



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.2264 OF 2015**

**JOSEPH MAINA MWANGI .....CLAIMANT**

**VERSUS**

**GATHARE BAR HOTEL & BOARDING HOUSE.....RESPONDENT**

**JUDGEMENT**

The claimant filed the Memorandum of Claim on 17<sup>th</sup> December, 2015. The respondent entered appearance on 22<sup>nd</sup> January, 2016 and filed response on 9<sup>th</sup> February, 2016.

Despite several invitations to attend for taking hearing directions, the respondent failed and or neglected to attend as required.

On 6<sup>th</sup> February, 2020 the respondent filed Notice of Change of Advocates.

On 21<sup>st</sup> January, 2020 the matter was mentioned for allocation of a hearing date but the respondent remained absent and hearing was allocated for 24<sup>th</sup> March, 2020 and due to COVID-19 pandemic there was no attendance.

Several other hearing dates were allocated but the respondent remained absent. On 23<sup>rd</sup> November, 2020 a hearing date was located or 26<sup>th</sup> January, 2021, the respondent was served and there are returns to confirm service but there was no attendance. The court satisfied there was sufficient notice heard the claimant on his evidence.

The claim is that on 15<sup>th</sup> May, 2008 the claimant was employed by the respondent as a security guard at the respondent's premises on an oral contract. The claimant worked until 30<sup>th</sup> July, 2015 when his employment was unfairly terminated.

The claim is that the claimant was paid a wage of ksh.3, 500 per month and work hours being 6PM to 7AM without taking rest or a break and was not supplied with the necessary tools for the job.

The claim is also that the wage was increased to Ksh.5, 000 per month instead of Ksh.12, 221.10 and there was underpayment.

On 30<sup>th</sup> July, 2015 employment was terminated without notice or being given any reasons. Such was unfair and unlawful and without payment of terminal dues.

The claimant is seeking for the payment of the following;

- a. Notice pay ksh.12,221.10;
- b. Compensation for 12 months Ksh.146,653.20;
- c. Leave days for 7 years ksh.59,883.39;
- d. Severance pay for 7 years ksh.42,778.85;
- e. Underpayments from May, 2009 to April, 2016 Ksh.373,303.90;

f. Certificate of service; and

g. Costs of the suit.

The claimant testified in support of his claims.

The respondent's case in response is that it was the company policy that all workers employed are on casual or temporary terms and that none serving on permanent basis. The claimant previously worked for the respondent as a casual and on temporary basis at Park Road, Nairobi under a pseudonym of *Joseph Thuita Gathogo* instead of his official name.

As a former casual employee the claimant was conversant with the employment policy of maintaining casual workers on temporary basis. He was never made a permanent employee at any time. The duties of a watchman entailed opening the gate and the claimant was not a security guard.

The defence is also that the claimant was a neighbour to a shareholder of the respondent and was offered an oral contract as a casual and temporary watchman in July, 2015 as there was a policy not to employ on permanent terms. The paid wage was Ksh.5, 000 paid after 30 days together with accommodation.

On 30<sup>th</sup> July, 2015 the claimant requested to be paid his full wages to seek out financial affairs of his family and has since absconded duty. There was no unfair termination of employment as alleged.

The respondent counter-claimed for 7 days' notice pay the claimant having absconded duty and amounting to ksh.1, 166.55.

As noted above, the respondent failed to attend at the hearing despite being invited to attend and having been served with a hearing notice.

There are no work records filed as required under section 10(6) and (7) of the Employment Act, 2007. The court is left with the word of the claimant.

### **Determination**

The greatest emphasis in the respondent's response is that the claimant was employed on casual terms as the policy was not to employ on permanent basis.

That the claimant worked until 30<sup>th</sup> July, 2015 when he requested for his wages of Ksh.5, 000 to attend to family affairs and he never returned or gave notice and which is counter-claimed at 7 days wages of ksh.1, 166.55.

