



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 140 OF 2017**

**EVANS OSORO.....CLAIMANT**

**VERSUS**

**LABEL CONVERTERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim is brought by Evans Osoro against his former employer, Label Converters Limited. The claim is documented by a Statement of Claim dated and filed in court on 27<sup>th</sup> January 2017. The Respondent filed a Response to Claim on 28<sup>th</sup> February 2018 to which the Claimant responded on 3<sup>rd</sup> June 2021.

2. At the trial, the Claimant testified on his own behalf and the Respondent chose not to call any witness. Both parties filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent in the year 2014 as a Machine Operator. He adds that he was promoted to various positions during the course of his employment.

4. The Claimant states that in May 2016, he joined the Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers Union (KUPRIPUPA).

5. On 1<sup>st</sup> September 2016, the Respondent issued the Claimant with a notice of outsourcing of the Respondent's non-core business.

6. The Claimant claims that the Respondent terminated his employment in October 2016 without justifiable cause and without notice. He alleges that the real reason for the termination was because he had joined a trade union.

7. The Claimant makes a claim of unlawful and unfair termination and seeks the following remedies:

- a) 12 months' salary in compensation
- b) 1 month's salary in lieu of notice
- c) Kshs. 8,940 being service pay for 2015
- d) Kshs. 22,946 being leave pay
- e) Kshs. 32,032 being underpayment
- f) Damages for dismissal on account of joining a trade union
- g) Costs

## **The Respondent's Case**

8. In its Response to Claim dated 20<sup>th</sup> December 2018 and filed in court on 28<sup>th</sup> February 2019, the Respondent states that the Claimant was employed as a Machine Attendant, on yearly renewable contracts, with the last contract being signed on 1<sup>st</sup> January 2016 and terminated on 1<sup>st</sup> October 2016, when the Claimant was paid his dues in full.

9. The Respondent further states that the Claimant's services were terminated as per the contract dated 1<sup>st</sup> January 2016, upon issuance of a one-month notice on 1<sup>st</sup> September 2016

10. The Respondent adds that after the contract of employment was terminated, the Claimant was paid all his dues on 15<sup>th</sup> October 2016.

11. The Respondent denies that the Claimant's employment was terminated because he had joined a trade union and states that a decision was made to outsource labour from reputable contractors.

12. The Respondent takes the view that it is not liable to pay the Claimant terminal dues and severance pay because the Claimant's National Social Security Fund (NSSF) statutory dues were duly paid.

## **Findings and Determination**

13. There are two (2) issues for determination in this case:

- a) The nature and status of the Claimant's employment;
- b) Whether the Claimant has made out a case of unlawful termination;
- c) Whether the Claimant is entitled to the remedies sought.

## **Nature and Status of Claimant's Employment**

14. In the written submissions filed on behalf of the Respondent, it is suggested that the Claimant was either a casual employee or a piece rate worker.

15. In its Response to Claim however, the Respondent states that the Claimant was employed on yearly renewable contracts, with the last contract being signed on 1<sup>st</sup> January 2016.

16. No explanation was given for this evident inconsistency. At any rate, it was incumbent upon the Respondent to produce records to show the exact nature and status of the Claimant's employment, in addition to the terms of employment. This duty was not discharged and the Respondent cannot be allowed to use final submissions as an opportunity to testify, after electing not to call a witness at the trial.

17. The Court therefore adopts the Respondent's pleading in its Response to Claim that the Claimant was a regular employee on yearly renewable contracts.

## **Unlawful Termination?**

18. The Respondent, while denying that the Claimant's employment was terminated on account of trade union membership, discloses that it had made a decision to outsource labour.

19. In a three Judge Bench decision of this Court (**Nduma, Ndolo & Nzioki wa Makau JJ**) in *Wrigley Company (East Africa) Limited v Attorney General & 2 others [2013] eKLR* we set the following parameters for an outsourcing arrangement:

*a) Ordinarily employers are not expected to outsource their core functions;*

*b) An employer will not be permitted to use outsourcing as a means*

*to escape from meeting accrued contractual obligations to its employees;*

*c) An employer will not be permitted to transfer the services of its*

*employees without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and*

*d) Outsourcing is unlawful if its effect is to introduce discrimination*

*between employees doing equal work in an enterprise.*

20. In the present case, there was no evidence of either consultation with the Claimant on the outsourcing arrangement or settlement of accrued dues.

21. The outsourcing was therefore unprocedural and the consequent termination of the Claimant's employment was unlawful and unfair.

**Remedies**

22. I therefore award the Claimant six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of

service and the Respondent's unlawful conduct in bringing the employment to an end.

23. I further award the Claimant one (1) month's salary in lieu of notice.

24. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

25. No basis was established for the claims for service pay and underpayment which therefore fail and are disallowed.

26. Finally, I enter judgment in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs. 84,240
- b) 1 month's salary in lieu of notice.....14,040
- c) Leave pay for 2 years (14,040/30\*21\*2).....19,656
- Total.....117,936**

27. This amount will attract interest at court rates from the date of judgment until payment in full.

28. The Claimant will have the costs of the case.

29. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Amutallah for the Claimant

Mr. Wanyanga for the Respondent