



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2169 OF 2012**

**NEMROD NYANGWESO RATEMO.....1ST CLAIMANT**

**STEPHEN OKELLO JUMA.....2ND CLAIMANT**

**VS**

**KEL CHEMICALS LIMITED.....1ST RESPONDENT**

**FIROZ NANJI.....2ND RESPONDENT**

**AWARD**

**Introduction**

1. By a Memorandum of Claim dated 24th October and filed in Court on 25th October 2012, the Claimants have sued the Respondents seeking compensation for unlawful termination as well as payment of final dues. The Claimants subsequently filed a supplementary Memorandum of Claim on 16th June 2015.
2. The Respondents filed a response on 4th December 2012 and a further response on 15th September 2015. By consent of the parties, the claim against the 2nd Respondent was withdrawn at the commencement of the hearing. The Claimants testified on their own behalf and the Respondent called Peter Maina Kamau, a Labour Officer based at Thika and Fredrick Kamau, its Plant Supervisor.

**The Claimant's Case**

3. The 1st Claimant, Nemrod Nyangweso Ratemo states that he was employed by the Respondent as a general worker effective April 2010. He worked as such until 15th August 2012 when his employment was terminated. The 2nd Claimant, Stephen Okello Juma states that he was employed as a general worker (loader) on 26th April 2004 and was terminated on 18th August 2012. They were paid a daily rate of Kshs. 379. It is the Claimants' case that the termination of their employment was unlawful and unprocedural.
4. They claim the following:

**Nemrod Nyangweso Ratemo-1st Claimant**

- a. Compensation for loss of employment.....Kshs. 135,985.20
- b. 1 month's salary in lieu of notice.....9,854.00
- c. 50 days' leave pay.....18,950.00
- d. Overtime (5,880 hours).....47,040.00

- e. Rest days (112 days).....42,448.00
- f. Severance pay for 2 years (15 days' pay per year).....11,370.00
- g. House allowance (15% of basic pay).....41,386.80
- h. 15 days worked in August 2012.....5,685.00
- i. Certificate of service

**Stephen Okello Juma-2nd Claimant**

- a) Compensation for loss of employment.....Kshs. 135,985.20
- b) 1 month's salary in lieu of notice.....9,854.00
- c) 176 days' leave pay.....66,704.00
- d) Overtime (4,800 hours).....57,600.00
- e) Rest days (400 days).....151,600.00
- f) Severance pay for 8 years (15 days' pay per year).....45,480.00
- g) House allowance (15% of basic pay).....147,810.00
- h) 26 days worked.....9,854.00
- i) Certificate of service

**The Respondent's Case**

5. In its defence, the Respondent denies that the Claimants worked continuously and state that they were employed as daily rate workers. The Respondent also denies that the Claimants were terminated. Rather, the Claimants deserted duty.

6. The Respondent further states that at a conciliation meeting at the Labour Office in Thika, the Claimants were offered an opportunity to resume work but they declined the offer, opting to be paid their terminal dues instead. Having received their final dues, the Claimants released the Respondent from any further liability.

**Findings and Determination**

- 7. There are three issues for determination in this case:
  - a. Whether the Claimants were casual or regular employees of the Respondent;
  - b. Whether the Claimants deserted duty or were unlawfully terminated;
  - c. Whether the Claimants are entitled to the remedies sought.

**Claimants' Employment Status**

8. It is the Respondent's case that the Claimants were casual employees. On their part, the Claimants state that they worked on a continuous basis for over two (2) years and eight (8) years respectively. In support of its case, the Respondent produced schedules showing the days the Claimants had not worked.

9. On their face, these schedules appear to have been prepared specifically for this case which is cited at the top of the schedules. Moreover, the primary documents from which these schedules were extracted were not availed to the Court and it was therefore not possible to tell the days on which the Claimants' actually worked.

