 months' salary in lieu of notice. Different versions of the contracts exhibited by the Parties, give a notice period of 1 month, or notice pay of 1 month. **He is granted 1 month salary in lieu of notice under Sections 35 and 36, of the Employment Act and in accordance with most of the contracts exhibited by both Parties, at USD 1,500.**

53. The contracts exhibited by both Parties, and the pay slips, do not show any form of service pay was availed to the Claimant. He asks for service pay of 4 years. These are the years he says, he spent in SS and DRC. The Claimant worked outside Kenya from March 2009, to April 2012. These are 3 years completed serving outside. The prayer is merited under Section 35 [5] of the Employment Act. **He is granted service pay at 15 days salary for each of the 3 complete years of service, calculated at USD 1,500 divide by 26 working days = USD 57.6 x 15 days = USD 865 x 3 years = USD 2,596.**

54. Lastly, the Claimant states his contract was unfairly terminated. The Court agrees. As discussed above, he disagreed with the Respondent on the currency exchange rate adopted by the Respondent, in paying its Employees in SS. He was dismissed for persistently questioning this. This cannot have been a valid reason, justifying termination. The Claimant made enquiry not only for his own benefit, but for the benefit of other Employees who were affected by the decision taken by the Respondent. It was the role of the Claimant to explain to the Employees about pay roll adjustments, and he ought not to have been victimized for seeking clarification on the shift from USD to SS Pound. Employees were restless, and the dispute even brought to the attention of the SS Ministry of Labour. He was not given any hearing. He was not notified. His contract was cut short. He had worked for the Respondent from 2004. He served in SS and DRC, politically volatile regions. He was not paid terminal benefits, and when he enquired, Maria wrote to the Claimant an e-mail on 4<sup>th</sup> May 2012, alleging that the Claimant was given the opportunity to serve with the Respondent, when he did not have the requisite qualifications in the first place. She tore into the Claimant alleging he was employed through the influence of a relative, and was not suitable for the job. 'Ahsante ya punda ni mateke [a donkey thanks you by its kick],' writes Maria. The Claimant had continued to work, even when placed under devalued terms and conditions of service, in foreign territories. He was paid nothing on leaving; he was instead, traduced as a thankless donkey. Termination was procedurally and substantively unfair. **The Claimant merits and is granted, equivalent of 12 months' salary in compensation, at USD 18,000.**

55. **Certificate of Service to issue.**

56. **Costs to the Claimant.**

57. **Interest allowed at 14% per annum, from the date of Judgment till payment is made 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: underpayment of salary while in South Sudan at USD 3,279; underpayment while in the Democratic Republic of Congo at USD 5,285; 1 month salary in lieu of notice at USD 1,500; service pay at USD 2,596; and equivalent of 12 months' salary in compensation for unfair termination at USD 18,000- total USD 31,525.**

**c) Certificate of Service to issue.**

**d) Costs to the Claimant.**

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

Dated and delivered at Mombasa this 21<sup>st</sup> day of December 2018.

James Rika

Judge