



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2146 OF 2016**

**[formerly Nyeri E&LRC Cause No. 154 of 2015]**

**BETWEEN**

**JERRY OUMA OSORO ..... CLAIMANT**

**VERSUS**

**BIDCO OIL REFINERIES .....RESPONDENT**

Rika J

Court Assistant: Emmanuel Kiprono

Namada & Company Advocates for the Claimant

Oraro & Company Advocates for the Respondent

**JUDGMENT**

1. This Claim was originally filed at Nyeri E&LRC, on 8<sup>th</sup> September 2015.
2. It was transferred to the Court at Nairobi upon the application of the Respondent. It probably would have been heard and concluded much earlier at Nyeri, considering the comparative caseloads associated with the Courts in Nyeri and Nairobi.
3. The Claimant gave his evidence, and rested his case, on 18<sup>th</sup> February 2021. Lead Industrial Relations Officer, Zipporah Waruguru, gave evidence for the Respondent 14<sup>th</sup> July 2021, when the hearing closed. The Claim was last mentioned in Court on 30<sup>th</sup> September 2021, when Parties confirmed filing and service of their Closing Submissions, and the date for Judgment reserved. Judgment was scheduled for 12<sup>th</sup> November 2021 but is ready for delivery on the date shown below, and Parties accordingly notified.
4. The Claimant's position is that he was employed on or about 1<sup>st</sup> July 2011 by the Respondent, as a Packer, earning a monthly salary of Kshs. 26,370, which excluded house allowance. He reported to work at 8.00 a.m. and left at 6.00 p.m.
5. His contract was terminated by the Respondent on 12<sup>th</sup> August 2014. There was no notice or reason. He leant of termination on the material date, when the clocking machine rejected his biometrics. He states also, that he was told that the Respondent had reduced its workforce. He was not dismissed for an employment offence.
6. He avers that he never went on annual leave; he was denied leave pay and leave allowance; overtime pay; and, N.S.S.F deductions were not fully remitted.
7. He prays for Judgment against the Respondent for: -
  - a. 1-month salary in lieu of notice at Kshs. 26,370.
  - b. Salary for days worked in August 2012 at Kshs. 26,370.

- c. Accrued house allowance for 3 years at Kshs 142,380.
- d. Accrued annual leave for 3 years at Kshs. 79,110.
- e. Services for 3 years worked at Kshs. 39,555.
- f. Overtime standard of 3 years at Kshs. 414,720.
- g. Compensation for loss of employment at Kshs. 316,080.
- h. Baggage allowance at Kshs. 100,000.
- i. Public holidays at Kshs. 97,366.
- j. Rest days at Kshs. 97,366.
- k. Certificate of Service.

8. On cross-examination, he told the Court that he first worked at Kenblest Limited. He worked for different companies, as shown in the N.S.S.F Statements of Account. He used work with other companies, when the Respondent gave him off-duty days. He was casual at the Respondent. He was not paid on days he did not work. He worked 4 of 5 days a week.

9. The Respondent filed its Statement of Response on 12<sup>th</sup> July 2016. Its position is that the Claimant was employed by the Respondent as a Casual Labourer. He was not a regular Employee, on a monthly salary of Kshs. 26,370. His daily rate was inclusive of housing element as provided for by the law. He failed to turn up after his shift of 8<sup>th</sup> August 2014. There was no reason to hear the Claimant, due to the nature of his engagement. He never worked more than 4 days a week or 20 days a month. He was compensated for any excess hours worked. N.S.S.F deductions were duly remitted. The Respondent denies to have terminated the Claimant's contract. The Respondent prays for dismissal of the Claim with costs.

10. The Respondent's Witness reiterated the position above. The Claimant was engaged on casual basis, working in any department where some work was available. As shown in Respondent's document 'BOR 1' the Claimant was among Daily Workers who were paid on their instructions, weekly rather than daily wages. The Claimant was not restricted to work for the Respondent. He was paid Kshs. 432 as a daily rate, in accordance with the Minimum Wage Order. The factory is based at Thika, with the applicable rate indicated at column 3 of the Order- Kshs. 432. House allowance was included in the daily rate. Basic rate and overtime hours, were paid as shown in the pay slip. N.S.S.F contributions were remitted as shown in Respondent's documents dated 8<sup>th</sup> June 2020. The Claimant did not work throughout the year, and contributions reflect the time worked, according to shift patterns. In the period 1<sup>st</sup> May 2011 to 31<sup>st</sup> June 2011, he worked for 4 days; while he did 3 days between 1<sup>st</sup> October 2021 to 31<sup>st</sup> December 2012. He last worked the night shift of 7<sup>th</sup> August 2014. He never went back to work after this. He only did 4 days in July 2014. He was not denied access. It was not unusual for casuals to skip duty.