10. Section 9 of the Employment Act, 2007 places the responsibility of documenting the employment relationship on the employer and where the employer fails to discharge this duty, the Court is at liberty to interpret the applicable terms and conditions. According to Section 37 of the Employment Act, the maximum number of days during which an employer may keep an employee in casual employment is one month. I have already stated that the schedules produced by the Respondent do not provide conclusive evidence regarding the Claimants' work history. In addition, the Respondent did not produce the casual payment sheets to show the days for which the Claimants were paid.

11. Where an employer fails to produce a written employment contract, Section 9(7) of the Act shifts the burden of proving or disproving an alleged term of employment on that employer. Applying this provision, the Court adopts the Claimants' testimony with regard to the nature and length of their employment with the Respondent. The Respondent's assertion that the Claimants were casual employees is therefore rejected.

### **Desertion of Duty or Unlawful Termination?**

12. The Respondent states that the Claimants deserted duty. Desertion of duty is a form of gross misconduct that renders an employee liable to summary dismissal. However, like all other forms of misconduct, it must be proved. It is not enough for an employer to state that an employee deserted duty. The employer must show efforts made towards establishing the whereabouts of the employee. At the very least, the employer must show that a notice to show cause was issued to the employee alleged to have deserted duty. There was no evidence of any effort made by the Respondent in this regard and the Court therefore rejects this line of defence.

13. That said, the Court upholds the Claimants' testimony that their employment was terminated without justifiable cause and in violation of due procedure. Before addressing the issue of remedies, I need to deal with some disputed agreements produced by the Respondent. The Claimants denied having signed these documents or receiving any payment from the Respondent. I have looked at the documents and the only thing to say that they carry obvious alterations that are not countersigned by the parties. In the absence of any explanation on these alterations and taking into account that the Claimants consistently disowned these documents, the Court has arrived at the conclusion that they carry no probative value and proceeds to reject them as evidence in this case.

### **Remedies**

14. In light of my finding that the Claimants were unlawfully terminated, I award the 1st Claimant, Nemrod Nyangweso Ratemo three (3) months' salary and the 2nd Claimant, Stephen Okello Juma eight (8) months' salary in compensation. In making this award I have taken into account the Claimants' respective length of service as well as the Respondent's conduct in the termination process. I further award each of the Claimants one (1) month's salary in lieu of notice.

15. The Respondent did not produce any leave records and the claims for leave pay therefore succeed and are allowed. There was also no evidence that the Claimants were paid house allowance and I allow these claims at the rate of 15% of the basic salary and adopt the resultant cumulative figure of Kshs. 11,332 as the Claimants' respective monthly salaries for the purpose of tabulating their claims.

16. The Respondent's Plant Supervisor, Fredrick Kamau told the Court that no National Social Security Fund (NSSF) dues were paid on account of the Claimants and I consequently allow the claims for service pay. Having adopted the Claimants' testimony on their employment history, I allow the claims for final days worked as pleaded by the Claimants. The claims for overtime and rest days were not proved and are dismissed.

17. Finally I make an award in favour of the Claimants in the following terms:

### **1st Claimant - Nemrod Nyangweso Ratemo**

a) 3 months' salary in compensation for unlawful termination.....	Kshs.33,996
b) 1 month's salary in lieu of notice.....	11,332
c) Leave pay for 2 years & 4 months (11,332/30x42+11,332/30x1.75x4).....	18,509
d) House allowance for 28 months.....	41,387
e) Salary for 15 days worked in August 2012 (11,332/30x15).....	5,666
e) Service pay for 2 years.....	<u>11,332</u>
<b>Total.....</b>	<b>122,222</b>

**2nd Claimant – Stephen Okello Juma**

a) 8 months' salary in compensation for unlawful termination.....	Kshs.90,656
b) 1 month's salary in lieu of notice.....	11,332
c) Leave pay for 8 years (11,332/30x168).....	63,459
d) House allowance for 96 months.....	141,898
e) Salary for 18 days worked in August 2012.....	6,799
e) Service pay for 8 years.....	<u>45,328</u>
<b>Total.....</b>	<b>359,472</b>

18. The Claimants are also entitled to certificates of service and the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

19. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF APRIL 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Ayieko for the Claimant

Miss Mungoni for the Respondent