Where an employee is employed on casual terms and remains in the continuous employment and or service of the employer undertaking duties which ordinarily are not expected to end and be paid at the end of the day, such an employee ceases to be a casual worker and becomes protected under the provision of section 37 of the Employment Act, 2007 (the Act). The employee then enjoys the benefits and rights under the Act.

In addressing the provisions of section 37 of the Act, the Court of Appeal in the case of **Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR** held that;

*Section 37 is the one which empowers the Employment and Labour Relations Court (ELRC) to convert a contract of service of an employee engaged on a casual basis, to one where such an employee is deemed to have been engaged under a contract of service and thereby entitling him/her to monthly wages and other benefits such as leave and certificate of service.*

In **Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others [2018] eKLR** the court held that;

In particular, subsection 37 (5) provides that an employee whose contract of service has been converted (on account of a continuous service of three or more months like in the petitioners' case) and who has worked for two or more months from the date of employment as a casual employee, shall be entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee.

And in **Chemelil Sugar Company v Ebrahim Ochieng Otuon & 2 Others [2015] eKLR** the court held that employees who, on the facts of that case, were initially engaged as casual employees and worked in various capacities for periods ranging between one year and fifteen years, had their respective contracts of service converted to term contracts by operation of law under section 37 of the Employment Act. The Court stated:

Those provisions are self-explanatory. The respondents' employment with the appellant were automatically converted into term contracts by operation of that provision.

In this case, the claimant having worked as a casual employee from May, 2008 to 30<sup>th</sup> July, 2015 became protected under the law and the rights and benefits under the Employment Act, 2007 accrue.

The defence is that the claimant requested for his wages on 30<sup>th</sup> July, 2015 and never reported back to work. That he should pay for notice

and this has been counter-claimed. Save, an employee who absconds duty is subject to summary dismissal upon notice and hearing pursuant to section 41(2) of the Act. where an employee is alleged to have deserted duty, a report should be filed with the Labour Officer.

It is not sufficient for an employer to cite the employee for desertion of duty. It must be demonstrated what measures were taken to address such misconduct.

The claimant testified that he was called and without notice dismissed from his employment. his version of events is more probable.

Employment must terminate for a valid reason and upon the employee being given a hearing and notice. in this case, without any material evidence of any misconduct, the court finds there was unfair termination of employment.

On the remedies sought, notice pay is due. under the application wage orders, a night guard who was accommodated by the employer in July, 2015 was entitled to a gross wage of Ksh.10, 954.70 and which is due in notice pay.

On the claim for leave pay for 7 years, section 28 of the Act regulate such wage to a basic pay for the last 18 months total due being Ksh.16,431.

Severance pay claim is only due pursuant to the provisions of section 40 of the Act and this case did not stand out as one such case. Such is declined.

On the claim for underpayments such is due pursuant to the applicable Wage Orders;

From May, 2009 to April, 2010 the wage due was ksh.6, 743 and the claimant was paid Ksh.4, 000 less 2,743 and total underpayment is Ksh.32, 916;

From May, 2010 to April, 2011 the wage due was Ksh.6, 743 and the claimant was paid ksh.4, 000 and total underpayment is ksh.32, 916;

In May, 2011 to April, 2012 the wage due was Ksh.7, 586 and the claimant was paid ksh.4, 000 underpayment being 43,032;

In the year 2012/2013 the wage due was Ksh.8, 579 and the claimant was paid ksh.4, 000 and underpayment of ksh.54, 948;

The underpayment in the year 2013/2014 is ksh.69, 360;

The underpayment for 2014/2015 is ksh.69, 360;

And for May to July, 2015 the due wage was ksh.10, 954 and the claimant was paid ksh.5, 000 and underpayment of ksh.17, 862.

Total underpayment is ksh.320, 394.

On the dues awarded, the payment of which shall adequately compensate the claimant.

A certificate of service shall issue pursuant to section 51 of the Act.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- a. Notice pay ksh.10,954.70;**
- b. Underpayments ksh.320,394;**
- c. Leave pay ksh.16,431;**
- d. Certificate of service shall issue; and**
- e. Costs of the suit.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2021**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....