



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 392 OF 2013**  
**(Originally Nairobi Cause No. 316 of 2011)**

**AMWATA MUTAHI NICOLUS** **1<sup>ST</sup> CLAIMANT**

**EVERLINE AUMA OMONDI** **2<sup>ND</sup> CLAIMANT**

**v**

**UKWALA SUPERMARKET**

**NAKURU & KERICHO BRANCH** **RESPONDENT**

**JUDGMENT**

1. The Claimants commenced legal proceedings against the Respondent on 9 March 2011 and they stated the issues in dispute as

1. Unfair termination
2. Underpayments.

2. The Respondent filed its Response on 15 April 2011.

3. On 3 December 2012, the Cause was dismissed by Nduma J on the application of the Respondent. Apparently, without realising that he had dismissed the Cause, Nduma J on 28 October 2013 ordered that the Cause be transferred to Nakuru for hearing and determination.

4. On 3 April 2014, Ongaya J pursuant to an application by the Claimants seeking review of the dismissal order, reviewed the order dismissing the Cause and had it reinstated and, after a few more appearances, the Cause proceeded to hearing on 1 July 2015 and 1 December 2015.

5. Before the hearing commenced, the Court directed that a subfolder for the case of the 3<sup>rd</sup> Claimant be opened after the Respondent disclosed that he had been dismissed at a different time from the other Claimants.

6. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the 1<sup>st</sup> Claimant was a general labourer or shop assistant, whether a till operator in a supermarket is legally a cashier, whether the dismissals of the Claimants were fair, whether*

*the cause or part of the cause of action is statute barred and appropriate remedies, including entitlements accruing from the employment relationship.*

### **Whether 1<sup>st</sup> Claimant was a general labourer or shop assistant**

7. The contract issued to this Claimant gave his occupation as a general labourer.

8. In the pleadings and in testimony, the 1<sup>st</sup> Claimant contended that his duties were those of a shop assistant. He stated that he used to sell inside the shop, ensured items on the shelves had correct price tags, expiry dates and that he also assisted customers to identify items within the supermarket. He would also get change from the bank.

9. The Wholesale and Retail Distributive Trades Order Legal Notice No. 249 of 1973 has defined a shop assistant as

**any person wholly or mainly employed for the purpose of transacting business with customers in that department of an undertaking to which customers have access but who is not in charge of such department.**

10. In my view, the duties carried out by the 1<sup>st</sup> Claimant do not qualify him as a shop assistant. He did not prove that he was responsible for sales. Getting change from the bank and confirming price tags and expiry dates do not primarily involve transacting business with customers/shoppers.

### **Whether till operator in a supermarket is legally a cashier**

11. The 2<sup>nd</sup> Claimant's appointment letter gave her designation as till operator.

12. During her testimony, she contended that she was actually a cashier as she would receive cash payment from shoppers.

13. The Wholesale and Retail Distributive Trades Order Legal Notice No. 249 of 1973 has defined a cashier as

**an employee who is principally employed in keeping records of cash transactions, receiving incoming cash, issuing change, cashing cheques, and preparing cash for bank deposit; and whose additional duties may include the verifying of cash held against records which are subject to audit, the operation of adding, calculation or preparing of wage or salary payments.**

14. The Court is satisfied that a till operator within a supermarket set qualifies to be a cashier for purposes of the law, and should be remunerated as such even where designated otherwise.

### **Whether the dismissals were fair.**

#### ***Burden on employee***

15. At the first instance, in a case of unfair termination of employment, an employee has a low threshold obligation to prove an unfair termination of employment occurred.

16. Under section 35 of the Employment Act, 2007, an employee paid by the month ought to be given written notice of at least 28 days. There was no suggestion the Claimants were given written notice and on that ground alone, the Court reaches the conclusion that the Claimants have met the statutory threshold and therefore the Respondent ought to demonstrate why notice was not given or was not necessary in terms of sections 36, 41 and 44 of the Act.

## ***Procedural fairness***

17. Pursuant to section 41 of the Employment Act, 2007, an employer has the statutory obligation to show that a hearing is conducted before an employee's employment is terminated on account of *misconduct, poor performance or physical incapacity*.

18. The Respondent called two witnesses. The first Shamlalbai Patel did not testify as to the process followed before the Claimants services were terminated.

