



15% of basic x yrs worked

2,288.85 x 128 months

Kshs. 292,972.8

e) Compensation for unfair termination

Gross pay x 12 months

17,547.85 x 12 months

Kshs. 210,574.2

**TOTAL CLAIM      Kshs.1,720,256.55/=**

c) Costs and Interests.

d) Any other relieve the Honourable may deem fit to grant.

The Respondent filed a Reply to the Memorandum of Claim on 10th August 2015 in which it denies in toto all the averments in the Claim and puts the Claimant to strict proof.

The case was heard on 21st November 2016 when the Claimant's evidence was taken and on 21st February 2017 when the Respondent's case was heard. The Claimant testified on his behalf. The Respondent called REBECCA CHELUGET, its Human Resource Manager who testified on its behalf. Parties thereafter filed and exchanged written submissions.

### **Claimants Case**

The Claimant testified that he was employed by Ken Knit, the Respondent on 11th February 2003 as a loader. After 3 months he was transferred to a lorry to work as a turn boy. After 5 months he was transferred to a bigger lorry as turn boy. After one year he was again transferred to yet another lorry where he worked in the same capacity until 2010 when he became a reliever driver but substantively still remained a turn boy. In February 2013 he became a full time driver and was assigned motor vehicle registration No. KBV 904V, a 6 tonne lorry. His salary as a driver was Kshs. 8221.

The Claimant testified that he worked until August 2014 when the lorry developed a mechanical problem which he was informed would require 3 weeks to repair. He was on 31st August 2014 transferred to Nairobi to drive directors who were visiting from UK. While in Nairobi he was driving a Toyota Rav 4 registration No. KPU 243U. The directors were residing in Westlands, Nairobi and he was living with them. During the period he was paid a salary of Kshs. 15,000 per month.

The Claimant testified that he returned to Eldoret from Nairobi on 1st November 2014 and was informed that he would be assigned a pick-up for construction. When he reported to work he used the pick-up for 18 days. On 18th November 2014 he reported late for work as the road he used was under construction and one side of the road was blocked causing traffic snarl up. He arrived at work at 8.30am. but was not allowed to work. At 10 am he was told there was no driver and he drove the director, sales to work and worked until 5.30 pm.

The Claimant testified that the following day on 19th November 2014 he arrived at work early but was not allowed to work by the security officer on orders of the Human Resource Manager. The Human Resource manager later asked him to write a statement to explain why he was late. When he submitted the statement to the Human Resource Manager he directed the Claimant to admit he was late but to delete the part stating that the reason for his late arrival was the road construction. He was later issued with a warning letter by the Human Resource Manager which he refused to sign. He was told that he either signs the letter of warning or go back to Nairobi. The Claimant testified that thereafter he was issued with a Final Dues Acknowledgment Form which he refused to sign. He testified that there were a total of 3 letters presented to him on that date but he was eventually issued with only one.

The Claimant testified that the termination of his employment contract was unfair as he was never given an opportunity to defend himself. He was also never issued with a letter of termination of employment. He further testified that he was paid the same salary while working as a loader, turn boy and driver.

The Claimant testified that he sought assistance from the Human Rights office which sent a demand letter to the Respondent but the Respondent did not respond to the letter. He thereafter engaged an advocate who also sent a demand letter to the Respondent but again the Respondent did not reply. He thereafter filed this suit.

The Claimant prayed for an order for payment of his terminal benefits by the Respondent. He testified that he worked up to between 5.30 and 6pm.

Under cross examination the Claimant stated he was a member of NSSF and was paid house allowance. He stated that his working hours were from 8am to 5pm, and on Saturdays from 8am to 1pm. He stated that on the day he was late he reported to work 30 minutes late and he worked up to 5.30 pm on that day to recover the lost time.

The Claimant testified that overtime form was issued by the security officer and signed by the director. He denied that he was issued with an improvement notice in 2014.

