



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR  
RELATIONS COURT AT MOMBASA  
CAUSE NUMBER 692 OF 2015

**BETWEEN**

HERBERT KWANUSU WAKHUNGU.....CLAIMANT

**VERSUS**

KEMU SALT PACKERS

PRODUCTIONS LIMITED .....RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Chala & Company Advocates for the Claimant*

*Muli & Ole Kina Advocates for the Respondent*

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JUDGMENT

1. This Claim was filed on 10<sup>th</sup> September 2015. The Claimant states he was employed by the Respondent as a Machine Operator, earning Kshs. 14,500 per month. He was employed in the year 2004. The Respondent terminated his contract unfairly and unlawfully, on 28<sup>th</sup> March 2015. He was not given notice of termination. He was denied a fair hearing. He prays for Judgment against the Respondent as follows:-

- a) 1 month salary in lieu of notice at Kshs. 14,500.
- b) Annual leave pay for the entire 11 years worked at 21 days each year, computed at Kshs. 128,826.
- c) Severance pay at 15 days' salary for each of the 11 years at Kshs. 79,750.
- d) Gratuity at 18 days' salary for each year, calculated at Kshs. 102,535.
- e) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 174,000.

Total...Kshs. 499,611

f) Certificate of Service to issue.

g) General Damages for loss of employment and loss of expected earnings.

h) Interest.

i) Any other suitable relief.

2. The Respondent filed its Statement of Response on the 5<sup>th</sup> October 2015. Its position is that the Claimant was employed on various short, fixed term contracts. His first contract, executed in 2004, was for 3 months. He was availed pro-rata leave at the end of each contract. The Respondent did not terminate his last contract as alleged; the Claimant left work voluntarily in August 2012. He signed another contract on 7<sup>th</sup> May 2014. He was asked to step down on 28<sup>th</sup> March 2015 pending investigations of theft allegations made against him. He was paid for the months he was asked to step down. The Respondent did not unfairly and unlawfully terminate the Claimant's contract. The Claim has no merit, and should be dismissed with costs to the Respondent.

3. The Claimant testified, and closed his case, on the 1<sup>st</sup> July 2015. Personnel Manager, James Mumba Chome, testified for the Respondent on 14<sup>th</sup> October 2016 when hearing closed. The dispute was last mentioned in Court on 14<sup>th</sup> November 2016 when Parties confirmed the filing of their Submissions, and date for delivery of Judgment reserved.

#### **Claimant's Case:-**

4. The Claimant told the Court he was a Packing Machine Operator. His terms and conditions of employment were as stated in his Claim and Witness Statement. The Personnel Manager Chome sent a Co-Employee of the Claimant to the Claimant, to ask the Claimant to shut down his machine, and leave. There were no reasons given why the Claimant should leave work. He consulted the Manager, who, instead of offering some kind of assistance to the Claimant, insulted the Claimant.

5. Cross-examined, the Claimant testified he was a regular Employee. He last worked on 28<sup>th</sup> March 2015. He was aware of the various contracts attached to the Response. The name of the Claimant, his identity card details appeared on the contract dated 2<sup>nd</sup> February 2015. The signature was not his.

6. He was not paid his salary for February, March and April 2015. He did not know about the Equity Bank deposit slip for April 2015. He did not take pro-rata annual leave at the end of the various contracts. Some signatures on the various contracts are not Claimant's. He did not apply for leave or take leave as shown in Respondent's bundle of documents. He was insulted by the Manager. He was threatened. He reported threats to the Police. This is not captured in the Witness Statement filed by the Claimant.

7. He was still working between August 2012 and May 2014. It is not true that he opted not to sign a contract, and sat out throughout this period.

8. He was a Machine Operator, not a Stitcher. He would not know how many sacks he stitched in a day. There is nothing showing he was entitled to 21 days of leave annually, in the various contracts. Redirected, the Claimant stated his last contract was ended prematurely by the Respondent. The salary vouchers for April and May 2015 were not signed by the Claimant. He was at work even in the period 2012-2014.

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

9. Chome testified he was employed in the year 2003, and deals with personnel issues at the Respondent.

10. The Claimant was employed as a Stitcher of sacks, on 3 months' contracts. He was employed in 2005. There was not a single continuous contract. The last contract was for 3 months, beginning 2<sup>nd</sup> February 2015, ending 30<sup>th</sup> April 2015.

11. The Claimant enjoyed pro-rata leave at the end of each period. He was away between August 2012 - 2014. He applied for a job with the Respondent initially in 2003.

