



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 475 OF 2015**

**BETWEEN**

**JOSPHAT KUMENDA MOMANYI ..... CLAIMANT**

**VERSUS**

**MOMBASA APPAREL [EPZ] LIMITED ..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Otieno Asewe & Company Advocates for the Claimant*

*The Federation of Kenya Employers for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 14<sup>th</sup> July 2015. He states he was employed by the Respondent on 9<sup>th</sup> June 2009, as a Mass Production Machinist. His position was declared redundant by the Respondent, on 29<sup>th</sup> May 2015. He avers termination was abrupt, and not in accordance with Section 40, 41, 43 and 45 of the Employment Act. He states his contract was terminated 2 months before its due date. His last salary was Kshs. 12,749 per month. The Claimant prays for the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 12,749.
- b) 2 months’ salary for the balance of his contractual period at Kshs. 25,498.
- c) Annual leave pay from the year 2009 to 2015 at Kshs. 70,560.
- d) Severance pay at Kshs. 44,100.
- e) 12 months’ salary in compensation for unfair termination at Kshs. 152,988

Total..... Kshs. 305,895

f) A declaration that termination was unfair, unlawful and unjust.

g) Costs and interest.

h) Any other suitable relief.

2. The Respondent filed its Statement of Response on 15<sup>th</sup> July 2016. Its position is that the Claimant was employed as a Mass Production Machinist in January 2015, not in 2009. The Claimant indicated in his employment form that as of the year 2014, he worked for a company called Devick. The Respondent did not terminate his contract. He deserted after 29<sup>th</sup> May 2015. The Respondent attempted to trace the Claimant to no avail. The Respondent next heard about the Claimant when he made demand for redress of alleged unfair termination, through his Advocates, in a letter dated 24<sup>th</sup> June 2015. The Claim has no merit.

3. Counsel for the respective Parties agreed in Court, on 19<sup>th</sup> July 2016, to have the dispute determined on the strength of the record. They confirmed the filing of their Final Arguments at the last Court appearance on 17<sup>th</sup> October 2016.

#### **Claimant's Position:-**

4. The Claimant submits he signed his first contract with the Respondent on 12<sup>th</sup> June 2009, having worked from 9<sup>th</sup> June 2009. He later worked on periodic contracts, the last of which was renewed on 12<sup>th</sup> July 2015. It was terminated prematurely on the 29<sup>th</sup> May 2015. He was told by the Human Resource Manager, that his contract had been terminated on the ground of redundancy.

5. It is not true that he deserted. There was no clear evidence presented by the Respondent indicating the Claimant deserted. The Checklist exhibited by the Respondent is a desperate attempt by the Respondent to back up its assertion on desertion. There was no evidence to show the Respondent attempted to reach the Claimant. Section 40 of the Employment Act 2007 was disregarded. The Claimant submits he has established his case, and asks the Court to find redundancy was unfair, and the prayers sought merited.

#### **Respondent's Case**

6. The Respondent holds the Claimant was employed in the year 2015, not 2009. He deserted on 29<sup>th</sup> May 2015. Respondent's attempts to reach him, failed. He worked for a Company called Devick in the period 2013-2014. He is not entitled to the prayers sought.

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

7. The Claimant position is largely contradicted, by available employment records. He did not dispute the authenticity of the 'Candidate Application Form' attached to the Statement of Response, as appendix 2. He states in this Form, that he worked for Devick, in the position of Charger, for the period 2013-2014. Why then mislead the Court that he worked for the Respondent from 2009, uninterruptedly, up to May 2015? Why claim severance pay based on the period 2009 to 2015?

8. The lack of forthrightness shown by the Claimant above, casts a long shadow over the veracity of his other claims. He states he was employed in 2009, and signed a contract on 12<sup>th</sup> June 2009. He signed other periodic contracts between 2009 and 2015. On record there is a contract dated 13<sup>th</sup> January 2015, and its extension dated 13<sup>th</sup> April 2015. There are no other contract documents, or evidential material, showing the Claimant worked at any other time outside these documents. He did not appear in Court in person, or call former colleagues as Witnesses, to satisfy the Court that he worked from the year 2009. There is absolutely nothing, to disavow what the Respondent says: that the Claimant was employed in January 2015, and left in May 2015.

9. The Respondent nonetheless, did not convince the Court that the Claimant abandoned his job, and was not pushed out of it. The Attendance Register merely shows the Claimant was marked as being absent, from 29<sup>th</sup> May 2015. This not evidence of desertion, but evidence of the Parties' common position, which is, that the Claimant was not at work from 29<sup>th</sup> May 2015.

10. The Respondent did not prove the reason for termination, and show validity of that reason. Its explanation that the Claimant just packed his bag and baggage, and left employment on 29<sup>th</sup> May 2015, 2 months before his contract expired, is unpersuasive. There is no evidence that the Respondent called the Claimant, or wrote to him, asking him to return to work. It was mentioned that the Respondent contacted the Claimant's Wife, who informed the Respondent that the Claimant had deserted not only his workplace, but his place of abode too. The Respondent did not show the Court evidence of this communication between the Respondent and Mrs. Momanyi. There was no attempt to reach the Claimant, and bring him to answer the charge of desertion. Termination was therefore unfair under Section 41, 43 and 45 of the Employment Act 2007.

11. There is insufficient evidence however, to attribute redundancy as the reason for termination. The Court would have no reason to invoke section 40 of the Employment Act.

12. Termination was unfair for the reason stated at paragraph 10 above. ***The Claimant is granted 2 months' salary in compensation for unfair termination at Kshs. 25,498.***

13. ***He is granted 1 month salary in lieu of notice at Kshs. 12,749.***

14. In granting compensation the equivalent of 2 months' salary, the Court has, under Section 49 [4] [f] of the Employment Act, considered that the Claimant expected he would have gone on working for 2 months, had his contract not been terminated. He is not therefore entitled to salary for the unexpired period, as his loss of employment has been redressed through compensation the equivalent of 2 months' salary.

15. Redundancy was not established as the reason for termination. Severance pay is not awardable.

16. It has been concluded that there was no evidence the Claimant worked from the year 2009. He was shown to have worked for another company in the period 2013-2014. He did not exhibit other contracts showing employment outside the contracts made in 2015. He had not completed 12 continuous months, under the last contract. There is no foundation in the prayer for annual leave pay.

IN SUM, IT IS ORDERED:-

***a) Termination was unfair.***

***b) The Respondent shall pay to the Claimant the equivalent of 2 months' salary in compensation for unfair termination at Kshs. 25,498; and 1 month salary in lieu of notice at Kshs. 12,749- total Kshs. 38,247.***

***c) No order on the costs.***

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

Dated and delivered at Mombasa this 17<sup>th</sup> day of February, 2017.

James Rika

Judge