### **Respondent's Case**

RW1, REBECCA CHELUGET testified that the Claimant was employed on 21st February 2015 and left employment on 20th November 2014. His last salary was Kshs. 12,184 with a house allowance of Kshs. 1,828. She testified that the Claimant's employment was not terminated. She testified that whenever the Claimant was called to respond to a disciplinary issue he would walk away and come back later or the following day.

Rebecca testified that the cause of the Claimant reporting to work late was that he refused to live in town and was operating from his home in the village. She testified that every time the Claimant reported late he asked that the lost time be recovered from his working hours which was inconvenient to the company.

Rebecca testified that the Claimant was served with a show cause letter on 6th December 2013 but refused to give a written explanation or explain and just walked away. She testified that before issuing the letter the company offered to transfer him to work in its go-down in Nairobi as a loader/general worker but he refused.

Rebecca testified that on 20th November 2014 the Claimant reported to work late and when asked he refused to receive the notice and walked away never to return. She testified that the Claimant was never issued with a letter of termination but the Respondent tabulated his terminal dues. The Claimant was to be paid for days worked, leave due, house allowance, and one months' salary in lieu of notice all amounting to Kshs. 31,488 which he did not collect. She testified that the company also prepared the Claimant's Certificate of Service but he did not go to collect it.

Rebecca testified that the Claimant did not work overtime, that the exercise book he produced does not come from the Respondent and that he made it himself.

Under cross examination Rebecca stated that the payslip the Claimant submitted at page 10 of his bundle of documents is not from the company. She testified that the Claimant was a general worker and worked from 8am to 5pm. in General Bond section of the company. She testified that he used to work in a lorry that delivered goods to different towns. She stated that the Claimant was paid as a turn-boy. She testified that the Claimant was posted to Nairobi as a turn-boy and did not go to Nairobi to drive the family of a director. She stated that he was not given a letter of transfer.

Rebecca denied that the Claimant was underpaid. She stated that the Claimant was paid overtime. She stated that the Claimant was paid for pro-rata leave of 8 months.

## **Determination**

I have considered the pleadings and evidence. The issues that arise for determination therefrom are the following:

1. When the Claimant was engaged by the Respondent;
2. Whether the Claimant deserted duty or was unfairly terminated; and,
3. Whether the Claimant is entitled to the orders prayed for.

## **Date of Appointment**

According to the Claimant he was employed on 11th February 2003. He submitted a copy of payslip dated 31st May 2003 and another for 30th June 2004 as proof of employment. The Respondent on the other hand contends that the Claimant was employed on 21st February 2005 as per letter of engagement of that date annexed at page 6 of the Respondent's bundle of documents filed with the Response.

I have perused the contract dated 21st February 2005 and its wording is not a recruitment but confirmation of engagement. The opening paragraph thereof reads:

*"This letter confirm your appointment as an employee of Ken-Knit (Kenya) Ltd., of the following terms and conditions of services."*(sic)

Taking into account the wording of the letter and the two payslips for the months of May 2003 and June 2004 I am persuaded that the Claimant was in employment of the Respondent before the letter of engagement was issued on 21st February 2005 and I find and hold accordingly.

## **Whether the Claimant deserted duty or was unfairly terminated**

The Claimant testified that his employment was terminated after he refused to sign a warning letter on 20th November 2014 after he was given an option to either sign the letter or go to work in Nairobi. The Respondent on the other hand avers that the Claimant walked away after refusing to sign an improvement notice and failed to go back to work. The respondent contends that the Claimant's employment was never terminated and he was not issued with a letter of termination.

The Respondent produced several documents all dated 20th November 2014. The first is the improvement notice. The second is the Final Dues Payment Acknowledgment Receipt and the third is the Certificate of Service. The questions that arise from these documents are the following: Does an employer prepare a certificate of service and final benefits on the very day that an employee refuses to receive a warning letter? What is the implication of a certificate of service and a final dues form?

The answer is obvious. A final dues form and a certificate of service are confirmation of termination of employment. The documents are never prepared in respect of an employee merely because the employee has refused to accept receipt of a warning letter and walked away.

