



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NUMBER 148 OF 2015**

**BETWEEN**

**JUMAA BEJA MZUNGU.....CLAIMANT**

**VERSUS**

**MINI BAKERIES LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Ms. Onyango Advocate instructed by Katee Omollo Onyango & Company Advocates for the Claimant*

*Mr. Kongele Advocate instructed by Muriu, Mungai & Company Advocates for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

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

1. The Claimant filed an Amended Statement of Claim on the 24<sup>th</sup> September 2015. He states he was employed by the Respondent Bakery Company. He was employed as a Loaf Packer earning Kshs. 592 on day shifts, and Kshs. 620 on night shifts. He was employed in January 2009. He did not report to work on the 12<sup>th</sup> December 2013, as this is a gazetted public holiday. The following day, he was summarily dismissed for failing report to work the previous day. He holds termination was unfair and unlawful, and seeks the following orders against the Respondent:-

- a. 1 month salary in lieu of notice at Kshs. 592 x 30 = Kshs. 17,760.
- b. Unpaid annual leave of 3 years at Kshs. 17,760 x 3 = Kshs. 52,280.
- c. Gratuity for 5 years at Kshs. 44,400.
- d. 12 months' salary in compensation for unfair termination at Kshs. 231,120

In total the monetary claim stands at Kshs. 328,560. The Claimant also prays for declaration that: termination was unfair; and the Claimant was entitled to 1 month of annual leave after every year worked.

2. The Respondent filed its Statement of Response on the 23<sup>rd</sup> April 2015. Its position is that the Claimant was employed as a Casual Labourer. He left employment on his own accord sometime in December 2013. He is not entitled to any of the prayers sought.

3. The Claimant gave evidence, and closed his case on the 9<sup>th</sup> December 2015. The Respondent testified through its Senior Production Manager Badi Mohammed Somo on 9<sup>th</sup> December 2015, and through its Malindi Branch Manager Wilfred Maloba on the 25<sup>th</sup> February 2016 when hearing closed.

### The Claim

4. Mzungu told the Court he worked 5 days in a week, and earned Kshs. 592 per day. He was away from work on 12<sup>th</sup> December 2013. It was Jamhuri Day. The following day, he was told not to work by the Manager Mohammed, on the ground that he had refused to work the previous day. The Respondent was normally open on Public Holidays. Employees ordinarily worked on Public Holidays. The Claimant had a sick Child, and had informed the Manager Salim, he would be attending to his Child on Jamhuri day. Salim granted the Claimant permission to be away on Jamhuri day. The Claimant had in April 2013 been suspended. He did not have a warning in his record.

5. Cross-examined, the Claimant told the Court there were days he was not on duty. He was sick during these days. The Employer paid N.H.I.F contributions. The N.H.I.F Statements showed different Employers. The Claimant explained he did not work for one Employer all through. Contributions were remitted by different Employers at different times.

6. He was ill May to September 2013. From October 2013, he was doing sales. He did so, on a Company bicycle. He would get orders from Customers, and distribute on his bicycle. He was not given specific number of days to attend to his stricken Child. He returned the bicycle on Jamhuri day. He told the Manager he would not work on this day and returned the bicycle. He did not provide evidence that his Child was sick. He paid Kshs. 100 per day as security for the Company bicycle. On termination, he was paid Kshs. 2,500 being the total deposited security. He testified he seeks gratuity, but did not work for 5 years as pleaded in the claim for gratuity.

7. Redirected, the Claimant testified it was true he did not work the whole of the year 2010. He returned to work in August 2011. He worked up to May 2012. He was injured and resumed work in July 2012. He worked till 13<sup>th</sup> December 2013 when his contract was terminated. He had stomach problems. Mohammed terminated the Claimant's contract. A different Officer terminated the Claimant's contract. The Claimant's prays the Court to allow the Claim.

### The Response

8. Badi Mohammed Somo told the Court the Claimant joined the Respondent in the year 2009 as a Casual Employee. He was inconsistent in attendance of work. He worked at Mikindani Branch. Salim was the Manager there. The Claimant last reported to work on 10<sup>th</sup> December 2013. He called Mohammed on 11<sup>th</sup> December 2013 and placed an order. On Jamhuri day, he returned the bicycle. He did not tell Mohammed what his problem was. He left and did not return until January 2014 when he went to collect his security deposit. He was paid by the cashier. In April 2014, he returned, asking to be reinstated. He was advised there was no opportunity.

