



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 85 OF 2011**

**BETWEEN**

**TRANSPORT AND ALLIED WORKERS UNION**

**[TAWU].....CLAIMANT**

**VERSUS**

**EXCEL PETROLEUM AGENCIES..... RESPONDENT**

*Rika J*

*CC. Leah Muthaka*

*Nasib Makuwa Industrial Relations Officer appearing for TAWU*

*Ms. Atina instructed by Milimo, Muthomi & Company Advocates for the Respondent*

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**ISSUE IN DISPUTE: REDUNDANCY PAYMENT**

**AWARD**

1. This Court gave an Award in favour of the Grievant represented by his Trade Union TAWU, for payment of a total of Kshs. 160,864 in terminal benefits and compensation for unfair termination. The Award, dated 5<sup>th</sup> December 2011 was made *ex parte*. This decision was subsequently set aside in a ruling dated 29<sup>th</sup> February 2012, upon the Court finding fault with the service of the summons and the hearing notice. The dispute was heard afresh in the presence of both Parties on 25<sup>th</sup> April 2013 and 27<sup>th</sup> June 2013.

2. The Claimant called the Grievant who gave evidence on 25<sup>th</sup> April 2013. He testified he was employed by the Respondent as its Pump Attendant on 22<sup>nd</sup> April 2008. He was paid a gross monthly salary of Kshs. 6,000. The Respondent operated petrol business in Nairobi and Kerugoya. The business closed on 30<sup>th</sup> October 2009. He was not paid redundancy benefits on closure of the business, which he seeks in terms granted by the Court in its *ex parte* Award. On cross-examination the Grievant stated he was not

given a written contract of employment. He never fought with a colleague called Mercy Wanjiku. Termination did not arise from this incident. He was not a casual employee. He did not know why the company closed. He did not know of its dealership with Kenol Kobil. He was not paid anything on termination. The N.S.S.F records showed he was employed on 1<sup>st</sup> November 1998. This was in reference to the 1<sup>st</sup> employer. There was no information given to the employees by the employer that the Kenol Kobil Franchise was over.

3. Juliet Wanjugu testified she was the Manager and Owner of the Petrol Station in Kerugoya where the Grievant worked. It was a different business from Gerry Anne Traders. The Petrol Station was operated as a Kenol Kobil dealership. It was an arrangement based on performance. If the business ceased to operate profitably, Kenol Kobil would terminate the dealership without notice to the Respondent. The Grievant was employed as a Pump Attendant. All employees had contracts.

4. The Petrol Station endured perennial floods and most employment records were destroyed. The Grievant earned a minimum of Kshs. 8,000 per month. The agreement was oral. Termination of the Grievant's contract of employment came 3 months before closure of business. He fought with a co-worker Mercy Wanjiku. He was paid all his dues. Without a dealership, the Respondent did not have any other business. She agreed on cross-examination that the Grievant was an employee of the Respondent. Gerald Mugo served as a Director, not the business owner. All employees had oral contracts. The Grievant earned Kshs. 8,000 gross pay. He fought with Mercy Wanjiku. He had a habit of fighting other employees. Termination was 3 months before closure of business. He was paid terminal dues, which consisted salary for days worked. She could not recall the exact details as the records were lost in the floods.

5. Samuel Mokaya worked as the Supervisor for the Respondent from January to October 2009. He worked on casual basis. There was no contract. The Grievant worked under Mokaya. There were many complaints lodged by his fellow employees against the Grievant's conduct. He fought a colleague named Mercy. Customers complained he gave them the wrong change. The Witness left on 30<sup>th</sup> October 2009. He was paid his dues. This was after the Kenol Kobil dealership came to an end. On cross-examination, Mokaya testified that the Grievant fought Mercy. On the first occasion he was warned, and on the second he was dismissed. The Respondent prays for dismissal of the Claim.

#### *The Court Finds and Awards:-*

6. There is no material or evidence given to the Court in this fresh hearing that would warrant the interference of the Court with the findings and orders made in the initial Award. The Respondent was granted the full opportunity to refute the Statement of Claim and the evidence given by the Grievant, but has not given such refutation. Instead, the Respondent gave inconsistent and sometimes startling evidence.

7. Employment records are said to have been destroyed in floods. The Grievant and all employees were on oral contracts. Without employment records, and against the background of oral contracts, how is the Court to accept the word of the employer? It is stated the Grievant fought a fellow employee named Mercy Wanjiku. There is no record of a disciplinary process where the Grievant was called to explain his fight with Wanjiku. It is suggested his contract was terminated after the fight, and not after or because of the closure of the business. There was evidence by the Respondent's last witness that the Grievant fought several times, was initially warned, and subsequently dismissed. This was not supported through any employment records, and not even the employee who was alleged to have fought the Claimant was presented in Court. Juliet testified the Grievant was paid all his dues, but gave absolutely no evidence to show payment. She stated he was paid for days worked. The days are not given, the amount is not given, and the Grievant's contract was simply explained to have been terminated about three months before the business closed. Mokaya's evidence did not assist the Court. He testified that the Grievant fought Mercy and gave customers wrong change. These allegations were never put to the Claimant in a disciplinary investigation or hearing as far as the record shows. Mokaya testified he was employed on casual basis, and appeared to suggest employees were on casual basis. All this evidence was very unpersuasive, and meant to take focus away from the real cause of termination.

8. The real cause was that all the employees' positions were rendered redundant, after the Kenol Kobil dealership came to an end. The Grievant was among the affected employees. He was entitled to be paid redundancy benefits. The Court upholds the findings and decision in the first hearing, and *Orders-*:

***[a] The Respondent shall pay to the Claimant a sum of Kshs. 160,864 as detailed in the first Award and release the Claimant's certificate of service forthwith.***

***[b] No order on the costs.***

Dated and delivered at Nairobi this 3<sup>rd</sup> day of February 2014

James Rika

Judge