



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT MOMBASA**  
**CAUSE NUMBER 455 OF 2015**

**BETWEEN**

**NYAMAWI GAMBO.....CLAIMANT**

**VERSUS**

**1. MOMBASA MAIZE MILLERS LIMITED**

**2. READY CONSULTANCY COMPANY LIMITED.....RESPONDENTS**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mr. Anaya Advocate instructed by Matete Mwelese & Company Advocates for the Claimant*

*No appearance for the 1<sup>st</sup> Respondent*

*Ms. Maina Advocate instructed by Marende Birir Shimaka & Company Advocates for the 2<sup>nd</sup> Respondent*

---

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

**AWARD**

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

1. Nyamawi Gambo filed his Statement of Claim on the 9<sup>th</sup> July 2015. He states he was employed by the 1<sup>st</sup> Respondent Company in May 1996, as a Casual Loader. The 2<sup>nd</sup> Respondent is a Labour Outsourcing Firm, engaged in management of Labour at the 1<sup>st</sup> Respondent. The Claimant was employed on a wage of Kshs. 400 paid daily. The rate was later reviewed to Kshs. 625 payable daily. The Claimant states he was dismissed by the 2<sup>nd</sup> Respondent on the 15<sup>th</sup> May 2015. He complains dismissal was unfair and unlawful. It happened after he and other Employees complained that they were not being paid sufficient wages. He seeks against the Respondents the following orders:-

a. 1 month salary in lieu of notice at Kshs. 16,250.

- b. Service pay at 15 days for every year completed in service at Kshs. 168,750.
- c. Accrued annual leave from 1996 to 2015 at 22 days for each year, calculated at Kshs. 247,500.
- d. 12 months' salary in compensation at Kshs. 195,000

Total ..... Kshs. 627,500

The Claimant also prays for his Certificate of Service to be availed to him, and for Costs of the Claim.

2. The 1<sup>st</sup> Respondent did not file a Statement of Response.

3. The 2<sup>nd</sup> Respondent filed its Statement of Response on the 3<sup>rd</sup> September 2015. Except for the description of the Parties, and the jurisdiction of the Court, all else is denied in this Statement. The 2<sup>nd</sup> Respondent nevertheless filed a Witness Statement on the 24<sup>th</sup> February 2016. Supervisor Ibrahim Mwaro, states the 2<sup>nd</sup> Respondent deployed its Employees to work for the 1<sup>st</sup> Respondent. The Claimant worked under this arrangement. Ibrahim states the 2<sup>nd</sup> Respondent started managing the Claimant in 2012, not on any date prior to this. The 2<sup>nd</sup> Respondent prays the Court to dismiss the Claim with costs to the Respondent.

4. On 24<sup>th</sup> February 2016, the Parties agreed in Court to have the dispute considered and determined on the strength of their respective records. They confirmed filing of their Closing Arguments at the last Court appearance, on the 23<sup>rd</sup> March 2016.

### The Claim

5. The Claimant states he was dismissed on the 15<sup>th</sup> May 2015 by the 2<sup>nd</sup> Respondent, under instructions from the 1<sup>st</sup> Respondent. His relationship with the Respondents is not in doubt, and was admitted in the Witness Statement of Ibrahim. The assertion by the 2<sup>nd</sup> Respondent that the Claimant is a stranger to the 2<sup>nd</sup> Respondent is therefore contradictory to 2<sup>nd</sup> Respondent's own evidence.

6. The 1<sup>st</sup> Respondent was served with the Summons to appear, and the Hearing Notice, but ignored both.

7. The Claimant earned a daily rate of Kshs. 625. There was no evidence by the Respondents to challenge this. The Claimant was dismissed by word of mouth, after complaining about his meager wages. He was not heard. He was not charged with any offence. Section 41 of the Employment Act 2007 was ignored.

