



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUS NO. 292 OF 2015**

**THOMAS MWANGARA RUMBAYA .....CLAIMANT**

**VERSUS**

**NARCOL ALUMINIUM ROLLING MILLS LTD .....RESPONDENT**

**J U D G M E N T**

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of employment by the respondent on 3/3/2015. According to the claimant, he was terminated for lawful cause and without prior notice or fair hearing. The respondent has however denied liability for the alleged unfair termination and averred that it was the claimant who terminated the contract by deserting employment without notice. It is the defence case that she engaged the claimant first on casual basis and later on periodic contracts till 3/2/2015 when he deserted work on his own volition. She therefore prayed for the suit to be dismissed for lack of merits.

2. The suit was heard on 25/7/2016 when the claimant testified as CW1 and the respondent called Mr. Felix Mutua Kisingu as RW1. Thereafter both parties filed written submissions.

**CLAIMANT'S CASE**

3. CW1 stated that he was employed by the respondent in November 2008 as a clerk. His duties revolved around updating of daily stock report and he worked daily and continuously because there was work daily. He started as a casual employee but from 2009 to 2012 he was engaged under periodic written contract earning ksh.15860 per month. In between the periodic contracts, the claimant continued working as casual employee earning the same salary but distributed on weekly basis. The last written contract was dated 1/7/2012 to expire on 30/11/2012 but he declined to sign and continued as casual until 31/1/2015 when he was suspended orally for one month by the HR Manger Mr. Gabriel Nyangori.

4. Cw1 reported back to work on 3/3/2015 but he was stopped by the guards at the gate and when he was finally allowed in, HR Manager Mr. Gabriel Nyangori told him that his services had been terminated and a new person employed because the reports he was preparing on Ms Excel were now being required under Ms-Access. According to the claimant, the termination was orally done and for no good reason because he was competent to do the work on Ms-Access. He contends that he was not given any chance to demonstrate his competence in MS- Access. He further contended that he was not accorded any hearing before the dismissal. He was also paid dues after the termination.

5. CW1 testified that he knew RW1 as his senior at work but clarified that RW1 left the respondent company in 2011 and that he was not present when he was dismissed by Mr. Nyangori on 3/3/2015. Cw1

denied the allegation by the defence that he absconded duty and maintained that he was first suspended and then dismissed the day he reported back from the suspension. He therefore prayed for the terminal dues and compensation as tabulated in the claim.

### DEFENCE CASE

6. RW1 was employed by the respondent as Administrator from 1992. He admitted that CW1 was employed by the respondent in 2008 as a junior Clerk doing the duty of preparing stock report. He however stated that CW1 was a habitual absconder from duty, a good example being that from 31/1/2015, CW1 absconded work save for 2 (two) days. He explained that he never served continuously and as such he never qualified for annual leave.

7. On cross examination, Rw1 admitted that he was not present when CW1 was terminated. He further admitted that the claimant was employed on periodic contract basis but in between the contracts he served on casual basis. He further admitted that, after working for 3 continuous months as a casual, an employee becomes a permanent employee. He also admitted that the claimant was never served with any warning for his habitual absence from work. He did not produce any work attendance records to prove the alleged absence from work by the claimant. On being shown work records for 2013 and 2014 he admitted that the claimant attended work in 2013 and 2014. Again on being shown NSSF statements, he admitted that from December 2012 to 2015 no NSSF deductions were remitted in favour of the claimant.

### ANALYSIS AND DETERMINATION

8. There is no dispute that the claimant was employed by the respondent between 2008 and March 2015. The issues for determination are:

- (a) Whether the claimant's service ever converted to regular terms contract.
- (b) Whether the termination of the claimant's contract of service was unfairly terminated.
- (c) Whether the reliefs sought out to issue.

### CONVERSION TO REGULAR TERM CONTRACT

9. CW1 told the court that he started working for the respondent from 2008 as a casual employee but between 2009 and 2012 he was engaged by periodic contract which were separated by intervals of casual employment. That during the periodic contracts he was paid a monthly salary and NSSF contributions were deducted from his salary and remitted to the fund. However during the brief periods he worked on casual basis in between the periodic contracts, he was paid on weekly basis and no NSSF contributions was deducted from his pay or remitted to the fund. He contended that the last written contract given to him was to run from 1/7/2012 to 30/11/2012 but he declined to sign it for the reasons that it did not incorporate some of the negotiated benefits. As a result, he continued to work on casual basis without any written contract earning a weekly wage until 30/1/2015 when he was suspended and later terminated on 3/3/2015. He has therefore contended that his contract had converted to permanent employment.

10. The respondent has denied that the claimants' employment contract had converted to permanent employment. According to RW1, the claimant worked on casual basis earning a daily wage save during the period when he was engaged under fixed term contract. That even during the period of casual employment the claimant never worked continuously but only when the need arose. That during such periods the respondent remitted a special NSSF contribution to the fund on behalf of the claimant and other casual employees. RW1 however admitted that he left the respondents' employment before CW1 was terminated. According to the claimant RW1 left the respondent in 2011.

11. I have carefully considered the evidence presented to the court and I find no denial from the RW1 that he left the respondent in 2011. That fact corroborated his evidence that he worked for the respondent for 20 years from 1992. It is therefore clear that RW1 cannot competently testify on matters relating to the

claimant's employment from the time he left in 2011. It further means that the claimant's evidence about his employment relationship with the respondent after 2011 is uncontroverted by the defence.

