



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 256 OF 2018**

**SAMMY MUTHUI MUSYIMI.....CLAIMANT**

**VS**

**PWANI OIL PRODUCTS LIMITED.....1<sup>ST</sup> RESPONDENT**

**INSIGHT MANAGEMENT CONSULTANTS LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim dated 16<sup>th</sup> April 2018 and filed in court on 19<sup>th</sup> April 2018, the Claimant has sued the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for unlawful termination of employment and failure to pay terminal dues.
2. The Respondents filed a joint Memorandum of Reply on 13<sup>th</sup> June 2018.
3. The matter proceeded to full trial where the Claimant testified on his own behalf with the Respondent calling their former Site Human Resource Officer, Ismail Amir.

**The Claimant’s Case**

4. The Claimant avers that he was employed by the Respondents as a loader, sometime in November 2013. He earned a daily wage of Kshs. 622, payable on weekly basis.
5. The Claimant states that on 24<sup>th</sup> August 2017, he was involved in an industrial accident, while working within the 1<sup>st</sup> Respondent’s premises. He was treated at Coast General Hospital as an outpatient.
6. The Claimant adds that he went back to work on 10<sup>th</sup> March 2018, after expiry of his sick off but was informed by the 2<sup>nd</sup> Respondent’s supervisor, a Mr. Ismael that the Respondents had decided not to work with him since the volume of work had reduced.
7. The Claimant therefore claims that the Respondents terminated his employment without following the due process required under Section 40 of the Employment Act, 2007.
8. Further, the Claimant states that he was not issued with any show cause notice or warning letter prior to the termination of his employment on 10<sup>th</sup> March 2018.
9. The Claimant maintains that he was not afforded an opportunity to be heard prior to the termination. He states that a sour relationship between him and the Respondents started after the Respondents received summons on his work injury claim.
10. The Claimant’s claim against the Respondents is as follows:

- a) Notice pay.....Kshs. 18,660
- b) 12 months’ salary in compensation.....223,920

- c) Unpaid house allowance for 3 years.....100,764
- d) Severance pay @ 15 days' pay per completed year.....27,990
- e) Salary for January and February 2018.....37,320
- f) Leave pay for 3 years & 3 months.....59,712
- g) Certificate of service

h) Costs

### **The Respondents' Case**

11. In their Memorandum of Reply dated 4<sup>th</sup> June 2018 and filed in court on 13<sup>th</sup> June 2018, the Respondents state that prior to the industrial accident on 24<sup>th</sup> August 2017, the Claimant, like many other young men residing around the 1<sup>st</sup> Respondent's factory, would gather by the gate of the Respondents in case there was work.

12. The Respondents state that the Claimant ceased working as a casual sometime in January 2015 but returned on 24<sup>th</sup> August 2017, the same day he was injured. The Respondents paid the Claimant's medical bills and gave him paid sick offs.

13. The Respondents assert that they paid the Claimant subsistence for over 94 days after the accident but at the lapse of the sick off period sometime in December 2017, they did not see the Claimant at the gate whenever casuals were taken in for work.

14. The Respondents deny the existence of any bad blood between them and the Claimant.

15. The Respondents point out that the alleged date of termination cited by the Claimant being 10<sup>th</sup> March 2018, fell before the filing of the work injury claim in court.

16. The Respondents aver that the Claimant having worked for half a day besides not having been spotted at the Respondents' gate since the expiry of the 94 days' sick off in December 2017, his case did not meet the threshold for the procedural fairness requirements of Section 41 of the Employment Act.

17. The Respondents further aver that the Claimant's daily wage was inclusive of house allowance.

### **Findings and Determination**

18. There are three (3) issues for determination in this case:

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

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

19. The Respondents' case is that the Claimant was a casual employee engaged on need basis.

20. Section 2 of the Employment Act defines a casual employee as:

***“a person the terms of whose employment provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”***

21. The Respondent's witness, Ismail Amir told the Court that the Claimant ceased working as a casual employee in January 2015 only to return on 24<sup>th</sup> August 2017, the same day he was injured.

22. Amir further testified that after the accident of 24<sup>th</sup> August 2017, the Claimant was allowed paid sick off, in addition to the Respondent paying his medical bills.

23. In support of their case, the Respondents filed employment records for January to August 2017. The records for the prior period were however not availed. This was a fatal omission by the Respondents, especially in light of the Claimant's claim that he worked continuously from November 2013 until 10<sup>th</sup> March 2018.

24. Under Sections 10 and 74 of the Employment Act, the Respondents were under a duty to produce employment records for the entire period the Claimant claims to have worked for them.

25. In the circumstances, the Respondents failed to prove their assertion that the Claimant was a casual employee.

26. I therefore find and hold that the Claimant was a regular employee of the Respondents.

**Unlawful Termination?**

27. The Claimant states that upon reporting back to work after sick off on 10<sup>th</sup> March 2018, he was informed by the 2<sup>nd</sup> Respondent's supervisor, Mr. Ismael that his employment had been terminated due to reduction in volume of work.

28. The Respondent's witness, Ismail Amir told the Court that after the lapse of the sick off period sometime in December 2017, he did not see the Claimant at the gate looking for casual work.

29. Having rejected the theory that the Claimant was a casual employee, his assertion that his employment was unlawfully terminated was uncontroverted.

**Remedies**

30. Flowing from the finding that the Claimant's employment was unlawfully terminated, I award him eight (8) months' salary in compensation. In making this award, I have considered the Claimant's length of service plus the Respondents' unlawful conduct in terminating the employment.

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

32. The Respondents' witness, Ismail Amir admitted that the Claimant was not allowed to go on leave, ostensibly because he was a casual. Having disagreed with the Respondent on this score, I allow the claim for leave pay.

33. The Claimant also claims house allowance. However, in his own testimony, he stated that he was paid a daily rate which would ordinarily be inclusive of house allowance. The claim for house allowance is therefore declined.

34. No basis was established for the claim for severance pay which therefore fails and is dismissed.

35. The claim for salary for January and February 2018 was not proved.

36. Finally, I enter judgment in favour of the Claimant as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the following terms:

a) 8 months' salary in compensation.....	Kshs. 149,280
b) 1 month's salary in lieu of notice.....	18,660
c) Leave pay for 3 years (18,660/30*21*3).....	39,186
d) Prorata leave for 3 months (18,660/30*1.75*3).....	<u>3,266</u>
<b>Total.....</b>	<b>210,392</b>

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

38. The Claimant is also entitled to a certificate of service plus costs of the case.

39. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF JULY 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Anaya for the Claimant

Ms. Nanjale h/b for Mr. Mdao for the Respondent