8. He was not a casual Employee. He worked in continuity from 1996. He was issued a job identification card, annexure NG1, which was availed only to regular Employees. Section 37 of the Employment Act demands the Claimant is in any case treated as a regular Employee. The assertion by Ibrahim that the Claimant attended to duty intermittently was made in afterthought. There were no attendance registers shown to the Court, to support the assertion. There were no letters written to the Claimant by the Respondents, calling on him to explain any absence from duty.

9. The Claimant submits he merits notice pay. He was sent home without notice. He was not subscribed to any social security plan. He deserved service pay. His dismissal was without substantive justification, and procedural fairness was cast out of the window. He merits compensation. He was not in any year, allowed to take his annual leave. The Claimant asks the Court to grant these prayers with costs to him.

### The Response

10. The 2<sup>nd</sup> Respondent submits that the Claimant was not dismissed, but ceased working from May 2015. There was no report of poor pay made as asserted by the Claimant, which led to dismissal. Any

liability against the 2<sup>nd</sup> Respondent should only arise from 2014, when as borne out in the Claimant's own Witness Statement, the outsourcing arrangement between the two Respondents commenced.

11. The Claimant does not say who he lodged his complaint about poor wages to, or who dismissed him. The 2<sup>nd</sup> Respondent is not aware about such a complaint. The Claimant own evidence was that his wage was raised from Kshs. 400 per day to Kshs. 625 per day, or Kshs. 18,750, way above the minimum wage.

12. The Respondent submits the Claimant was a perennial absentee, and it was therefore not expected of the Respondent to go out looking for the Claimant after he had absented himself from work. He is not entitled to notice, as it was not the Respondent who terminated the contract. Service pay would only be payable if the Claimant was not enlisted to the N.S.S.F. If enlisted, liability on the part of the 2<sup>nd</sup> Respondent would be for the period beginning May 2014. Annual leave pay would be payable by the 2<sup>nd</sup> Respondent only from the year 2014. In any event the 2<sup>nd</sup> Respondent submits the Claimant took his annual leave for the period. Compensation is not deserved, the Claimant having left employment of his own free will. The 2<sup>nd</sup> Respondent urges the Court, to dismiss the Claim.

The Court Finds:

13. There are two Respondents. The first one was the principal Employer of the Claimant. The Claimant states he was employed by the 1<sup>st</sup> Respondent in 1996. The 1<sup>st</sup> Respondent did not file any Statement challenging this position. The Court finds the Claimant was initially employed solely by the 1<sup>st</sup> Respondent as a Casual Loader, at a daily wage of Kshs. 400.

14. The next important date falls in the year 2014. The Claimant states in his Witness Statement, that the triangular relationship involving him, the 1<sup>st</sup> Respondent, and the 2<sup>nd</sup> Respondent came into being in early 2014. The labour management agreement between the Respondents was created in 2014. The 2<sup>nd</sup> Respondent can only shoulder liability if any, from early 2014, when Parties agree the 2<sup>nd</sup> Respondent became the Employer.

15. That liability would include the claim for compensation for unfair termination, and notice pay, termination if any, having taken place in May 2015, when the 2<sup>nd</sup> Respondent was already in active management of the 1<sup>st</sup> Respondent's labour force.

16. Section 37 definitely places the Claimant within the bracket of regular employment. He had worked from 1996. He worked in continuity. He was issued a job identification card. His contract could not in the year 2015, be taken as a casual contract. He is entitled to full protections and guarantees applicable to regular Employees, under the Employment Act 2007.

17. Among those protections and guarantees are contained in Sections 41, 43 and 45 of the Employment Act 2007. The Respondent must prove the reason for termination. In this case the 2<sup>nd</sup> Respondent alleges the Claimant was a Casual Employee, given to skiving work, and from May 2015, he left work for good voluntarily.

