



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1038 OF 2013**

**JOSPCHAT MAWEU**

**CLAIMANT**

v

**CREATIVE CLEANING SERVICES LTD**

**RESPONDENT**

**JUDGMENT**

1. Attempts to have this Cause heard and determined had previously aborted until the Deputy Registrar scheduled the hearing as part of the *Service Week*.
2. The Claimant testified on his behalf while the Respondent called its Human Resources & Administration Manager to testify.
3. The Claimant filed his submissions on 4 April 2017, while the Respondent filed its submissions on 6 April 2017, one day outside the agreed timeline. The Court has considered the pleadings, evidence and submissions.
4. The issues arising for determination are, *whether the employment of the Claimant was unfairly terminated, what was the nature of contract between Claimant and Respondent, whether Claimant was underpaid, whether Claimant had pending leave at point of separation, whether Claimant worked overtime, whether there are parallel proceedings and appropriate remedies.*
5. The Court will make reference to the parties' contentions while addressing the Issues as identified.

**Fairness of termination**

6. The Claimant's testimony was that he was sent on compulsory leave on 28 May 2011 and that while on leave he was called by the Respondent's Director called Onyach, who told him that due to low business he should stay away until instructed otherwise and that when he made follow ups, the Director sent him to the Secretary to collect his cheque, but the Secretary after consultations with a Manager told him to go and wait to be called.
7. Tired of waiting he reported to the Labour Office and after conciliation, the Respondent failed to pay his dues hence the instant proceedings.
8. He maintained that he was dismissed unfairly on account of redundancy.
9. The Respondent's Human Resources Manager on the other hand testified that the Claimant's leave was

mutually agreed but he did not resume after the leave ended on 22 June 2011.

10. Challenged to state why the Claimant was not given a show cause for unexplained absence, the witness only stated that attempts were made to reach out to the Claimant through phone.

11. If the Claimant did not resume duty after leave as contended by the Respondent, then it was incumbent upon it to comply with the requirements of sections 35 and 41 of the Employment Act, 2007.

12. Absence from work without permission or lawful cause is a *misconduct* for which the disciplinary proceedings as envisaged by section 41 of the Employment Act, 2007 should be conducted.

13. The Respondent did not lay any concrete evidence to show whether and how that it complied with the requirements of section 41 of the Employment Act, 2007. For purposes of the section, an employer becomes a duty bearer and the employee a rights holder.

14. In the circumstances, the Court finds the Claimant's testimony that he was sent on leave due to low business more probable. It is also noteworthy that the Respondent did not deny the contention by the Claimant as to his discussions with the Respondent's Director.

15. The Court therefore concludes that the employment of the Claimant was unfairly terminated on account of redundancy (due to no fault on his part).

### **Nature of contract**

16. The Respondent contended that the Claimant was on 1 year renewable contracts but in the same breathe, its Human Resources Manager admitted that the Claimant had continuous service from 2004 to time of separation in 2011.

17. The Court would therefore reach a conclusion that the Claimant was on a contract of *indefinite duration* as the Respondent allowed him to serve continuously without formally renewing his contract.

### **Underpayments**

18. Underpayments can arise under two scenarios. It could be due to payment of wages below the contractually agreed rates or payment below the statutory prescribed minimum rates.

19. The Claimant was a truck driver and he appeared to have anchored the claim for underpayments on the prescribed minimum wages.

20. Although the Respondent's Human Resources Manager admitted that the prescribed minimum wage around 2011 was Kshs 18,000/- per month, the Claimant did not draw the attention of the Court to the specific *Regulations of Wages Orders* applicable during the period of employment, and therefore the Court declines to reach a conclusion that he was underpaid.

21. The Claimant should have given more details/evidence on this head of claim but failed to do so.

### **Leave**

22. On this head of claim, the Claimant accepted that he went on leave in 2011, but nevertheless stated that he did not go on annual leave without disclosing during which periods of employment he did not get the leave pleaded.

23 In consideration of the failure to state the precise dates leave was not taken and the provisions of section 28(4) of the Employment Act, 2007, the Court concludes the Claimant did not lay adequate evidential basis for this head of claim.

## **Overtime**

24. Working hours are regulated by contract and where applicable, various *Regulation of Wages Orders*.

25. These orders apply to particular sectors of industry and in the case at hand, the Claimant did not disclose which specific *Regulation of Wages Order* applied in the sector the Respondent operated in.

26. This head of claim must therefore fail because the Claimant did not lay proper evidential and legal foundation on which to anchor it on.

## **Cause No. 1621 of 2011**

27. Apart from making reference to this other Cause, the parties did not demonstrate whether the cause of action therein was similar to the present one. That could have easily been done by presenting before Court, the proceedings in this other Cause.

28. In any case, the Claimant's testimony that the Cause was eventually withdrawn was not controverted.

## **Appropriate remedies**

### **Pay in lieu of Notice**

29. Because of the conclusion that the termination was unfair, the Court finds that the Claimant is entitled to 1 month salary in lieu of notice.

### **Underpayments**

30. The Claimant sought Kshs 330,685/20 on account of underpayments, but again because of the reasons outlined in the body of this judgment, the Court declines to grant this head of relief.

### **Leave**

31. For reasons set out above, the Court declines to grant this relief.

### **Severance pay**

32. The Claimant sought Kshs 68,142/- and because the Court has concluded the termination was due to low business, he is entitled to severance pay. The Respondent did not challenge the computed sum.

### **Compensation**

33. The Claimant served the Respondent for about 6 years and in consideration of the length of service, the Court is of the view that the equivalent of 7 months gross wages would be appropriate ( gross wage as of June 2011 was Kshs 10,500/-).

## **Overtime**

34. This head of relief is also declined for the reasons set out herein above.

## **Conclusion and Orders**

35. The Court finds and holds that the employment of the Claimant was unfairly terminated and the Court awards him and orders the Respondent to pay him

(a) 1 month pay in lieu of Notice Kshs 10,500/-

(b) Severance pay	Kshs 68,142/-
(c) Compensation	Kshs 73,500/-
<b>TOTAL</b>	<b>Kshs 152,142/-</b>

36. Claimant to have costs.

**Delivered, dated and signed in Nairobi on this 7<sup>th</sup> day of April 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant                      Mr. Kalwa instructed by Kalwa & Co. Advocates

For Respondent                  Mr. Murage instructed by Mugambi & Kariuki & Co. Advocates

Court Assistant                  Nixon