12. For the foregoing reason, there is no dispute that from June 2012 to 31/1/2015 when the claimant was suspended, he worked continuously on casual basis but earning monthly salary of ksh.13910 divided in equal weekly amounts. Under Section 37(1) (a) of the Employment Act, where a casual employee works for a period or a number of continuous working days which amount to an aggregate of not less than one month, the contract of service shall be declared to be one where wages are paid monthly and one that can only be terminable with a 28 days notice in writing under Section 35(10 9c) of the Act. Under Section 37(3) of the Act, where the employee whose contract has converted continues to work for two months or more as a casual employee, he shall be entitled to regular terms contract as if he never started as a casual.

13. In this case, the claimant worked for more than two months as a casually continuously from June 2012 to March 2015. His contract therefore converted to regular terms contract from August 2012. The reason for the foregoing being that from 1/6/2012 when he refused to sign written contract he worked continuously as a casual employee henceforth.

### UNFAIR TERMINATION

14. The claimant testified that he was suspended on 31/1/2015 for one month and when he reported back on 3/3/2015, the HR Manager Mr. Gabriel Nyangori told him that he had been terminated. The termination was without prior notice and fair hearing on whether or not the claimant was competent to prepare stock report using MS Access. Mr. Gabriel never testified herein and as such the claimant's evidence that he was terminated unfairly was not rebutted.

15. Under Section 45(2) of the Act, termination of employment by the employer is unfair unless the employer prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. RW1 admitted that he was not working for the respondent when the claimant's services were terminated. Consequently, I find and hold that the respondent has failed to prove the reason for the termination, and that she followed a fair procedure before terminating the contract. As held herein above, the claimant's contract had converted from casual to regular terms contract which could not be terminated without complying with the statutory fairness enacted under the said Section 45 of the Act.

### RELIEF

16. Under Section 49 of the Employment Act, an unfairly dismissed employee is entitled to salary in lieu of notice plus compensation of upto 12 months gross salary. The claimant pleaded that he was earning ksh.15560 per month being an increase from the ksh.13910 he was earning initially. He repeated the same position in his testimony under oath but the respondent has not challenged he said salary either in her pleadings, evidence or cross examination of the claimant. I therefore find and hold that the claimant is entitled to ksh.15860 as salary in lieu of notice.

17. In addition he is awarded Ksh.158600 being ten months gross salary as compensation for the unfair termination. In making the said award I have considered the fact that the claimant served for over 7 years before the termination. I have also considered the fact that nowadays jobs are not easy to come by and that is why from the March 2015 when the claimant was dismissed to July 2016 when the suit came up for hearing, the claimant was still without employment.

### SALARY FOR FEBRUARY 2015

18. The claimant testified that he was suspended by Mr. Nyagoti, the HR Manager for one month from 31/1/2015 and resumed work on 3/3/2015 but he was fired. The respondent alleges that the claimant was not on suspension but he has absconded duty for the whole month except two days of which he was paid the lawful wages. The alleged two days worked and paid for have however not been pleaded and proved by evidence. In addition Mr. Nyagori has not denied the suspension in evidence. Without any employment records from the employer of the alleged absconding of duty and without the evidence from

Mr. Nyangori denying the alleged suspension of the claimant for one month, I find in favour of the claimant that he was indeed suspended during the whole month of February 2015 and as such he is lawfully entitled to the whole salary for the said month being ksh.15860.

### LEAVE

19. The claim for leave is declined. It has not been proved in evidence that the claimant and the employer mutually agreed to have leave accumulated or that the claimant was always applying for leave but he refused to approve.

### GRATUITY

20. Likewise the claimant for gratuity is dismissed for lack of evidence. Right to gratuity is constitutional and unless the same is provided for in the contract or statutory provisions, the court has no basis to award the same.

### REFUND OF NHIF AND NSSF DEDUCTIONS

21. The claimant alleges that from 2009 to 2015 he was deducted NSSF and NHIF contributions at rate of ksh.400 each per month but in 43 months the contributions deducted were not remitted to the relevant funds. No evidence has been adduced to support the claim for the unremitted NHIF deductions. I therefore dismiss it.

22. As regards the NSSF deductions, the statement produced was for 2009 to 2012 showing periods of remittances standing between regular intervals of three months of non-remittance. The said patterns of remittances corroborates the claimant's and RW1 in their testimony when they said that the claimant was serving on periodic contracts of three or six months separated by intervals of service on casual basis. It also corroborates the testimony by RW1 that NSSF was not deducted from the claimant's wages during the period of service as casual employee but only when he was under the periodic contract.

23. The claimant has in my opinion not proved on a balance of probability that he was being deducted NSSF contributions during the period he was casual appointment. He cannot therefore claim refund of what he did not contribute. Likewise the claimant did not prove that he was deducted NSSF contribution between 2013 and 2015 and the same was not remitted. He did not produce any NSSF statement for that period or any evidence of the alleged deduction. I therefore dismiss the claim for the refund of unremitted NSSF deductions for the period between 2009 and 2015.

### DISPOSITION

24. For the reasons that the claimant was unfairly dismissed by the respondent, I enter judgment on his favour for the sum of Ksh.190320 plus costs and interest.

Dated, signed and delivered this 28<sup>th</sup> April 2017

**O.N. Makau**

**Judge**