19. However, he is the one who witnessed what happened and he informed a director who handed over the case to the person in charge of human resources.

20. This was the second witness and Administration Manager in charge of human resources. He narrated how he received the report from the first witness and carried out investigations by calling the Claimants to give their side of the story at about 6.00pm after which he consulted the Respondent's lawyers. The Claimants thereafter had their employment terminated.

21. The Court listened keenly to the 2<sup>nd</sup> Respondent's witness testimony. At no stage of his testimony did he disclose **who** were present when the Claimants were informed that the termination of their employment was under consideration and asked to make representations.

22. He did not even disclose **where** a hearing took place. Was it his office?

23. Both the Claimants testimony that when they went to the Accountants office on the same day, the termination letters had already been prepared were not challenged or controverted.

24. The Court is not convinced that the process conducted/carried out by the Respondent on 3 January 2011 meet the basic/essentials of procedural fairness as envisaged by section 41 of the Employment Act, 2007. At most, what the Administration Manager did was to make inquiries/investigations to establish the facts upon which to take disciplinary action.

25. Although the parties did not address the issue, the Court can and does take judicial notice that the Respondent runs supermarkets in various towns in Kenya, and therefore it has more than 50 employees and in terms of section 12 of the Employment Act, 2007 it ought to have policies on disciplinary cases.

26. It is unclear therefore whether the Respondent complied with such policies if the same were in place.

27. The Court in the circumstances finds that the termination of the employment of the Claimants was devoid of procedural fairness, and in this respect, it is not necessary to examine whether the termination(s) meets the burden expected of employers by sections 43 and 45 of the Employment Act, 2007.

## **Limitation**

28. The Claimants services were terminated on 3 January 2011 and the Memorandum of Claim was lodged in Court on 3 March 2011 all within the prescribed period in section 90 of the Employment Act, 2007.

29. The claims are not caught up with limitation.

## **Appropriate remedies**

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

30. Both Claimants were paid pay in lieu of notice as indicated in the Final dues pay sheets and nothing turns on this head of claim.

### ***Underpayments***

31. The 1<sup>st</sup> Claimant's contention that he carried out the duties of a shop assistant has been rejected and therefore he cannot assert underpayments accruing for the position of a shop assistant.

32. The Court has found that though the 2<sup>nd</sup> Claimant was designated a Till Operator she was carrying on the duties of a cashier and therefore she ought to have been remunerated as a cashier.

33. In the pleadings, Legal Notices Nos. 38 of 2006, 70 of 2009 and 98 of 2010 were cited.

34. The Court finds that she was underpaid and is entitled to the Kshs 190,425/-.

### ***Overtime***

35. The contractually agreed working hours were set out in the appointment letters.

36. The copies of pay slips produced by the Respondent all have elements of both normal overtime and public holiday overtime.

37. It is more plausible that the Claimants were paid all due overtime and the Court declines to make an award on overtime.

### ***Service gratuity***

38. No contractual or statutory foundation for service pay gratuity was disclosed and the same is denied.

39. In any case, the final dues schedules show service pay was made.

### ***Annual leave***

40. The final dues pay sheets show the Claimants were paid in lieu of pending leave and the Court declines the invitation to make an award on account of leave.

### ***Compensation***

41. The Court having reached the conclusion that the termination(s) of the Claimants employment were unfair would award them the equivalent of 7 months gross wages each as compensation, considering the length of service (1<sup>st</sup> Claimant's pay slip for November 2010 has gross wage of Kshs 14,531/- while 2<sup>nd</sup> Claimant has a gross wage of Kshs 18,976/-).

### ***Conclusion and Orders***

42. The Court finds and holds that the termination of both Claimants employment were procedurally unfair and awards them and orders the Respondent to pay them

#### **1<sup>st</sup> Claimant**

(a) 7 months wages compensation                      **Kshs 101,717/-**

#### **2<sup>nd</sup> Claimant**

(a) Underpayments    Kshs 190,425/-

(b) 7 months wages compensation                      Kshs 132,832/-

TOTAL

**Kshs 323,257/-**

43. Claimants to have costs.

**Delivered, dated and signed in Nakuru on this 8<sup>th</sup> day of April 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant

Mrs. Ndeda instructed by Ndeda & Associates

For Respondent  
Advocates

Mr. Murimi instructed by Murimi, Ndumia, Mbago & Muchela

Court Assistant

Nixon