



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO. 536 OF 2015**  
**ONESMUS MUNGA.....CLAIMANT**  
**VERSUS**  
**JARIBUNI TIMBO.....RESPONDENT**  
**J U D G M E N T**

**INTRODUCTION**

1. The claimant was employed a general labourer by the respondent from March 2007 to 29/1/2015. His daily wage was ksh.300 per day but was being paid on weekly intervals. He has now brought this suit alleging that he was unlawfully terminated by the respondent on 28/1/2015 without any reason and without being given any hearing. He therefore prays for compensation for unfair termination plus terminal dues including one month salary in lieu of notice, accrued leave, gratuity and salary from 1/5/2013 – 28/1/2015.

2. The respondent has admitted the said employment relationship but denied liability for the alleged unfair termination of the employment contract. He avers that the claimant voluntarily absented himself from work from 28/1/2015 until 1/4/2015 without permissible explanation. The respondent further avers that the claimant reported a labour dispute at the Kilifi County Labour office and on 9/4/2015, the dispute was resolved by the respondent being directed to pay the claimant one month wages in lieu of notice, accrued leave for 3 years, outstanding wages for 6 days worked in January 2015 plus gratuity for 3 years' service totaling to Ksh.58800 less ksh.53300 loan advanced. It is further defence case that the only Ksh.5500 remained owing to the claimant and the same was deposited at the labour office.

3. On the other hand the respondent has counter claimed for ksh.36 per day as salary over payment which translates to ksh.31104.

4. The case was heard on 21/11/2016 when the claimant testified as CW1 but the respondent and his counsel never attended the court to tender their defence and prosecute the counter claim. However after the hearing both parties filed written submissions.

**ANALYSIS AND DETERMINATION**

5. There is no dispute that the claimant was employed by the respondent as a General Labourer from March 2007 to 28/1/2015. The issue for determination are:

a. Whether the claimant was unfairly terminated or he is the one who deserted his employment on

28/1/2015.

- b. Whether the claimant is entitled to the reliefs sought by the suit.
- c. Whether the respondent counterclaim has merit and should be allowed.

#### UNFAIR TERMINATION OR DESERTION

6. Under Section 45(2) of the Employment Act, termination of employee's contract is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case the respondent has not given any evidence to discharge the said burden of proof against the claimant. The claimant's evidence that he was terminated without any valid reason and without being accorded any hearing was not rebutted. I therefore make a finding of fact and law that the claimant's contract of service was unfairly terminated by the respondent and dismiss the respondent's defence that it was the claimant who deserted work without any plausible explanation.

7. The foregoing finding is buttressed by the respondent's letter dated 20/5/2015 which was produced as Exh2 and which confirmed that even the county Labour Officer who heard the dispute in April 2015 blamed the respondent for the termination and directed him to pay one week wages in lieu of notice.

#### RELIEFS.

8. The respondent has contended in his defence that the matter was resolved at the labour office whereby he was directed to pay ksh.58500 as the final dues to the claimant. I have carefully considered the documentary evidence filed together with submissions by both parties. It is clear that the dispute at the labour office ended with directions that the respondent pays the claimant Ksh.58800 less loan of Ksh.53300, but the claimant declined to sign the settlement agreement. In that regard the court finds that the dispute was never resolved at the labour office and as such the court has jurisdiction to determine it.

#### SALARY IN LIEU OF NOTICE

9. The claimant worked for a long period of time and although he was being paid on weekly intervals basis his contract had converted to regular terms contract under Section 35 and 37(1) (3) of the Employment Act. Section 37(1) (a) of the Act provides that where a casual employee works for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month, the contract of service of the casual employment shall be deemed to be one where wages are paid monthly and Section 35(1) (c) shall apply to that contract. Section 35(1) (c) of the Act provides that the contract of service shall be terminable by either party by a 28 days written notice.

10. In this case, the claimant contends that he worked from March 2007 till 28/1/2015. No evidence to the contrary has been tendered by the defence. I therefore find and hold that the claimant's contract was only terminable after a 28 days' notice in writing and proceed to award him ksh.9000 as one month salary in lieu of notice at the rate of ksh.300 daily wage.

#### COMPENSATION FOR UNFAIR TERMINATION.

11. Under Section 49(1) (c) of the Act, I award ksh.108000 being twelve months salary as compensation for unfair termination. In awarding the maximum compensation, I have considered the fact that the claimant has served the respondent from 2007 to 2015 which a fairly long period. In addition, I have also considered the fact that the claimant never contributed to his termination through misconduct.

#### ACCRUED LEAVE

12. The claim for accrued leave is granted as prayed being ksh.18900. Although the particulars thereof are not pleaded, the claim was admitted by the respondent both in his defence and the written submissions by council.

### GRATUITY

13. The claim for service gratuity of ksh.36000 is granted as prayed because it is also admitted in the defence and the respondent's written submissions.

### SALARY UNDER PAYMENT

14. The claimant alleges that his daily wages were underpaid from 1/5/2013 to 28/1/2015 compared to the wages gazette vide legal notice No. 197 of 2013. The respondent has denied the alleged underpayment in his defence and written submissions. According to the defence, the claimant was based in Kilifi County where the minimum daily wage for general labourer is ksh.264 which is below the Kh.300 he was paying to the claimant. I have carefully perused and considered the General Wage Order published vide the legal notice No. 197 of 2013 and I agree with the submissions by the defence that the minimum wage for general labourer in Kilifi was Ksh.264 per day. The claimant has not proved by evidence that his place of work was situated in an area that entitled him to a minimum wage exceeding the ksh.300 he was being paid daily. Consequently the claim for underpayment of wages is dismissed.

### CERTIFICATE OF SERVICE

15. The claim for certificate of service is granted because it is provided for under Section 51 of the Act. I have noted from paragraph 17 of the defence that the certificate is ready for collection by the claimant.

### COUNTER-CLAIM

16. The counter claim was not prosecuted during the hearing and consequently I dismiss the same. In dismissing the counter claim, I have also considered the fact that the payment of ksh300 was voluntarily done by the respondent and within the law.

### DISPOSITION

17. For the reason that the termination of the claimant's contract of service was unfair, I enter judgment for the claimant in the sum of Ks.171,900 plus costs and interest.

Dated, Signed and delivered this 31<sup>st</sup> March, 2017

O.N. Makau

Judge