



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO.55 OF 2015**

**HARUN AMBAYA IMBENZI..... CLAIMANT**

**VERSUS**

**MC NEEL MILLERS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 4<sup>th</sup> December, 2015)

**JUDGMENT**

The claimant filed the memorandum of claim on 01.04.2015 through Ishmael & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Declaration that the termination of the claimant's employment was unlawful and violated the claimant's rights to fairness and fair labour relations as provided for under Article 50 of the Constitution and the Employment Act, 2007.
- b. Special damages amounting to Kshs. 4, 663, 710.00.
- c. General damages for unfair and wrongful termination of the claimant arising from the dismissal.
- d. Severance pay for the years of service in employment.
- e. An order for issuance of certificate of service for 19 years of service.
- f. Accumulated pension payable.
- g. Costs of the suit and interest at court rates on (b), (c) and (d) above.
- h. Any other relief the court may deem fit to grant.

The respondent filed the defence on 21.04.2015 through Ndung'u Mwaura & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant testified that he was employed by Kifaru Textiles Limited in 1996 and his duties were weaving. He served for three years then he was employed by Kenblest Limited from 2000 to 2002 where he served as a supervisor in loading and off loading. Thereafter in 2002 the respondent, Mc Neel Limited employed him as a supervisor in loading and off loading designated as the store clerk till termination of his employment in 2015. It was the claimant's testimony that his service between the three companies was not broken; he was not paid all his dues when he moved from Kenblest Limited into the service of the respondent; and the three companies belonged to the same group of companies because they all had the same directors, managers and shared the business premises. Over time the company name changed and in 2002 his pay slip changed from Kenblest Limited to that of the respondent as his employer but no fresh letter of appointment was given to him.

The claimant further testified that on 18.02.2015, while on duty, he was summoned by one of the respondent's manager. The manager asked him about a variance of 3,134.85 Kg in waste flour and the claimant's position was that the inquiry was outside his scope of duties because only the production

supervisor could answer the same. The claimant testified that that the variance was not reflected in records and the manager refused a joint reconciliation as requested by the claimant. Instead, the claimant testified that the manager told him to leave the store and to go away. The claimant complied and at a later time he visited the claimant's premises. The manager, one Nirji, was away but another manager, one Samson asked the claimant to record a statement. The claimant wrote the statement and explained that the production supervisor was responsible for necessary explanation in the variance of the weight of waste flour as was alleged. The claimant's case was that the production supervisor did the actual weighing of the flour and presented the figures to the store clerk for on ward transmission to the manager. Further he was given the termination letter dated 18.02.2015 on 02.03.2015 and not on 18.02.2015. The termination letter stated that there was a variance of 3, 134.85Kgs upon checking the physical stack summary book and flour packaging production book so that the recorded figure had been doctored to reflect the figure on the flour packaging book. The physical stock was therefore, the letter stated, not tallying as per the record kept by the claimant. It was further stated in the letter that the claimant failed to recheck and reweigh the wheat flour in bags at the weighbridge as per the management instruction; amounting to negligence and inability to perform duties as assigned to the claimant. Thus, the claimant's employment was terminated effective 6.02.2015 with pay of days worked in February 2015; that the claimant had been employed on 1.05.2002 and even though the respondent was not liable to pay notice, he would be paid one month notice, leave pay and travelling leave allowance on prorated basis; the claimant would sign a discharge voucher on receipt of the cheque for provident fund; and that the claimant would receive a certificate of service.

The **1<sup>st</sup> issue** for determination is the period of service the claimant served the respondent as an employee. In the termination letter the respondent stated that the claimant was employed on 01.05.2002. In the demand letter dated 05.03.2015 the claimant stated that he had served for 13 years and for which he claimed overtime. The court finds that the respondent employed the claimant on 01.05.2002 and in line with the parties own documentation.

