



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 133 OF 2012**

*(Before Hon. Justice Mathews N. Nduma)*

**KENNEDY OCHIENG' OCHUKA.....CLAIMANT**

**VERSUS**

**WILHAM KENYA LIMITED.....RESPONDENT**

**J U D G M E N T**

1. The matter was heard during service week at Nairobi exparte since the respondent did not attend hearing even though service week notices had been served on Nyachoti and Company Advocates for the respondent and affidavit of service filed on 16/4/2018

2. The claimant testified in support of the particulars of claim to the effect that he was employed by the respondent as a packer in the export department in November 2006. That he was paid Kshs 265 per day. The wages were paid fortnightly. That the wages were withdrawn by an ATM card given to the claimant by the respondent. The claimant stated that he worked six to seven days a week from 8.00 am in the morning to 5.00 pm in the evening. That he was not granted annual leave and was not paid in lieu of leave. That he was not housed.

3. That on 10<sup>th</sup> August 2011, the supervisor told him that there was no more work to be done by the claimant. He was sent home without notice. The claimant was not charged with any misconduct nor was he given opportunity to explain why he should not be sent home. The claimant was not paid any terminal benefits. He was also not given certificate of service. He had worked continuously for a period of five (5) years.

4. The claimant seeks the following orders:-

- (a) One month salary in lieu of notice – Kshs. 9,490
- (b) Accrued leave days for 5 years – Kshs 47,450.
- (c) Service gratuity for 5 years – Kshs. 27,375
- (d) Salary for August 2011 to January 2012.
- (e) Payment for work done in Public holidays – Kshs. 6,570
- (f) Rest days not given – 240 days x Kshs. 730 = Kshs. 175,200
- (g) Certificate of service.
- (h) Compensation for unlawful dismissal.
- (i) Costs of the suit.

**Response**

5. The respondent filed memorandum of response to the claim on 28<sup>th</sup> September 2012 in which it had denied the claims by the claimant.

The respondent in the response averred that the claimant was a casual paid at the end of every week or after two weekly worked days and was therefore not entitled to the reliefs sought. The respondent admitted in the response that the employees were provided with ATM cards through which their salaries were paid.

6. As stated earlier, the respondent did not attend the hearing and therefore the testimony by the claimant remains uncontroverted.

#### **Determination**

7. The suit is undefended. The respondent having failed to attend the hearing. The claimant bears the onus of proving the case on a balance of probabilities in terms of *Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya*, absence of the respondent notwithstanding.

8. The issue for determination is whether the claimant has proved that his employment was unlawfully terminated and whether he is entitled to the reliefs sought.

9. Uncontroverted testimony by the claimant has demonstrated that the claimant was without notice, notice to show cause or disciplinary hearing sent home upon reporting to work on 10<sup>th</sup> August 2011. This amounted to summary dismissal for no valid reason and without following a fair procedure. The summary dismissal was therefore unlawful and unfair and in violation of *Sections 41, 43 and 45 of the Employment Act, 2007*. The claimant is therefore entitled to compensation in terms of *Section 49(1) (c) and (4) of the Act*.

10. In this regard, the claimant had served 5 years. He was treated like a casual even though clearly he was a protected employee in terms of *Section 37 of the Employment Act* and was entitled to leave and or payment in lieu of leave. Was entitled to gratuity since no NSSF dues were paid for him. He was entitled to overtime if he worked in excess of 8 hours a day and for work during public holiday. The claims put forth by the claimant in these respects remain uncontroverted. However, some of them have not been sufficiently clarified to the standard required by law and therefore were not proved on a balance of probabilities.

11. The final analysis of the reliefs sought is as follows:-

#### **Notice Pay**

12. The claimant is entitled to payment in lieu of one month notice since he was summarily dismissed without notice in the sum of Kshs 9,490.

#### **Accrued leave for 5 years**

13. The claimant was treated as a casual and therefore not granted leave for five (5) years. The court awards the claimant payment in lieu of leave for the last three (3) years to the date of termination in the sum of Kshs. 28,470. The rest are caught by the doctrine of laches.

#### **Service pay for 5 years.**

14. Service pay accrues on the date of termination. The claimant was not registered with NSSF as he was treated as a casual and is entitled to gratuity calculated at 15 days salary for each completed year of service in terms of *Section 35 of the Employment Act* in the sum of Kshs. 23,725.

#### **Salary – August 2011 to January 2012.**

15. This claim was not proved and is dismissed.

#### **Public holidays**

16. This claim was not proved and is dismissed.

#### **Rest days**

17. This claim was not proved and is dismissed.

#### **Certificate of service.**

18. The respondent is to provide the claimant with a certificate of service within 30 days of the judgment.

#### **Compensation**

19. In this regard, the court has found the claimant was dismissed summarily for no valid reason and without following a fair procedure. The claimant suffered loss of earnings and damage as a result thereof. The claimant was not paid any terminal benefits or compensation for the sudden loss of the job. The claimant did not contribute to the job loss. The claimant wished to continue working for the respondent. The claimant was unlawfully treated as a casual for the entire period he served the respondent and was denied various rights at the work place as seen in the judgment. This is an aggravating circumstance considering similar cases including:-

(a) Kisumu ELRC Cause No.20 of 2018, Jos Madede –vrs-Acacia Ventures Ltd.

(b) Kisumu ELRC Cause No.98 of 2016, Richard Okoth Ochieng –vrs- HS Amin & Co.Ltd

20. The court awards the claimant five (5) months salary in compensation for the unlawful and unfair dismissal in the sum of Kshs 47,450.

21. Judgment is entered in favour of the claimant as against the respondent as follows:-

(a) Kshs. 9,490 notice pay

(b) Kshs. 28,470 in lieu of leave.

(c) Kshs. 23,725 service gratuity.

(d) Kshs. 47,450 compensation.

(e) Provision of certificate of service within 30 days.

Total award Kshs. 109,135.

(f) Interest at court rates from date of filing suit till payment in full in respect of (a), (b) and (c) above and from date of judgment in respect of (d) above.

(g) Costs of the suit.

**Dated and Signed in Kisumu this 20th day of March, 2019**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 5<sup>th</sup> day of April, 2019**

**Maureen Onyango**

**Judge**

**Appearances**

Mr. Nyabena for Claimant

Mr. Nyachoti & Company for the Respondent

Daniel Ngumbi – Court Clerk