



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**CAUSE NO. 101 OF 2016**

**PAUL OWUNO ONYANGO.....CLAIMANT**

**VERSUS**

**MENENGAI OIL REFINERIES LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed a Memorandum of Claim dated 1<sup>st</sup> March, 2016 on 9<sup>th</sup> March, 2016 through the firm of M. Korongo and company advocates claiming unfair termination, underpayment, unpaid leave and Notice pay from the Respondent. He therefore sought the following reliefs;

**a. One month salary in lieu of notice.**

**b. Underpayments.**

**c. Leave for 7 years and 10 months.**

**d. Compensation based on section 49(1) c of the Employment Act for unfair termination.**

2. The Claimant avers that he was employed by the Respondent as a general worker commencing on the 17<sup>th</sup> December, 2008 and deployed to the Boiler department at a wage of Kshs.240 per day. His wages was increased to Kshs 290 from August 2010, Kshs 340 from May, 2012, Kshs 420 from August, 2013, which money he received till his termination. He contends that he was underpaid in accordance with the applicable wages orders for each period.

3. The Claimant avers that he worked for the Respondent for 7 years, 10 month without taking any leave or being compensated for the same.

4. The circumstances leading to his termination, was that the Claimant reported to work as usual on the 6<sup>th</sup> October, 2015 together with other colleagues only to be denied entry by the guard at the main gate without any explanation. He tried reaching the Respondent's management in vain forcing him to report the dispute to Nakuru labour offices and in response the Respondent issued him with a cheque of Kshs 34,645, through the labour office without giving a breakdown of what is being paid for.

5. Despite the said pay, the Claimant maintains that he was unfairly terminated and the pay did not cover his terminal dues which he urged this Court to allow the claim as prayed.

6. During hearing the Claimant testified as CW-1 and adopted his witness statement dated 11.12.2015 which basically reiterated he contents of the claim.

7. Upon cross-examination he testified that he was the Respondent's employee and his NHIF and NSSF statements shows as much. Further that he was not issued with payslips as he was paid daily and that upon termination he was issued with a cheque of Kshs 34,645 after reporting the dispute to the labour office. He then denied signing any agreement letter at the labour office.

8. The Respondent entered appearance on the 25<sup>th</sup> May, 2016 and filed a response to the claim on even date denying all the averments in the claim and instead stated that, the Claimant was not their employee but an independent contract who was duly paid after completion of the work contracted to perform.

9. The Respondent then stated that the Claimant was never terminated as alleged.

10. The Respondent called one witness, Peter Kanenje Muchibi, one of its senior Human Resource officers as RW-1 who also adopted his statement dated 12.11.2021. He then testified that the Claimant was the Respondents' former employee who was engaged on casual basis and paid on daily basis.

11. Upon cross examination, he stated that the Claimant was employed by the Respondent as a casual employee in August, 2019 and not in 2008 as pleaded. That the Claimant was given work in the boiler department to feed logs in the boiler, clean among others and that the said work was not guaranteed every day.

12. Upon further cross examination, RW-1 testified that the Claimant was not terminated from employment as alleged. He then stated that he was the one that handed the cheque to the labour office for onward transmission to the Claimant. He also admitted that the cheque did not indicate what the money was paying for.

#### **Submissions.**

13. The Claimant submitted from the onset that he was an employee and not a casual labourer as defined under section 2 of the Employment Act. It was argued that having worked for 7 years and 10 months for the Respondent his employment converted by operation of law under section 37 of the Employment Act, therefore that the termination of the Claimant service ought to be done in accordance with the law both in substance and procedurally.

14. The Claimant then submitted that the Respondent terminated his services without giving him any reason nor was he subjected to disciplinary process as envisaged under section 43 of the Employment Act and therefore that his termination was unfair as provided for under section 45 of the Employment Act. In support of his case he cited the case **Rashid Jeneby V Prime Bank Limited [2015] eklr** and the case of **Sikuku Nzuki Ngii V Gacal Merchants Ltd [2015] eklr**.

15. The Claimant then urged this Court to allow the reliefs sought as prayed.

16. The Respondent on the other hand submitted that the Claimant was a casual employee as defined under section 2 of the Employment. It was argued that the Claimant never worked on continuous basis rather that he was engaged depending on availability of work and was always paid at the end of the day as was affirmed by the Claimant in cross-examination.

17. On whether the Claimant's services were terminated unceremoniously, it was argued that the Claimant being a casual employee did not require to be given notice before termination and that either party can terminate the services at the end of the day as provided for under section 35 (1)(a) of the Employment Act, which was the case in this suit.

18. The Respondent then submitted that the claim by the Claimant is not tenable in light of his position at the Respondent and it then urged this Court to dismiss this case. In support of its case the Respondent cited the case of **Rashid Mazuri Ramadhani & 10 others V Doshi and company (Hardware) Limited and another[2018] eklr**.

19. The Respondent in conclusion submitted that the Claimant upon receiving his terminal dues of Kshs.34,645, signed a discharge voucher which shields the Respondent from any further liability.

20. I have examined the evidence and submissions of the parties herein. From the evidence submitted, the Claimant was an employee of the Respondent at one point or another. As to when the Claimant was employed, he avers that he was employed from 2008. The only evidence the Claimant sought to rely on to prove this is a cheque dated 21/10/2015. There is however no proof that this relationship began in 2008.

21. The Respondent indicated that they employed the Claimant as a casual in 2009. From the worksheet produced by the Claimant, there is an indication that the Claimant worked for the Respondent since 2009 August and he worked continuously during the period from 17 to 31 days of every month up to October 2015.

22. The Claimant having served the Respondent continuously in the period for length exceeding 3 months, the provision of Section 37(1) of the Employment Act which states as follows comes to play.

#### **“37. Conversion of casual employment to term contract**

##### **(1) Notwithstanding any provisions of this Act, where a casual employee—**

**(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or**

**(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)**

**(c) shall apply to that contract of service.”**

23. It is therefore my finding that the Claimant was an employee of the Respondent from August 2009 to October 2015 – a period of 6 years

which employment I convert it into permanent and pensionable terms.

24. The Claimant having worked for the Respondent as per my finding above, he could not be terminated without being subjected to a fair disciplinary hearing.

25. There is no indication that the Claimant was subjected to any hearing as provided for under Section 41 of the Employment Act.

26. I therefore find that the termination of the Claimant was unfair and unjustified.

**1. The Claimant indicated that he was paid 420/= per day at the time of his termination which translates to  $420 \times 30 = 12,600/=$  per month.**

**2. The Claimant submitted that he was underpaid during this period which I find is true in relation to the wages orders of the period.**

**3. I therefore find for Claimant on underpayments as pleaded for - Kshs.13,706.85/=**

**4. I also award Claimant 1 month in lieu of notice = 11,623.20**

**5. In addition I award Claimant 1 year leave = 11,623.20**

**6. And compensation for unfair termination equivalent to 8 months salary =  $8 \times 11,623.20$**

**= 92,985.60**

**TOTAL AWARDED = 129,939/=**

**Less statutory deduction**

**7. The Respondent will pay cost of this suit plus interest at court rates with effect from the date of this Judgment.**

**DATED AND DELIVERED IN OPEN COURT THIS 22<sup>ND</sup> DAY OF MARCH, 2022**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Orare for respondent – present

Juma for claimant – present

Court Assistant - Fred