



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 241 OF 2016**

**BETWEEN**

**SAHA MWADZIWE SAHA.....CLAIMANT**

**VERSUS**

**JUMBO WIRE PRODUCT LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*IRB Mbuya & Company Advocates for the Claimant*

*Oduor Simiyu & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 29<sup>th</sup> March 2016. He avers, he was employed by the Respondent Garment Company as a Machine Operator, between 9<sup>th</sup> July 2013 and 9<sup>th</sup> October 2015. He last earned a daily rate of Kshs. 595.
2. He alleges his contract was terminated unfairly, after he elected to join a Trade Union. He never went on annual leave.
3. He prays for Judgment against the Respondent for:-
  - a) 1 month salary in lieu of notice, at Kshs. 15,470.
  - b) Annual leave pay at Kshs. 28,113.
  - c) 12 months' salary in compensation for unfair termination at Kshs. 185,640.
  - d) Certificate of Service.
  - e) Declaration that issuance of 3 months' contracts by the Respondent, to the Claimant, amounted to unfair labour practice.
  - f) Costs.
  - g) Interest.
4. The Respondent filed its Statement of Response on 5<sup>th</sup> September 2016. Its position is that it employed the Claimant, as a Machine Operator, on casual basis. He worked as such, intermittently, between 9<sup>th</sup> July 2013 and 9<sup>th</sup> August 2015. He was hired wherever the Respondent needed extra manpower. The Respondent was not aware of Claimant's decision to join a Trade Union. He was in casual employment, and not entitled to annual leave. He did not work for 1 year in continuity, to merit annual leave. He was paid Kshs. 15,470 in notice. He does not merit Certificate of Service, because he was in casual employment. The Respondent prays the Court to dismiss the Claim with costs.

5. The Claimant testified, and closed his case, on 2<sup>nd</sup> October 2018. Legal Manager Francis Tony Manaly, gave evidence for the Respondent on 5<sup>th</sup> March 2019, when hearing closed.

6. The Claimant told the Court that he was involved in production of wire mesh. He was on 3 months contract, which was renewable. He was paid every week, on Saturdays. His contract was terminated by his Supervisor Mohammed on 9<sup>th</sup> October 2015. It was terminated for the reason that the Claimant went to the loo. There were grievances among the Employees. The Union had recruited Machine Operators. The Respondent demanded the Operators had to choose between their remaining in employment, or in the Union. On 9<sup>th</sup> October 2015, the Claimant was told there was no more work. He was not in casual employment. When not in machine operation, he was given a slasher and instructed to clear the compound. He was the only Employee who was dismissed. He was not heard before the decision.

7. Cross-examined, the Claimant testified, to have worked for 2 years. There was no time he was absent. He earned about Kshs. 3,000 weekly. Weekly Wage Register on record, shows there were days when the Claimant was absent. He would slash around the compound, when not involved in production. The machine was in operation throughout. It never broke down and was never serviced. The Claimant was sick, on dates shown to have been absent. He did not have evidence in form of documents, confirming illness. He was paid notice of Kshs. 15,470.

8. Francis Tony Manaly confirmed that the Claimant worked for the Respondent as a Machine Operator, between 2013 – 2015. He worked about 15 days a month. He did not work in continuity. He was in casual employment. The Respondent did not restrict its Employees in associating with Trade Unions of their choice. The Claimant was paid Kshs. 15,470 in lieu of leave.

9. Manaly told the Court on cross-examination that he holds Bsc. LLB, and Ph.D in Business Administration. He advises the Respondent on legal issues, but does not deal with staff issues. The Claimant earned a daily rate. Manaly did not know if the Respondent paid Claimant's N.S.S.F contributions. The Respondent scaled down its labour force. Employees were informed individually about the scaling down. Those who were smart, were assigned other duties. On redirection, Manaly told the Court that payment of Kshs. 15,470 was in lieu of notice. Employees were informed by the Respondent about scaling down of operations.

#### **The Court Finds:-**

10. There is consensus that the Claimant was employed by the Respondent as a Machine Operator, between 2013 – 2015.

11. There is no consensus on the exact date the Claimant left employment. He avers, it was on 9<sup>th</sup> October 2015. He Respondent states, it was on 9<sup>th</sup> August 2015. It is not disputed that he entered employment on 9<sup>th</sup> July 2013. The Court does not think the lack of consensus on the departure date, affects in a material way, the issues in dispute, and remedies sought.