The three documents, that is, the improvement notice, final dues form and certificate of service, support the evidence of the Claimant that his employment was terminated after he refused to receive the warning letter which is the document referred to as the Improvement Notice. The evidence of termination of employment are the certificate of service and the final dues form both of which state that the Claimant's employment terminated on 20th November 2014 and which is inconsistent with the evidence of RW1 to the effect that on that date the Claimant walked away after refusing to receive the improvement notice and was never seen again.

The foregoing mean that the Claimant's employment was terminated without reason and without being subjected to the disciplinary procedure provided in section 41 of the Employment Act being that the

employee was not given a hearing before termination of employment.

The contents of the final dues form also discloses the Respondent's intentions and contradicts the evidence of RW1. The Respondent paid the Claimant one months' salary in lieu of notice. An employee who deserts duty is not rewarded by payment of salary in lieu of notice, but is subject to summary dismissal. This therefore discloses that the intention of the Respondent was to terminate the Claimant's employment hence the payment of salary in lieu of notice.

From the foregoing I find that the Respondent terminated the Claimant's employment without issuing him with a letter of termination and without compliance with sections 41 and 43 of the Employment Act. The termination was therefore unfair in terms of section 45(2) of the Act.

## **Remedies**

I will now consider the Claimant's prayers. Before I do so however I have to determine the rate of pay for the Claimant. RW1 testified that the Claimant was a general worker. The final dues form states the Claimant's basic pay as Kshs.12,184 and a house allowance of Kshs. 1,828. In his payslip for September 2014 the basic salary is given as Kshs. 15,000. This is consistent with the Claimant's evidence that he was paid the said sum while in Nairobi where he was housed. The Claimant on the other hand has based the tabulation of his terminal dues on a basic salary of Kshs. 15,259.30 and house allowance of Kshs. 2,288.85 which is not explained.

I will go by the latest payslip which was not contested and base the workings of the final dues on a basic salary of Kshs. 15,000 and house allowance of Kshs. 2,250. The gross salary is therefore Kshs. 17,250.

### **1. Pay in lieu of Notice**

The Claimant prayed for 3 months' salary in lieu of notice. The Claimant did not submit any evidence to prove that he is entitled to 3 rather than 1 months' notice as provided in law and in his letter of engagement dated 21st February 2005.

I award the Claimant 1 months' gross pay in lieu of notice in the sum of Kshs. 17,250.

### **Overtime**

There is evidence that the Claimant worked overtime as he was distributing goods in far flung towns including Nairobi, Nakuru, Kericho, and Busia. However the only evidence produced in court relate to the period up to September 2011, which under section 90 of the Employment Act would be time barred. I find no evidence of overtime that would form the basis of this award and dismiss the prayer.

### **Service Pay**

Service pay as provided for in section 35(5) and (6) of the Employment Act is not payable to an employee who is a member of NSSF as is evident from the Claimant's payslips. The Claimant also admitted that he was a member of NSSF. The claim is therefore not proved and is dismissed.

### **House allowance**

It is evident from the Claimant's payslips that he was paid house allowance. There is therefore no basis for the claim. The same is dismissed.

### **Compensation**

Having been unfairly terminated and taking into account the Claimant's long service of more than 20 years, and further taking into account all relevant factors I award the Claimant maximum compensation of 12 months' gross pay in the sum of Kshs. 207,000.

### **Costs and Interest**

The Respondent shall pay Claimant's costs of this suit and the decretal sum shall attract interest at court rates from date of judgment.

The Respondent shall in addition pay the Claimant 8 month's prorata leave as stated in the final dues form in the sum of Kshs. 6,370.

### **Conclusion**

In summary I declare that the Claimant was unfairly terminated by the Respondent and enter judgment for the Claimant against the Respondent in the total sum of **Kshs. 230,620** with costs and interest.

**Dated and signed and delivered this 27th day of July, 2017**

**MAUREEN ONYANGO**

**JUDGE**