12. The General Manager called Chome in March 2015. He advised that the Claimant should cease working, pending investigation. Chome was not told about the nature of the investigation. The Claimant was paid salary for February, March and April 2015 while out of work. He did not return to enquire about the outcome of the investigation. He was never issued a letter of termination. He did not return for renewal of contract. N.S.S.F and N.H.I.F contributions were deducted and remitted to the respective bodies as shown in the payment vouchers.

13. Chome told the Court Claimant first applied for a job in 2003. Respondent was under different Management. There were no contracts signed in 2005. Claimant left in August 2012, and returned on 7<sup>th</sup> May 2014. The General Manager suspended the Claimant. There were loading and stitching queries. Suspension was by word of mouth. Investigation concluded on 30<sup>th</sup> April 2015. There was no report on the investigations filed in Court. Chome testified all dues to the Claimant were paid at the end of each contract.

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

14. It is clear from the evidence of the Claimant and the Personnel Manager that Parties have had a long employment relationship, stretching back to the year 2003, and ending in March 2015. It is accepted the Claimant earned Kshs. 14,500 as of the date he left employment.

15. He worked for long aggregate years, and would not be considered anything but a regular Employee, under Section 37 of the Employment Act 2007, even if service may have been interrupted at a certain time.

16. There is an overabundant body of evidence showing the Claimant was entitled, under the various contracts, to pro-rate leave. There are leave application forms signed by him, showing he applied for, and was allowed to utilize annual leave days. The Court did not believe him at all, when he says he did not take annual leave for 11 years. There are countless letters in his own handwriting where he seeks leave days to attend to family obligations. It is unlikely these annual leave documents were manufactured by the Employer over the long employment period the Claimant worked. The prayer for annual leave pay has no foundation and is declined.

17. There is no support for the prayer on severance pay. It was not suggested anywhere, by either Party, that termination was based on redundancy, so as to bring into play, Section 40 of the Employment Act 2007 which provides for severance pay. The item is declined.

18. The Court was not shown the basis for the claim for gratuity. It is not in any of the contracts concluded between the Parties. No wage instrument has been brought to the attention of the Court, extending gratuity to the Claimant. No CBA, or wage order has been cited. If it was intended to pursue service pay under Section 35 of the Employment Act 2007, there is evidence the Claimant was enrolled under the N.S.S.F and therefore ineligible for service pay under Section 35[6] of the Employment Act. The prayer for gratuity is rejected.

19. The Respondent states there were investigations going on, and the Claimant was asked to 'step down.' The nature of the investigation was unclear. Chome was not told what the investigation was all about, and in what way the Claimant was implicated. It is not even clear to the Court what the Respondent meant by asking the Claimant to 'step down.' Was it a suspension or termination of employment? What was the justification and why was not anything put in writing? Employment records are meant to be in writing.

20. Once the Claimant stepped down as vaguely instructed, there is no evidence that he was engaged in any form of investigation or disciplinary process by the Respondent. He was not recalled, or informed he had been dismissed for whatever reason. It did not matter if the Respondent paid his salary for February, March and April 2015. The contract was that the Claimant would be engaged in actual work. Fulfillment of pay roll obligations, while denying the Claimant the right to work, amounted to very little. Payment of salaries to the end of the last contract would not make termination in any way, fair.

21. Termination was unfair and failed to meet the minimum standards of fairness under Sections 41, 43 and 45 of the Employment Act 2007. ***The Claimant is granted the equivalent of his 10 months' salary in compensation for unfair termination at Kshs. 145,000*** under Section 49 and 50 of the Employment Act and Section 12 of the Employment and Labour Relations Court Act.

22. ***He is allowed the prayer for notice pay of 1 month, at Kshs. 14,500,*** under Section 36 of the Employment Act 2007.

23. ***Certificate of Service to issue under Section 51 of the Employment Act 2007.***

24. Compensation granted to the Claimant is aimed at redressing Claimant's loss of employment. The claim for additional general damages for loss of employment has no foundation.

25. No order on the costs.

26. Interest granted at 14% per annum from the date of Judgment till payment in full.

IN SUM, IT IS ORDERED:-

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

***b) The Respondent shall pay to the Claimant the equivalent of 10 months' salary at Kshs. 145,000 in compensation; and 1 month salary in lieu of notice at Kshs. 14,500- total Kshs. 159,500.***

***c) Certificate of Service to issue.***

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

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

**Dated and delivered at Mombasa this 16<sup>th</sup> day of June 2017**

**James Rika**

**Judge**