



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NAROB**

**CASE NO. 1425 OF 2014**

**GEORGE AMENYA BOGONKO.....CLAIMANT**

**VERSUS**

**MANJI FOOD INDUSTRIES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent stating that he was employed as a casual worker from March 2010 till 15<sup>th</sup> December 2010 when he was injured at the workplace. He sought a declaration that he was unlawfully dismissed after the failure of the Respondent to reinstate him to employment after he was healed and for payment of overtime, leave allowance, off days, service pay, NSSF and NHIF contributions, house and transport allowance for the 7 months.

2. The Respondent denied that the Claimant was entitled to any of the relief sought and averred that the Claimant was a casual employee whose services were terminated at the end of each day.

3. The Claimant testified that he was injured while at work and his hand crushed leading to its amputation. He sought the payment of overtime as he stated that he worked for more than 8 hours as he would report at 5.30pm and work till 7.00am. He sought compensation for the unlawful termination as well. In cross-examination he was asked whether he was indicated as a casual in the records of the company and he confirmed that he was recorded as a casual and received Kshs. 530/- per day worked. He confirmed he worked from March to December, a total of 7 months. In re-examination he testified that he did not work for one day and that the Respondent kept the records he signed. He stated that the Respondent paid all the medical charges arising out of his injury.

4. The Respondent called Christopher Nzyoka the head of HR at the Respondent. He stated that the Claimant was not a permanent employee of the Respondent as he was contracted on casual basis and after the injury was treated at the Respondent's expense. He regretted the Claimant was injured while at work. In cross-examination he stated that the Claimant would access the Respondent's workplace by use of the ID and that the Claimant got injured while operating a machine. He was not operating the machine alone and was feeding. He regretted the error he made in filing the form. The form indicated that the Claimant was a machine operator.

5. The Claimant submitted that the records showed that he was a machine operator and was paid Kshs. 650/- per day which was computed daily but paid at the end of the month. He thus sought salary arrears from December 2010 till March 2011, salary in lieu of notice and 12 months compensation. The Respondent submitted that the Claimant was a casual employee and that the Claimant was not in its employment continuously to allow for the conversion of his contract to a monthly contract.

6. The Claimant was an employee of the Respondent. What is in dispute is the nature of the employment and the manner of its termination. Under the Employment Act each party before me had an obligation. The Claimant was required to prove that a dismissal had occurred contrary to the law and the Respondent was to prove that there were reasons for the dismissal. There is no dispute that the Claimant got injured while at work and his right arm subsequently amputated due to injury sustained at the Respondent's premises. The Respondent catered for all the medical expenses and therefore the dispute is on overtime and the compensation due for the unlawful dismissal. The Claimant, who was a machine operator according to the DOSH form filed after the injury, was terminated after the injury. As the Respondent did not subject the Claimant to the process under Section 41, the Claimant was unlawfully terminated. Due to his physical incapacity to feed the machine or work the equipment the Respondent ought to have called the Claimant and explained to him his services were to be terminated. He therefore was entitled to notice of one month prior to termination. From the records, the Claimant earned a daily rate of between Kshs. 530 and Kshs. 700 a day. The average earnings were therefore Kshs. 615/- a day which the court will use to compute his dues. He did not prove he was not paid overtime and that he did not go on off days. He was entitled to a fair process at termination and for this failure I would award 3 months compensation. He will also have costs of the suit. In the final analysis I will enter judgment for the Claimant as against the Respondent for:

- i. One months salary in lieu of notice Kshs. 18,450/-
- ii. Compensation for 3 months Kshs. 55,350/-
- iii. Costs of the suit
- iv. Interest on i) and ii) above at court rates from date of judgment till payment in full.
- v. Sums in i) and ii) above are subject to statutory deductions in terms of Section 49 of the Employment Act.

It is so ordered.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of October 2018**

**Nzioki wa Makau**

**JUDGE**