



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO 310 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOHN NYONJE ELIUABA.....CLAIMANT**

**VRS**

**LUBAO JAGGERY ACTORY LTD.....RESPONDENT**

**JUDGMENT**

The claimant John Nyonge Eliuba was employed by the Respondent Lubao Jaggery Factory Limited the Respondent by letter dated 13th July, 2003. He avers in his plaint that he was dismissed verbally by the Respondent on 30th April, 2013. He further avers that his salary was stopped from March, 2012 and he worked without a salary until the date of termination.

He seeks the following Orders against the Respondent

- i) Leave for 2 years.....Kshs. 16,913.40
- ii) Under payments.....Kshs. 117,849.00
- iii) Overtime for 1 year .....Kshs. 45,355.00
- iv) unpaid salary for 13 months .....Kshs.159,695.00
- v) Public holidays for 4 years.....Kshs. 17,719.20
- vi) Service pay .....Kshs. 60,405.20

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**Total Kshs. 417,937.92**

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He further prays for:

- a) General damages.

b) Special damages in terms of paragraph 13 of the plaint.

c) Costs of this suit.

d) Interest on (a) , (b) and (c) at court rates.

The Claimant avers that the respondent paid him Shs. 70,000 out of the outstanding terminal dues leaving a balance of Shs. 347,937.92.

The Respondent filed a defence denying all allegations by the Claimant.

At the hearing the Claimant who was unrepresented testified that he was employed and issued with a letter of appointment on 13th July, 2003 originally on a monthly salary of Shs. 5000. In 2008 his salary was increased to Shs. 8000 per month. He testified that he was dismissed on 30th April, 2013. He reported the dismissal to Kenya Union of Commercial Food and Allied workers who wrote a demand letter to the Respondent. The 1st letter dated 27th May, 2013 was not responded to. The Union sent a reminder dated 11th July 2013 following which a meeting was held between the Respondent and the Claimant at which a sum of Shs. 70,000 was agreed upon and was paid to the Claimant by Himesh B. Patel on 22nd July, 2013. The agreement signed pursuant thereto states that other items remained contentious. It however does not specify what was paid and what items were not agreed upon.

The Claimant alleges the sum he has claimed being Shs. 347,937.92 is the balance .

For the Respondent, Paul Khatela Munanga testified that he is a Senior Supervisor, that the Claimant was a personal employee of Himesh Patel and that the Company is currently closed. His job at the factory is to take care of the factory and attend to visitors.

### **Determination**

I have considered the pleadings and evidence carefully, I have also perused the written submissions filed by the parties.

In both the defence and in the written submissions the Respondent denies that the Claimant was an employee of the Respondent. The Respondent states that the Claimant was a personal employee of Himesh Patel.

The letter of appointment is on the letterhead of the Respondent and states:

*"Date: 13th July, 2003*

*To:*

*John Nyonje Eliuba*

*P.O.606*

*KAKAMEGA*

*I, Himesh B. Patel hereby appoint/employ the above named as my clerk.*

*I wish to make him one of my employees in my Company.*

*His responsibilities shall be arranging files, filing of important documents in their respective files, typing letters and all confidential documents.*

*The agreed salary is five thousand shillings (Kshs. 5,000.00) per month. The salary shall be paid*

*every end of the month, signed to show that he has received/been paid.*

*A notice of two months shall be issued before termination from work."*

The letter is signed by Bhavin Patel but states the Claimant would be one of the employees in the company as a clerk to Himesh B. Patel.

The Respondent's witness testified that they worked together with the Claimant. The payment agreement is between Lubao Jaggery Factory Ltd and the Claimant and is signed by Himesh B. Patel on behalf of the Respondent.

All these point to the fact that the Claimant was an employee of the Respondent and not a personal employee of Himesh Patel. I therefore find the Respondent's averment that the Claimant was not an employee of the Respondent to be without basis.

The Claimant having been an employee of the Respondent, it was under obligation to prove that the Claimant took leave, was not underpaid did not work overtime or on public holidays and is not entitled to service pay. Such obligation is statutory under Section 10 and 74 of the Employment Act. Section 10(7) expressly provides that failure of the Respondent to produce such records shifts the burden of proof from the Claimant to the Respondent.

From the evidence on record, the Claimant who was employed as a clerk was underpaid as he was paid less than the statutory minimum rate of pay. The Respondent did not controvert the Claimant's allegations that he never took leave for the entire period he worked for the Respondent.

I however do not find any proof of overtime, non-payment of salary for 13 months and I also do not find any proof of unfair termination.

For these reasons I award the Claimant the following

- i) Leave for 2 years.....Shs. 17,717.00
- ii) Underpayments for 2 years.....Shs.111,717.60
- iii) Services pay.....Shs. 63,274.50

**Total** **Shs.192,709.10**

Less payment received.....Shs. 70,000.00

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**Shs. 122,709.10**

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Balance due to Claimant is therefore **Shs. 122,709.10** which I award

The Respondent shall also pay Claimant's costs which I assess at Shs. 10,000/=.

**Dated, signed and delivered this 26th January, 2016.**

**MAUREEN ANYANGO**

**JUDGE**