18. This explanation was not convincing. There were no employment records availed to the Court to show the Claimant's attendance record. There were no attendance registers showing when the Claimant was absent, or that he went away in May, never to return. And if it is true he just vanished, there were no attempts made by the 2<sup>nd</sup> Respondent to reach the Claimant, find out why he had deserted, and commence disciplinary proceedings against him. The Claimant himself stated he was dismissed after he demanded for better pay. It was not for the Claimant to prove the reason for termination. It was for the 2<sup>nd</sup> Respondent to establish that the Claimant deserted, and that desertion was a valid ground to consider the contract terminated. The Claimant's duty under Section 47 of the Employment Act, was to show that termination was unfair, while the duty of justifying termination rested entirely on the shoulders of the 2<sup>nd</sup> Respondent.

19. The 2<sup>nd</sup> Respondent neither justified termination by proving valid reason, nor subjected the termination procedure to the standards of fairness created under Section 41 and 45 of the Employment Act. Termination was therefore unfair and the Claimant merits compensation under Section 49 of the Employment Act as read together with Section 12 of the Employment and Labour Relations Court Act. The Claimant was earning Kshs. 625 per day which in a 26 day working month, translates to a monthly pay of Kshs. 16,250. **He is granted 6 months' gross pay at Kshs. 16,250 x 6 = Kshs. 97,500, payable solely by the 2<sup>nd</sup> Respondent.**

20. **The claim for notice pay is allowed under Section 35 and 36 of the Employment Act at Kshs. 16,250, again payable by the 2<sup>nd</sup> Respondent.**

21. There was no evidence to show the Claimant was at any time, subscribed to the N.S.S.F, or any other social security Plan. He is entitled to service pay under Section 35, as read together with Section 36 of the Employment Act. He completed 18 years in service. **He is granted service pay at Kshs 625 x 15 days = Kshs. 9,375 x 18 = Kshs 168,750. The sum of Kshs. 159,375 in service pay, representing the first 17 years, shall be paid by the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent shall pay the balance of 1 year of service at Kshs 9,375.**

22. The Claimant did not establish that he was entitled to 22 days of annual leave each year. The law recognizes a minimum of 21 days of annual leave. In the absence of employment records from either of the Respondents, the Court has no reason to disbelieve the Claimant that he was denied his annual leave entitlement. Again liability on this item should be apportioned as in the case of service pay, to the Respondents. **Annual leave pay is granted for 21 days x 18 years = 378 days x Kshs. 625 = Kshs 236,250. The 1<sup>st</sup> Respondent shall take responsibility for the first 17 years at Kshs. 223,125, while the 2<sup>nd</sup> Respondent shall meet the balance of 1 year at Kshs 13,125.**

23. **Two Certificates of Service shall be issued to the Claimant by the Respondents, the first issued by the 1<sup>st</sup> Respondent to cover the period 1996-2014, and the second issued by the 2<sup>nd</sup> Respondent to cover 2014-2015.**

24. Lastly, costs granted to the Claimant, to be met by the 1<sup>st</sup> Respondent.

IN SUM, IT IS ORDERED:-

**a. Termination was unfair.**

**b. The 2<sup>nd</sup> Respondent shall pay to the Claimant 6 months' salary in compensation for unfair termination at Kshs. 97,500.**

**c. The 2<sup>nd</sup> Respondent shall pay to the Claimant notice pay at Kshs. 16,250.**

**d. The Respondents shall pay to the Claimant service pay totaled at Kshs. 168,750. of this amount, the 1<sup>st</sup> Respondent shall pay Kshs. 159,375, and the 2<sup>nd</sup> Respondent to pay the balance of Kshs. 9,375.**

**e. The Respondents shall pay to the Claimant annual leave pay amounting to Kshs. 236,250. Kshs. 223,125 shall be paid by the 1<sup>st</sup> Respondent and the balance of Kshs. 13,125 by the 2<sup>nd</sup> Respondent.**

**f. The Respondents shall release the Claimant's Certificates of Service to the Claimant as directed under paragraph 23 of this Award.**

**g. Costs to the Claimant to be met solely by the 1<sup>st</sup> Respondent.**

***h. The Award shall be satisfied in full within 30 days of its delivery.***

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

James Rika

Judge