



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 391 OF 2014

BETWEEN

DIDYMUS KINYAMASYO MULL.....CLAIMANT

VERSUS

M/S BHACHU INDUSTRIES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Okemwa & Company Advocates for the Claimant

J. Maluki & Company Advocates for the Respondent

JUDGMENT

1. The Claimant, through his Statement of Claim filed on 13th March 2014, prays for Judgment against the Respondent, his former Employer, on the following terms:-

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| a) 1 month salary in lieu of notice at | Kshs. 14,670. |
| b) Annual leave pay over a period of 7 years at | Kshs. 77,873. |
| c) 364 weekly resting days at | Kshs. 177,996. |
| d) 83 public holidays at | Kshs. 40,587. |
| e) Severance pay at | Kshs. 51,345. |
| f) 12 month's salary in compensation for unfair termination at | <u>Kshs. 178,485.</u> |
| Total | <u>Kshs. 540,956</u> |
| g) Certificate of Service to issue. | |
| h) Costs. | |
| i) Interest. | |
| j) Any other suitable order. | |

2. He states that he was employed by the Respondent around June 2006 as a General Labourer. He was later promoted to a Grinder, earning a daily rate of Kshs. 489. He was denied resting days, public holidays and annual leave. His contract was unfairly terminated by the

Respondent on 10th January 2014.

3. The Respondent filed its Statement of Response on 11th April 2014. It is conceded that the Claimant was employed by the Respondent. He was not denied resting days, public holidays and annual leave. His contract was not unfairly terminated. His Claim is misconceived.

4. The Claimant, and Respondent's Claims Officer James Wangila, gave evidence on 19th October 2018 when hearing closed. The matter was last mentioned before the Hon. Deputy Registrar at Nairobi, on 20th November 2018, when the Claimant confirmed filing of his Closing Submissions. The file was subsequently forwarded to the Court in Mombasa for preparation of the Judgment.

5. The Respondent did not file Closing Submissions as directed, while those filed by the Claimant are not signed. They are expunged from the record. Parties did not comply with the order on filing of Closing Submissions.

6. The Claimant affirmed that he was initially employed as a General Labourer, and later as a Grinder. He worked in continuity from 2006 to 2014. He never took annual leave. He was not subscribed to N.S.S.F. He worked Monday through to Sunday. On Sunday he worked half day. Kshs. 489 did not include overtime pay. He found his name pasted on the notice board in January 2014, with the advice from the Respondent that there was no more work, for those Employees whose names appeared on the notice board. Upon enquiry, he was told another person would be recruited in his place.

7. Cross-examined, the Claimant told the Court that he was employed between 2006 and 2014. He signed a contract. He used to sign at different times. He went on working after signing. He was not irregular; he worked in continuity.

8. Wangila told the Court that the Claimant was employed as a Casual. He did not have specific duties. He was assigned duty by the Foreman. He signed contracts, mostly for 2 months. His last daily rate was Kshs. 489. His last contract was not renewed. He was compensated for all overtime hours worked. Termination was through expiry of the last contract.

9. Wangila told the Court on cross-examination that he did not have documents showing he was employed by the Respondent, as a Claims Manager. Human resources administration was not a function of the Claims Office. The Claimant did not report to the Respondent. The contracts were signed by the Foreman. The Claimant was not subscribed to the N.S.S.F. There was no notice of termination. The Respondent pastes names of Employees whose contracts have expired, on the notice board. The Claimant was not entitled to annual leave. Wangila did not know how much overtime pay the Claimant received. Redirected, Wangila told the Court he handles all manner of Claims, including Claims filed in Court.

The Court Finds:-

10. The Claimant worked for the Respondent Company, from June 2006 to January 2014, a period of 7 Years. He worked for an aggregate number of days, which would qualify him as regular Employee, under Section 37 of the Employment Act 2007.

12. The Respondent preferred to employ the Claimant on 2 months' contracts, which were renewed upon expiry, over a long period of time. There was no reason given why, after this trend of renewal, the Respondent decided not to renew the Claimant's last contract, and employ another person in Claimant's place. There was no wrongdoing or poor performance attributed to the Claimant. He expected to go on working as he had done for 7 years. This was a reasonable and legitimate expectation. It was frustrated by the Respondent, without just cause, and without notice. The Claimant has shown that his contract was terminated without valid reason or reasons, and without notice. It is improper and against the law to terminate an Employee's contract through leaflets pasted on the notice board. Termination was not in accordance with Section 43 and 45 of the Employment Act. It was unfair.

13. ***The Claimant is granted the equivalent of 7 months' salary in compensation for unfair termination at Kshs. 102,690.***

14. ***He is allowed the prayer for notice pay at Kshs. 14,670.***

15. Wangila's evidence is that the Claimant did not merit annual leave because he was a Casual Employee. The Court has concluded that the Claimant worked for an aggregate number of continuous days, meriting conversion. He would therefore be entitled to all benefits available to regular Employees under the Employment Act, including annual leave at a minimum of 21 days, for every year. ***He is granted annual leave pay over a period of 7 years worked, at 21 days each year, computed at Kshs. 71,883.***

16. There are payment vouchers exhibited by the Respondent, showing Employees were paid for excess hours worked. It has been shown that the Claimant did not work for 7 days in continuity, without break, for 7 years. His prayers for weekly resting days and public holidays are not reasonable. He rested on many occasions, and was paid for excess hours worked. He has not established his prayers for overtime and holiday pay.

17. It is the common evidence of the Parties that the Claimant was not subscribed to the N.S.S.F. He left employment without the benefit of a Social Security Plan. He entered the sunset of his working years, without social security. He asks for severance pay, which the Court understands to mean service pay under Section 35 of the Employment Act. Severance pay is paid on redundancy under Section 40 of the Employment Act 2007. None of the Parties has alluded to redundancy. ***The Claimant deserves, and is awarded 15 days' salary for 7 complete years of service, at Kshs. 51,345, as service pay.***

18. ***Certificate of Service shall be supplied to the Claimant by the Respondent as required under Section 51 of the Employment Act. Costs shall be paid by the Respondent to the Claimant. Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: equivalent of 7 months' salary in compensation for unfair termination at Kshs. 102,690; 1 month salary in lieu of notice at Kshs. 14,670; annual leave pay at Kshs. 71,883; and service pay at Kshs. 51,345- total Kshs. 240,588.

c) Certificate of Service to issue.

d) Costs to the Claimant.

e) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and signed at Mombasa this 30th day of January 2019.

James Rika

Judge

Dated, signed and delivered at Nairobi this 8th day of February 2019.

Byram Ongaya

Judge