11. Cross-examined, Waruguru told the Court that the Claimant was employed in 2010. He was engaged on daily rate. He could work throughout the year. There was no need for the Respondent to issue letter to show cause why the Claimant should not be dismissed. There was no disciplinary issue. N.S.S.F does not require that only regular Employees are contributors. House allowance was consolidated in the daily rate. The Respondent did not terminate the Claimant's contract. It did not pursue him after he left, because as a Casual Employee, he was at liberty to leave. Redirected, the Witness told the Court that the Claimant did not complain in his letter of demand before action, about denial of access and inactivation of his biometric identification. Time-sheets show there were days and months, the Claimant was not at work. He had engagement with other Employers such as Kenblest Limited.

12. The issues as understood by the Court, are whether the Claimant was a regular Employee of the Respondent; whether the Respondent terminated his contract fairly, lawfully or at all; and whether he merits the prayers sought.

### **13. The Court Finds: -**

#### **Regular or Casual?**

14. This question was answered by the Claimant himself, in his evidence. In his evidence in chief, he told the Court, " *I was casual earning Kshs 26,370 monthly...*" He characterized his employment as casual, even before he was prompted to answer any questions by the Respondent.

15. On cross-examination, he was emphatic on his casual status. He told the Court, " *I worked in different companies when the Respondent gave me off... I was casual at Bidco [Respondent]. Records show I was casual, paid once monthly... I was not paid on days not worked...*"

16. Documents exhibited by the Parties confirm the above oral evidence of the Claimant. Principally, there is a Document referenced 'Undertaking,' signed by the Claimant. It reads: -

" I, Osoro Jerry Ouma, ID No. 22612781, being a casual and hired by Bidco Oil Refineries Limited as and when required getting paid on daily basis, however do hereby request Bidco Oil Refineries to hold my wages and pay on 8<sup>th</sup> day and/or once a week whichever comes first..."

17. Given this oral and documentary evidence, the Court has no reason to examine whether the Claimant was employed on any other basis, other than casual. He was free to work for other Employers, and did work for other Employers, during the period he claims to have worked for the Respondent. The document also sheds light on the frequency of his wages. He had an agreement with the Respondent that his daily wage is retained, and paid to him after a certain interval.

18. The Court does not have ground to invoke Section 37 of the Employment Act, and deem the Claimant's contract to have been converted into regular employment. The Claimant is clear in his evidence that he was in casual employment; he was free to work for other Employers; he worked sometimes for 3 of 4 days in a month; and was at liberty to leave employment at his pleasure. It is unhelpful for the Claimant to urge the Court in his Submissions, to find that his contract was converted into a permanent contract, while in his evidence and pleadings, there is nothing about conversion. There were strong statements in evidence, from the Claimant, that he was a Casual Employee. The Court would be going way out of line, by looking at the Claimant's relationship with the Respondent, as a regular one. Regular Employees do not work for 3 of 4 days in a given month and certainly do not undertake gainful employment with other Employers, during the currency of the acknowledged employment.

#### Termination.

19. Consequently, it cannot be concluded that the Respondent terminated the Claimant's contract. The Claimant left his casual night shift of 7<sup>th</sup> August 2014, never to return. The Respondent had no obligation in recalling the Claimant, enquiring into his whereabouts, or taking him through a disciplinary process. There was no requirement for a letter to show cause to issue, or to hear the Claimant in any form. Casual employment allowed the Parties, to disengage at the end of the day.

20. The Claimant walked out of the relationship as he was entitled to.

#### Prayers.

21. The Claimant is not entitled to notice or notice pay, having been a self-declared Casual Employee, and having left voluntarily.

22. He was paid for days worked, and was not paid for days he did not work, as stated in his evidence. He did not establish that he was denied wages for any day worked in August 2012.

23. Housing element was incorporated in his daily wage, in accordance with The Regulation of Wages [Agricultural Industry] [Amendment] Order, 2013. He is not owed house allowance in arrears as claimed.

24. He was away for prolonged periods on given months. He acknowledged that he did not work in continuity, and even had time to work for other Companies. There is no foundation to his prayers for leave pay.

25. The Claimant did not explain to the Court his prayer for "*services for the years worked for 3 years*" quoted at Kshs. 39,555. The prayer is rejected.

26. Similarly, there is no evidence or explanation for "*payment of overtime standard for 3 years.*" Records show that the Claimant was compensated for any excess hours worked.

27. The Respondent did not terminate the Claimant's contract unfairly, unlawfully, or at all, and the prayer for compensation is misplaced and declined.

28. There is no clause shown in any contract, or provision of the law, conferring the benefit described as baggage and luggage allowance, computed at Kshs. 97,366, upon the Claimant. The prayer is declined.

29. The Claimant did not establish that as a Casual Employee, he was entitled to and was denied public holidays and rest days. As stated elsewhere, he worked for as few as 3 days on certain months. Why should he ask the Court for additional rest days, while he went to work at his own pace and discretion?

30. Section 51 of the Employment Act affords the Claimant Certificate of Service. The Respondent shall forthwith issue to the Claimant, Certificate of Service.

IN SUM, IT IS ORDERED: -

**a. The Claim is declined, except that the Respondent, shall release to the Claimant his Certificate of Service forthwith.**

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

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 15<sup>TH</sup> DAY OF OCTOBER 2021.**

**JAMES RIKA**

**JUDGE**