The **2<sup>nd</sup> issue** for determination is whether the termination was unfair. The claimant's case was that the termination was unfair because the reason as advanced was not genuine or valid. The claimant further testified that he was not given a termination notice or a show-cause letter. The respondent's witness RW testified that the claimant wrote a statement admitting the liability as leveled against him. The claimant testified that he denied all the allegations. The respondent failed to file the relevant statement the claimant recorded as testified by RW. The court has considered the flow of events in this case. The claimant's evidence was not rebutted that on 18.02.2015, while on duty, he was summoned by one of the respondent's manager. The manager asked him about a variance of 3,134.85 Kg in waste flour and the claimant's position was that the inquiry was outside his scope of duties because only the production supervisor could answer the same. The claimant testified that that the variance was not reflected in records and the manager refused a joint reconciliation as requested by the claimant. Instead, the claimant testified that the manager told him to leave the store and to go away. The court considers that on 18.02.2015 the claimant was entitled to consider himself dismissed from duty without a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. Even if the court is to consider the termination letter as was subsequently delivered to the claimant, the court finds that throughout the purported disciplinary proceedings and the proceedings before the court, the respondent has failed to show that indeed the records in issue varied from the actual stocks and that the claimant was responsible. The claimant has never been given an opportunity to consider the records and the actual stocks in issue and in view of the allegations as were made against him. Thus the court returns that the respondent has failed to show that as at time of the termination, the respondent had a valid or genuine reason to terminate the claimant's employment as provided in section 43 of the Employment Act, 2009. Thus the termination was unfair for want of valid reason to justify the same.

The court has considered the claimant's long service of over 12 years and that the claimant never contributed to his termination and he was a good employee. Thus, the court finds that under section 49 (1) (c), 12 months' gross salaries will meet the ends of justice. The last gross monthly pay on record per the January 2015 pay slip was Kshs. 71, 846.15 and the court awards the claimant **Kshs.862, 153.80**.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other remedies as prayed for.

The court makes findings as follows:

- a. The claimant prayed for **Kshs. 54, 150.00** being unpaid salary and allowances for February 2015. The claimant was given the termination letter dated 18.02.2015 on 02.03.2015 and not on 18.02.2015. In the circumstances, the court finds that he is entitled as prayed for as he could not work elsewhere that month pending the respondent's termination letter or decision.
- b. The court finds that the claimant is entitled to one month pay in lieu of the termination notice under section 35 (1) (c) making **Kshs.54,150.00**.
- c. The claimant worked for only 2 months in 2015 and is awarded **Kshs. 9, 025.00** on prorated basis.
- d. The claimant prayed for accrued overtime pay due being Kshs. 4, 663, 710.00. The claim for overtime was from 2002 to the date of the termination being 3 extra hours worked every day; the claimant having worked from 8.00am to 1.00pm and then 2.00pm to 8.00pm. In his testimony the claimant testified he worked 11 hours per day and in his demand letter he claimed he claimed that he worked 12 hours per day. RW testified that all overtime was paid as part of the monthly pay as per the pay slips for January 2015 and December 2015 filed by the respondent. The court has considered the notice to produce documents filed on 30.04.2015 and the notice to inspect records or documents filed on 30.04.2015. The court observes that whereas the two notices were served and the respondent failed to take action, the notices did not relate to pay slips. The claimant has not explained why he did not file the pay slips. The court considers that the main issue in dispute is not whether the claimant put in overtime but whether the respondent paid the same on monthly basis. The court has considered the two pay slips which show that the claimant earned overtime as part of the monthly pay. The court has considered that on the material on record, there is no evidence that prior to the termination the parties had a grievance about unpaid overtime. In the circumstances the court finds that on a balance of probabilities and on account of the two pay slips, the respondent paid overtime on monthly basis and the claimant is not entitled as prayed for. The prayer will therefore fail.
- e. The claimant did not justify the basis for claim of gratuity and the prayer as per the submissions will fail.
- f. The claimant is entitled to a certificate of service as prayed for and as a statutory entitlement.
- g. As the claimant has substantially succeeded, he is entitled to the costs of the case.
- h. The claimant did not make submissions on the other prayers and the same will fail as abandoned by the claimant.

In conclusion judgment is entered for the claimant against the respondent for:

1. The declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant a sum of **Kshs.979, 478.80** by 1.01.2016 in default interest at court rates to be payable thereon from the date of this judgment till full payment.
3. The respondent to deliver to the claimant the certificate of service by 01.12.2015.
4. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 4<sup>th</sup> December, 2015**.

**BYRAM ONGAYA**

**JUDGE**