



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1001 OF 2015**

**MALAKI SING MAKWATA.....CLAIMANT**

*VERSUS*

**HUSSEINI GALSS KENYA LIMITED.....RESPONDENT**

Mr. Nyabena for claimant

**JUDGMENT**

1. Suit was brought vide a statement of claim on 10<sup>th</sup> June 2015. The claimant seeks maximum compensation for unfair termination and payment of terminal benefits to wit;

- (i) One moth salary in lieu of notice.
  - (ii) Payment in lieu of leave for the period 2000 to 2010 and 2 years upon confirmation.
  - (iii) Off duty payment from 2000 to 2010 at 4 days per month.
  - (iv) House allowance for 13 years worked at 15% of the basic salary
  - (v) Service gratuity for 13 years
- and
- (vi) Certificate of service.

2. The claim is opposed vide a statement of defence filed on 24<sup>th</sup> June 2015.

**Claimant's Case**

3. Claimant testified in court in support of the particulars of claim as follows;

- (i) That he was employed by the respondent as a glass cutter on or about the year 2000 at a daily rates Kshs.330/=. He worked continuously until the year 2010 when the respondent changed his terms to a monthly salary of Kshs.15,000/= per month exclusive of house allowance.

4. The employment was not reduced into writing. The claimant worked well until 12<sup>th</sup> February 2013

when the respondent terminated his employment on allegation that the claimant had voluntarily retired. The claimant attaches a letter by the respondent dated 10<sup>th</sup> february 2015 which state that the claimant had voluntarily retired because the respondent had lost most of its work and its affected the position of the claimant.

5. The claimant denies that he had retired voluntarily and alleges that his employment was unlawfully and unfairly terminated for no good reason and without being given opportunity to show cause why the employment ought not to be terminated in violation of Section 41 of the Employment Act, 2007.

6. The claimant states that he was not paid any terminal benefits accrued for 15 years worked upon termination.

7. In this regard claimant avers that during the entire period he took annual leave twice contrary to Section 28 of the Act.

8. The claimant testified that he worked daily for six days a week from 8.30 to 4.30 p.m. That the respondent remitted NSSF and NHIF dues only for the year 2011 when his terms became permanent.

9. That he stated going on leave from 2011 when he was employed permanently. He was also not paid house allowance.

10. That on 10<sup>th</sup> February 2015, when he reported to work the employer Mr. Sheikh told him that the work load had reduced and there was no more work for him. He was paid salary for the days worked and Kshs.7,000/= in lieu of untaken leave.

11. The letter dated 10<sup>th</sup> February 2015 was given to the claimant to enable the claimant claim his NSSF dues and that he did not retire voluntarily. That he did not get notice of termination nor was there a notice to the Ministry of Labour.

12. The claimant prays to be awarded the items set out in the statement of claim together with interest and costs.

## **Defence**

13. The respondent in its defence states that the claimant was employed by Hussein Glass Kenya Limited, the respondent, from the year 2010 and not in 2000 as alleged by the claimant. That the respondent started its operations in 2003 November and a copy of certificate of incorporation No. C 106981 is attached.

14. That the claimant's employment was terminated due to gross misconduct and not due to voluntary retirement as alleged by the claimant. That the letter of voluntary retirement was given to him but later on the same day, the respondent changed the reasons for termination to be due to poor work performance and neglect of duty. Respondent attached a letter of the same date titled '*service termination*'

15. The respondent produced calculated terminal dues paid to the claimant to include;

(i) One month prior salary in lieu of notice Kshs.10,000/=.

(ii) Salary for 10 days worked Kshs.3,330=

(iii) Leave for the year 2014/2015 Kshs.7,000/-.

Total dues Kshs.20,330/=

16. The respondent states that the claimant received the terminal dues signed the payment vouched in full

and final settlement.

17. Respondent further avers that the claimant had exhausted his leave days except for the days for the period 2014/2015 and he was paid in lieu thereof.

18. The respondent disputes the salary payable to the claimant and states that his monthly salary was Kshs.10,000/= and not Kshs.15,000/= as alleged.

19. The respondent further states that the claimant was not entitled to off duty since he worked normal hours from Monday to Friday and up to 1 p.m. on Saturdays.

20. No overtime was done by the claimant or any other worker since premises were closed on Saturday afternoon, Sundays and on public holidays.

21. That the termination was not a redundancy and the claimant is not entitled to service pay since he was also registered with NSSF.

22. The claimant did not receive certificate of service. That it was an oversight and same would be served immediately.

23. The respondent prays that the suit be dismissed with costs.

### **Determination**

24. The matter was heard on 7<sup>th</sup> October 2016 in absence of counsel of the respondent. The counsel for the respondent presented an affidavit of service sworn by Diffinah Moithaga an authorised court process server in which he deposes that he served the hearing notice at the respondent's premises on the Human Resource Manager who accepted the notice but refused to append the company stamp.

25. The statement of defence was filed by the company itself and the respondent had no advocate on record. The court deemed this to be a proper service and proceeded with formal proof in the absence of the respondent.

26. Averments in a statement of defence do not constitute evidence except where the parties enter consent that the statement of claim together with its attachments thereto are submitted as the evidence upon which the respondent relies. This was not the case herein, the respondent being in default of attendance.

27. To this end the testimony by the claimant is uncontroverted and the court regards it as the sole representation of what took place in this matter.

28. Accordingly, the court finds that the claimant served the respondent as a casual up to the year 2010 when he was employed on permanent terms at a monthly salary of Kshs.15,000/=.

29. The employment of the claimant was terminated on 10<sup>th</sup> February 2015 without following Section 40, 41, 43 and 45 of the Employment Act, 2007, in that the claimant was not given a valid reason for the termination and the respondent did not follow a fair procedure in terminating the employment of the claimant in that no notice or notice to show cause was given to the claimant nor was he given a hearing to show why his employment of many years ought not be summarily terminated.

30. The claimant did not retire voluntarily but was unlawfully and unfairly separated from his employment and the court finds that he is entitled to compensation in terms of Section 49 of the Employment Act, 2007 equivalent to 10 months prior salary in the sum of Kshs.150,000/=.

31. With regard to terminal benefits the claimant is awarded;

(i) Kshs,15,000 being one month's salary in lieu of notice.

(ii) The claims for payment in lieu of leave days not taken, was not proved on a balance of probability since the claimant was paid in lieu of leave days not taken for the period 2014/2015.

(iii) The claimant worked a normal week from 8.30 to 4.30 Monday to Friday and half day Saturday and there is no basis for the off days claim set out by the claimant.

(iv) Equally, the claimant has laid no basis for payment of house allowance. The claimant has not shown that the Kshs.15,000/= monthly salary paid to him did not satisfy the minimum statutory salary due to his category of employment for the period he served the respondent.

(v) From his own pleadings, the claimant states that he was registered with NSSF and the dues remitted from the year 2011 when he was employed on permanent terms. There is no basis for awarding the claimant service gratuity therefore.

32. In the final analysis judgment is entered in favour of the claimant for the sum of Kshs.165,000/= being compensation for unlawful and unfair termination of employment.

**Total award is Kshs.165,000/=.**

33. The award is payable with interest at court rates from date of judgment till payment in full.

34. The respondent to provide the claimant with a certificate of service within 30 days of the judgment.

35. Costs to follow the outcome.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of April 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**