



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2138 OF 2014**

**RAPHAEL NZETHE NDULI                      CLAIMANT**

**v**

**LALJI MEGHJI PATEL & CO LTD              RESPONDENT**

**JUDGMENT**

1. This Cause was heard on 30 October 2019. Raphael Nzethe Nduli (Claimant) testified and closed his case.
2. The Respondent then applied for an adjournment in order to file a substitute witness statement. The reason given was that the initial witness had died.
3. The Court declined to allow the adjournment sought because the Respondent had not in the first place filed any witness statement to express an intention to lead any evidence during the hearing. The Respondent then opted to close its case.
4. The Claimant filed his submissions on 1 November 2019 while the Respondent's submissions which should have been filed on or before 29 November 2019 were not on file by this morning.
5. The Court has considered the pleadings, evidence and submissions on record.

**Employment relationship**

6. The Respondent denied that there was an employment relationship between it and the Claimant.
7. To demonstrate that there was an employment relationship, the Claimant produced copies of staff identification card embossed with the name of the Respondent and a recommendation letter issued by the Respondent on 22 June 2009.
8. On the basis of the secondary documentation, the Court is satisfied that the Claimant was employed by the Respondent as a watchman from 2002 to 16 June 2012.

**Unfair termination of employment**

9. The Claimant's testimony that he was dismissed when he sought to be granted annual leave was not rebutted.
10. The Respondent had pleaded in the alternative that the Claimant had deserted work. The line of defence was not proved as no evidence was led.
11. Section 35(1) of the Employment Act, 2007 envisages written notice of termination of employment while section 41 of the Act

requires a hearing if the termination of employment is on account of *misconduct, poor performance or physical incapacity*.

12. If indeed the Claimant deserted work, that was not only misconduct but a repudiation of the contract, warranting dismissal but after a hearing as contemplated by section 41(2) of the Employment Act, 2007.

13. On the state of the evidence on record, the Court is satisfied that the Respondent dismissed the Claimant unfairly.

#### **Compensation**

14. The Claimant served the Respondent for about 10 years, and on account of the length of service, the Court is of the view that the equivalent of 10 months gross wages as compensation would be fair.

#### **Salary in lieu of notice**

15. Since no written notice was issued, the Court finds that the Claimant is entitled to a 1-month salary in lieu of notice.

#### **Breach of contract**

#### **Leave**

16. The Claimant sought Kshs 103,850/- in lieu of untaken leave for 10 years.

17. Section 28(4) of the Employment Act, 2007 circumscribes the amount of annual leave which may be carried forward and therefore the Claimant can only be eligible to accrue annual leave for the last 18 months of the contract.

18. The Court will allow this head of the claim only with respect to the last year of service and award the equivalent of 1 month salary.

#### **Overtime pay**

19. The Claimant did not lay any evidential foundation for this head of claim and relief is declined.

#### **Terminal dues**

20. The Claimant did not give any particulars of the Kshs 51, 925/- sought as terminal dues, and relief is declined.

#### **Conclusion and Orders**

21. The Court finds and declares that the Claimant's employment was unfairly terminated and awards him

(a) Compensation           Kshs 103,850/-

(b) Salary in lieu of notice   Kshs 10,385/-

(c) Accrued Leave           Kshs 10,385/-

**TOTAL           Kshs 124,620/-**

22. Claimant to have costs.

**Delivered, dated and signed in Nairobi on this 17<sup>th</sup> day of January 2020.**

**Radido Stephen**


**Judge**

**Appearances**

For Claimant Mr. Muigai instructed by Musyoka & Muigai Advocates

For Respondent Ms. Masomi instructed by Osundwa & Co. Advocates

Court Assistant Fred

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