9. Wilfred Kilunda Maloba testified the Claimant worked as a Casual Employee. He was employed to distribute cakes. He was required to place orders for cakes at the end of every day. The order would be ready for delivery the following day. Distributors were given a bicycle to facilitate their tasks. The Claimant placed an order on 11<sup>th</sup> December 2013, to collect on Jamhuri day. He reported on Jamhuri day, but refused to collect the cakes, saying he had other plans for Jamhuri. He left the cakes and the bicycle

and walked away. It was the last time Maloba saw the Claimant. The Witness testified on cross-examination that there was a book recording delivery of cakes, and return of bicycles. The book was not made available to the Court. The Respondent prays the Court to dismiss the Claim with costs.

*The Court Finds:-*

10. The Claimant was employed by the Respondent Company as a Loaf Packer earning Kshs. 592 on day shifts, and Kshs. 620 on night shift. He was employed around January 2009, and left on 13<sup>th</sup> December 2013.

11. His period of service was, by his own evidence, interrupted. He did not work the whole of the year 2010. He worked in 2011 from the month of August to May 2012. He claims he was injured and returned to work in July 2012, working up to December 2013, when he left employment.

12. The claim for 5 years' gratuity appears to the Court unjustifiable. The Claimant did not work for 5 years. In the estimation of the Court the Claimant worked for about 3 years. Between the year 2009 and 2013, the N.H.I.F Statements indicate the Claimant was employed by at least 3 different Employers. He did not work for the Respondent in continuity.

13. Even if he is to be considered for payment of gratuity based on 3 years, he has not demonstrated the Court what this item is based on. He has not focused the mind of the Court on any statutory provisions granting him gratuity, or any wage instruments, or contract, allowing him to be paid gratuity. The item is rejected.

14. The Claim for annual leave pay is similarly declined. The Claimant was away for prolonged periods of time. The indication in the N.H.I.F records that the Claimant may have worked for 3 different Employers between 2009 and 2013 makes it unsafe to grant him the prayer for annual leave pay. Redirected by his Advocate, the Claimant testified he did not inform the Company when he decided to take these prolonged days of absence. He took liberty with the Respondent, and would walk in and out at his own pace. He is not entitled to 3 years of annual leave.

15. The last prayers relate to the claim for unfair termination. The Claimant seeks notice pay and compensation. He alleges the Respondent terminated his contract of employment unfairly and unlawfully.

16. The Claimant made an order to deliver cakes on 11<sup>th</sup> December 2013. The order would mature for delivery on the busy Jamhuri Day. He retained the bicycle. On 12<sup>th</sup> December 2012, he reported to work and informed the Managers he was not ready to work, as he had other domestic commitments.

17. The Court was not persuaded by the evidence of the Claimant that he was attending to a sick member of his family. He did not show any formal request made out to the Management to be away on Jamhuri Day. He had committed himself the previous day to work on Jamhuri day, by making an order, and retaining the bicycle. Employees, who are required to work on Public Holidays owing to the nature of their work, should not walk away from their duties on Public Holidays, on the ground merely that they are entitled to rest on Public Holidays. They are ordinarily compensated at double hourly rate for the excess work. In the Claimant's case, he was in the business of selling cakes. The Business ordinarily operated even on Public Holidays. The Claimant testified this was the case, but that he had domestic problems requiring he is absent on Jamhuri Day. He did not make any formal request to be away, or show any lawful cause for not fulfilling his commitment to distribute cakes on Jamhuri Day.

18. The Claimant had in the past walked away from his job without the leave of the Respondent. He had returned on various occasions and was received back. It was not entirely different on 12<sup>th</sup> December 2013. He walked way without the leave of the Respondent. He expected he would walk back in, and attempted to do so in April 2014. When he was denied re-entry, he initiated this Claim.

19. The Court has not found any material that would warrant the grant of the prayers for notice pay and

compensation. The Claimant walked away from his job as he was wont to. There is no ground to allow the declaratory orders, or the prayers for costs and any other reliefs. ***The Claim is hereby dismissed with no order on the costs.***

Dated and delivered at Mombasa this 1<sup>st</sup> day of July 2016

James Rika

Judge