12. There is similarly, no consensus on whether the Claimant was in casual or regular employment.

13. The Court is satisfied, from the Weekly Wages Register exhibited by the Respondent, and from the nature of work carried out by the Claimant, that, the Claimant merited conversion to regular employment. He performed work which was central to the Respondent's business. The Respondent paid to the Claimant 1 month salary in lieu of notice at Kshs. 15,470. This could only have been paid to a regular Employees, under Section 35 (1) (c) and 36 of the Employment Act. The Claimant was in regular employment.

14. The Claimant alleges that his contract was terminated because he went to answer a call of nature. He also alleges that termination was on account of his association with the Trade Union. Both allegations were not established as the reasons leading to termination of the Claimant's contract. He testified that 15 machine Operators were recruited by the Union. Yet, it was only him, who was selected for victimization by the Respondent.

15. The Respondent, who bears the legal obligation under Sections 43 and 45 of the Employment Act 2007, to prove the reason or reasons, justifying termination, explained that termination was on account of scaling down of Employees/Operations. This alludes to a reason under Section 45 (2) (b) (ii) – where termination is fair, if shown to be based on operational requirements of the Employer.

16. The Respondent did not establish that termination was based on operational requirements. The scaling down was not shown to have affected other Employees. Manaly told the Court that Employees were informed verbally about scaling down. The Claimant testified it was only him, whose contract was terminated. Manaly told the Court that some Employees who were found to be smart by the Respondent, were assigned other duties. He did not elaborate how Employees were assessed to be smart or dumb, and how only the Claimant, did not pass this strange test.

17. Termination was not based on valid reason or reasons, and was therefore unfair, under Section 43 and 45 of the Employment Act.

18. Having worked for a relatively short period of approximately 2 years, the Claimant does not merit equivalent of 12 months' salary in compensation for unfair termination. He told the Court he ordinarily served on 3 months' contracts which could be renewed, or not renewed. There was no guarantee, that he could have worked for more than the 2 years, but for termination in the year 2015. **He is granted equivalent of 3½ months' salary in compensation for unfair termination at Kshs. 54,145.**

19. His prayer for notice pay at Kshs. 15,470 was satisfied by the Respondent, before filing of the Claim.

20. The Court has not been shown evidence, establishing that the Claimant utilized his annual leave entitlement, or was paid in lieu of utilization. Manaly testified in chief, that the Claimant was paid Kshs. 15,470 in lieu of leave before correcting himself on cross-examination, to indicate that this money was paid in lieu of notice. The alternative response contained at paragraph 15(b) of the Statement of Response, is that the Claimant was not entitled to annual leave, because he was in casual employment. This position has been rejected by the

Court, with the effect that the Court finds the Claimant merits annual leave pay.

21. He worked between 2013 and 2015. The exact period is disputed. The Weekly Wages Register shows there were months when the Claimant worked for less than 26 days in a month. He rested on many days in a month. Annual leave is availed to the Employee to rest, and allow the Employee to renew himself physically and mentally, so that he remains productive at work. The Claimant, even without being placed on annual leave formally had many days of rest between 2013 and 2015. It would be distortionist, to grant him annual leave days over a period of 2 years and 3 months as claimed. ***He is allowed annual leave pay over a period of 1 year, for the minimum statutory period of 21 days, at Kshs. 12,495.***

22. The Court does not think there is justification in declaring 3 months' contract issued to the Claimant, to have amounted to unfair labour practice. The Claimant acceded to these contracts, and the contracts were a mechanism of legally converting the Claimant from casual to contractual employment.

23. ***Certificate of Service is granted under Section 51 of the Employment Act 2007.***

24. ***No order on the costs.***

25. ***Interest allowed at 14% per annum, from the date of Judgment, till payment is made in full.***

IN SUM, IT IS ORDERED:-

***a) The Respondent shall pay to the Claimant equivalent of 3½ months' salary in compensation for unfair termination at Kshs. 54,145, and annual leave at Kshs. 12,495 – total Kshs. 66,640.***

***b) Certificate of Service to issue.***

***c) No order on the costs.***

***d) Interest granted at the rate of 14% per annum, from the date of Judgment, till payment is made in full.***

**Dated and delivered at Mombasa this 31<sup>st</sup> day of July 2019.**

**James Rika**

**Judge**