



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NUMBER 676 OF 2016**  
**BETWEEN**  
**OSCAR WERE WAKHUNGU.....CLAIMANT**  
**VERSUS**  
**DIMAMU AGENCIES LTD.....RESPONDENT**

*Rika J*

*Court Assistant: Emmanuel Kiprono*

*Mwaure & Mwaure Waihiga Advocates for the Claimant*

*Kariuki Runo & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 22<sup>nd</sup> April 2016.
2. He states that he was employed by the Respondent as a Loader, on 3<sup>rd</sup> February 2014. He earned a salary of Kshs. 10,660 per month, as of the date of termination, on or about July 2015.
3. He states that termination was unfair. There was no valid reason given to him. It was in violation of Article 41 and 47 of the Constitution of Kenya, and Section 45 of the Employment Act.
4. The Claimant prays for Judgment against the Respondent for: -
  - a. 1-month salary in lieu of notice – Kshs. 10,660.
  - b. Unpaid leave for 1.5 years – Kshs. 12,915.
  - c. Service pay for 1.5 years – Kshs. 9,225.
  - d. Public holidays for 1.5 years – Kshs. 12,300.
  - e. Off-duty days – Kshs. 27,880.
  - f. Underpayments- Kshs. 23,580.
  - g. Underpayments – Kshs. 4,458.
  - h. 12 months' salary in compensation for unfair termination - Kshs. 127,938.

Total...Kshs. 228,938.

i. Costs and interest.

j. Declaration that termination was unfair.

k. Any other relief.

5. The Respondent filed its Statement of Response on 9<sup>th</sup> June 2016. It is denied that the Claimant was employed by the Respondent as a Loader from 3<sup>rd</sup> February 2014, earning Kshs. 10,660 monthly. He was a Casual Employee, and left employment voluntarily, on 5<sup>th</sup> March 2015. He did not bother to resume. He took leave and rest days as he desired, having been in casual employment. He was involved in a dispute with Mombasa Cement Limited, where he had been assigned work. He was paid his wages up to and including the date he left. The Respondent does not owe him anything.

6. The Claimant and Respondent's Human Resource Officer, Simon Opicho, gave evidence for the respective Parties on 12<sup>th</sup> December 2021 closing the hearing. They adopted their Witness Statements and Documents on record, as their Evidence.

7. On cross-examination, the Claimant told the Court he worked at Mombasa Cement Limited. His hand was injured while at work. He said he could not continue working because of the injury. He left in July 2015. He was not loading after the injury. He did not have evidence of work performed during public holidays. He did not have N.S.S.F Account Statements. Opicho confirmed that the Respondent employed the Claimant. The Claimant sued Mombasa Cement Limited over work injury. The Claimant was given a hearing before he left employment. Opicho did not have documents to support this.

8. The issues are whether the Claimant was a regular or casual Employee of the Respondent; whether his contract was terminated by the Respondent or he left employment voluntarily; and whether he merits the prayers sought.

**The Court Finds: -**

9. The period worked, 3<sup>rd</sup> February 2014 to July 2015, is over 1 year. It is not disputed that the period was in continuity. The period is sufficient to consider the Claimant a regular, rather than a casual Employee, under Section 37 of the Employment Act, 2007.

10. Was his contract terminated by the Respondent? He answered this in the negative, when cross-examined. He told the Court: -

§ I was injured and sued Mombasa Cement.

§ I said I could not continue working because my hand was injured.

§ I was not loading after I was injured.

11. The Claimant was injured and was unable to continue working. He did not work after he was injured. He made the decision to stop working. It is not true that the Respondent terminated his contract because he sued Mombasa Cement over work injury.

12. Having made the decision to resign for medical reason, the Claimant was not entitled to any form of hearing by the Respondent, or reasons for a decision which not of the Respondent's own making. The Claimant initiated termination of his contract.

13. He does not merit notice pay. He has not established his prayers for compensation, underpayments, off-days and public holidays. He specifically told the Court that he did not have evidence of work performed on public holidays. He worked for 17 months. He merits annual leave for a minimum of 21 days [ February 2014- February 2015] and pro-rata leave of 5 months [ March –July 2015] This is allowed at a total of Kshs. 12,195.

14. No order on the costs.

**IN SUM, IT IS ORDERED: -**

***a. The Respondent shall pay to the Claimant annual leave, at Kshs. 12,195.***

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

Dated, signed and released to the Parties electronically at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this **22<sup>nd</sup> day of March 2022.**

**James Rika**

**Judge**

