



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

**CAUSE NO. 50 OF 2017**

**(Originally Nakuru Cause No. 397 of 2016)**

**SAMUEL OTIENO MUNALA**

**CLAIMANT**

**v**

**KEN KNIT (K) LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Samuel Otieno Munala (Claimant) sued Ken Knit (K) Ltd (Respondent) on 7 October 2016 alleging unfair termination of employment and breach of contract. He sought a total of Kshs 4,122,496/-.
2. On 28 April 2017, the Court directed that the Cause be transferred to Eldoret sub-registry and on 26 July 2017, the Court fixed formal proof for 25 September 2017, as the Respondent had not filed a Response.
3. On the morning of the hearing, Mr. Kinyanjui for the Respondent sought and got leave to file a *Response*, witness statements and documents before 29 September 2017 and hearing was scheduled for 1 November 2017.
4. The Response and other documents were filed in Court on 25 September 2017 and this prompted the Claimant to file a Reply to Response on 13 October 2017.
5. When the Cause was called for hearing on 1 November 2017, the Respondent and its advocate on record were not present and because the hearing date was taken in their presence, the Court allowed the hearing to proceed.
6. The Claimant gave sworn testimony and filed submissions on 8 November 2017.
7. The Court has considered the pleadings, evidence and submissions.
8. In the view of the Court, the *Issues* arising for determination are, *whether the termination of the Claimant's employment was unfair, whether the Claimant was underpaid, whether Claimant had pending leave at time of separation and appropriate remedies.*

**Unfair termination of employment Procedural fairness**

9. The Claimant was issued with a show cause notice dated 27 October 2015 and he acknowledged receipt of the notice.

10. The notice set out the allegations the Claimant was to respond to as *not performing your duty as required and you were all the time sleeping/seated during working hours.*

11. The Claimant responded to the show cause in writing on 27 October 2015, and an oral hearing was held on 29 October 2015.

12. From the foregoing, the Court is satisfied that the process undertaken by the Respondent substantially complied with the statutory requirements of section 41 of the Employment Act, 2007.

### **Substantive fairness**

13. Sections 43 and 45 of the Employment Act, 2007 place a statutory burden upon an employer to not only prove the reasons for terminating an employee's contract, but that the reasons were valid and fair.

14. Considering the Claimant's uncontroverted testimony that he was ailing at the material time and was on medication, and that the Respondent did not attend the hearing to discharge the burden placed on it to prove the reasons for the decision it took, the Court can conclude that the termination of the Claimant's contract was not for valid and fair reasons.

### **Underpayments**

15. The Claimant was employed as a machine operator in the blankets department.

16. His testimony on the remuneration from 1996 to 2015 and the applicable Legal Notices were not challenged or controverted and the Court will find that he was underpaid.

### **Pending leave**

17. The Claimant testified that he did not take his leave for 2015 (ten months), and considering that the Respondent did not file leave records in terms of section 10(3) as read with section 74 of the Employment Act, 2007, the Court finds that he had accrued leave for 10 months.

### **Appropriate remedies**

#### **Pay in lieu of notice**

18. The Claimant sought 2 months' pay in lieu of notice without disclosing the evidential basis for the same.

19. In terms of section 35(1)(c) of the Employment Act, 2007, the Court holds that the Claimant is entitled to 1 month pay in lieu of notice (basic wage was Kshs 10,316/-).

#### **Salary for October 2015**

20. The Claimant is entitled to the wages earned in October 2015.

#### **Pro rata leave**

21. Because the Claimant served for 10 months in 2015, he is entitled to *pro rata* leave.

#### **Service pay**

22. The Claimant was contributing to the National Social Security Fund and in terms of section 35(5) & (6) of the Employment Act, 2007, he is not entitled to service pay.

#### **Loss of earnings**

23. The Claimant sought Kshs 3,659,484/- under this head but did not lay any evidential, contractual or legal basis for the relief.

### **Underpayments**

24. The Court holds that the Claimant is entitled to the underpayments as sought.

### **Compensation**

25. Considering the 19 years of service, the Court is of the view that the maximum compensation equivalent to 12 month's gross wages would be appropriate (gross wage at separation was Kshs 11,863/-).

### **Certificate of Service**

26. A certificate of service is a statutory right and the Respondent should issue one to the Claimant within 14 days of today.

### **Conclusion and Orders**

27. From the foregoing, the Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

(i) Pay in lieu of notice	Kshs 10,316/-
(ii) October 2015 wages	Kshs 11,863/-
(iii) Leave	Kshs 7,734/-
(iv) Underpayments	Kshs 283,244/-
(v) Compensation	Kshs 142,356/-
<b>TOTAL</b>	<b>Kshs 458,513/-</b>

28. Respondent to issue Certificate of Service.

29. Claimant to have costs on half scale.

**Delivered, dated and signed in Eldoret on this 24<sup>th</sup> day of November 2017.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant            Mr. Kirwa instructed by Mwakio, Kirwa & Co. Advocates

For Respondent        Federation of Kenya Employers

Court Assistants        Nixon/Etyang