



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT MOMBASA

CAUSE NUMBER 254 OF 2015

BETWEEN

CALEB OTIENO NYAWAN CLAIMANT

VERSUS

**KALPESH MARUJI t/a UMIRAJ ENTERPRISES
RESPONDENT**

Rika J

Court Assistant: Benjamin Kombe

Claimant in Person

Ms. Mkongo Advocate instructed by Ameli Inyangu & Partners, Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on 21st April 2015. He states he was employed by the Respondent as a Casual Employee in March 2013. He earned Kshs. 11,700 per month. It was later adjusted to Kshs. 2,700 per week, or Kshs. 10,800 monthly.
2. He fell ill on the 7th April 2015. He was granted sick-off by the Respondent by word of mouth. He returned to work on 7th April 2015. The Respondent terminated the Claimant's contract of employment on return, without any notice or justification. He seeks from the Respondent the following:-
 - a. 1 month salary in lieu of notice at Kshs. 10,800.
 - b. 2 years' annual leave pay at Kshs. 18,900.

c. Service at Kshs. 13,500.

d. Public holidays' pay at Kshs. 9,000.

e. 12 months' salary in compensation at Kshs. 126,600

Total..... Kshs. 181,800

f) A declaration that termination was unfair.

g) The Respondent to avail to the Claimant his Certificate of Service.

h) Costs and Interest.

2. The Respondent filed his Statement of Response on the 2nd June 2015. It is conceded the Claimant was employed by the Respondent as a Casual Employee. He was employed on 1st October 2013, and earned Kshs. 11,700 per month. He opted to be paid weekly rather than monthly. He was issued 1 month notice of termination, and given reasons for the decision. He was paid terminal dues of Kshs. 8,775, having worked for 1 ½ years. The Respondent asks the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant testified, and closed his case, on the 6th October 2015. The Respondent gave evidence on the same date, bringing the hearing to a close. Parties confirmed the filing of their submissions on the 8th December 2015.

4. The Claimant restated he was employed as a Casual Employee by the Respondent, in March 2013. He was not issued a written contract. After 1 year, the Respondent changed the mode of payment of the Claimant's salary. He was initially paid 11,700 per month. This was changed to Kshs. 2,700, paid weekly. He was granted sick-off, but on return had his contract of employment terminated without notice or reason. He worked on public holidays without compensation. He was only paid Kshs. 8,000 on termination.

5. Cross-examined, the Claimant stated he did not use to sign an attendance register. He was aware such a register existed. He fell ill on the 27th March 2015. He never saw the letter dated 28th February 2015. It is a termination notice from the Respondent, giving the Claimant 1 month notice of termination. From 1st March 2015, the Claimant had not received this letter. He gave the Respondent his medical records. He was unwell from 27th March 2015. The treatment card from Savannah Clinic, states the Claimant went there on the 9th April 2015. He was paid Kshs. 8,000. He did not sign any discharge. He was not issued notice. He never went on annual leave. No reasons were given for the change in the mode of salary payment. There were 10 days of public holidays. It is not true that the Claimant declined to sign a contract.

6. The Respondent told the Court he employed the Claimant as his Casual Employee. He was loading and off-loading goods. He commenced employment on 1st October 2013, terminating on the 31st March 2015. From 1st October 2013 to 30th September 2014, he had signed a contract. After this the Claimant refused to sign contracts. He requested to be paid weekly. He signed all the vouchers exhibited by the Respondent, on receiving money from the Respondent. He was rude to Customers and was verbally warned. The Respondent was compelled to terminate the Claimant's contract. He refused to sign the termination notice after he had read it. The Respondent notified the Labour Office about the termination, and paid the Claimant service pay of Kshs. 8,775. He was paid annual leave pay of 21 days. He did not work on Public Holidays. Compensation is unmerited. Cross-examined, the Respondent told the Court the Claimant declined to sign the contract of employment, and the notice of termination. He was paid annual leave pay. He worked 1 ½ years. The notice was from 1st March 2015. The Claimant's salary was Kshs. 11,700 per month. Service pay was based on 15 days' salary for the years completed in service. The Respondent at the same time remitted N.S.S.F and N.H.I.F contributions. He prays for dismissal of the

Claim.

The Court finds:-

7. The Parties agree they were in an Employer- Employee relationship. The Claimant's contract was terminated by the Respondent. Parties are not in agreement on the circumstances surrounding termination.

8. The Respondent states he issued the Claimant a notice of termination of employment, dated 28th February 2015. It was to become effective 1st March 2015. The Respondent stated in the notice that the Claimant had failed to carry out his duties properly, and the business suffered loss as a result of the Claimant's negligence.

9. It was incumbent upon the Respondent to prove the reason for termination under Section 43 of the Employment Act 2007. The reasons given in the termination notice were not proved. It was not shown in what way the Claimant had failed to carry out his loading and offloading of goods duties properly. No details of negligence and loss are shown anywhere in the record. There was no valid ground shown to justify termination. Section 41 of the Employment Act 2007 demands where an Employee is charged with among others, improper or poor performance; the charges should be clearly laid out; and the Employee granted an opportunity to answer to the charges and defend the charges. It was not shown the Respondent granted the Claimant an opportunity to respond to the allegations. Termination in the view of the Court did not meet the demands of substantive and procedural justice, and was therefore unfair. ***The Claimant merits, and is granted compensation of unfair termination at 6 months' salary computed at Kshs. 11,700 X 6 = Kshs. 70,200.***

10. He was granted notice before termination, and his protestation that he did not receive such notice is unconvincing. His claim for notice pay is rejected. He was subscribed to the National Social Security Fund, and contributions on his behalf consistently forwarded to the Fund by the Respondent. He is not eligible for service pay under Section 35 [6] of the Employment Act 2007. He was paid for his unutilized annual leave, vide payment voucher dated 4th October 2014. His claim for additional annual leave pay is baseless. He did not show which public holidays he worked. He did not serve 7 days in a week. He was granted rest days as shown in the payment vouchers. Occasionally he worked for 5 days or less in a week. He did not account for the days he was off duty, in claiming public holiday pay. In any case the Claimant received a sum of Kshs. 8,775 on termination in service pay, while he was not entitled to service pay. He claims Kshs. 9,000 in public holiday pay. If the Court is wrong on this finding, and there was work done over the public holidays, the amount received erroneously as service pay, should be sufficient to satisfy the claim for holiday pay. On the whole these claims have no merit and are rejected.

11. The Certificate of Service is granted by the law, under Section 51 of the Employment Act 2007. There is no reason why the Respondent should retain the Claimant's Certificate. The Parties shall bear their costs of the litigation.

IN SUM, IT IS ORDERED:-

a. Termination was unfair

b. The Respondent shall pay to the Claimant compensation for unfair termination the equivalent of the Claimant's 6 months' salary at Kshs. 70,200, to be paid within 30 days of the delivery of this Award.

c. Certificate of Service to issue.

d. Parties to bear their costs of the Claim

Dated and delivered at Mombasa this 11th day of March, 2016

James Rika

Judge