



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1080 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOSEPH WAMBUA KITHEKA.....CLAIMANT**

**VERSUS**

**ENDMOR STEEL MILLERS LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant, Joseph Wambua Kitheka, instituted this claim by a Memorandum of Claim dated and filed on 22<sup>nd</sup> June 2012 seeking a declaration that the termination of his employment was unfair, untimely and unlawful, payment of his terminal benefits and accrued dues against the Respondent, Endmor Steel Millers Limited.

The Claimant avers that he was employed by the Respondent as a Bariman in the furnace department working seven days a week from 19<sup>th</sup> February, 2010 to 22<sup>nd</sup> August 2011 and at the time of termination, he was earning Kshs.550/= as daily wages. That he received a termination letter from the Respondent on 22<sup>nd</sup> August 2011 dated 25<sup>th</sup> August 2011 contents of which accused him of agitating workers to boycott work. He states that he was not given an opportunity to defend himself before a disciplinary body thus making the dismissal unfair and unlawful.

He avers that the Respondent did not pay his wages for 19<sup>th</sup> August 2011 and 20<sup>th</sup> August 2011, accrued leave days, one month's salary in lieu of notice and severance benefits that had accrued to him. He contends that since his termination was devoid of procedures set out in the Employment Act, he is entitled to statutory benefits payable under the Employment Act and the Regulation of Wages and Conditions of Employment Act as follows:

- a)---Salary arrears for 2 days and rest days worked----- Kshs.47,300.00
- b)---Compensation for loss of future earnings----- Kshs.396,000.00
- c)---Salary for public holidays worked----- Kshs.24,200.00
- d)--- Service pay----- Kshs.16,500.00
- e)--- Payment in lieu of notice----- Kshs.15,400.00

**TOTAL** **Kshs.499,400.00**

The Claimant avers that his employment was terminated without any justifiable cause, against all rules of natural justice and the Employment Act as he was never involved in any activity that would amount to gross misconduct. He contends that the Respondent was wrong to associate him with the actions of a few employees without providing proof of the same.

That since his services were those of a permanent employee subject to section 37 of the Employment Act, the requirements under sections 41 and 43 of the Employment Act ought to have been followed by the Respondent prior to terminating his services. Further, that the Respondent failed to comply with section 45 of the Act when section 3(6) of the Act is clear that the provisions of the Employment Act are the basic minimum requirements of employment and any deviation varying or amending the same should be null and void.

The Respondent in its Memorandum of Response dated 18<sup>th</sup> October 2012 and filed on 19<sup>th</sup> October 2012 admits employing the Claimant but states that since the Claimant's employment was not permanent, issuance of notice to him was not applicable. That by the time the Claimant left his employment, the respondent had paid all his dues save for Kshs.5,200/= which the Claimant has refused to acknowledge despite requests and demand. That it followed the laid down procedure in terminating the employment contract of the Claimant.

The Respondent avers that the Claimant was during his tenure as its employee, disrespectful, disobedient and involved in illegal activities which amounted to gross misconduct and which was detrimental to its business. It avers that the Claimant being a member of NSSF, is not entitled to the claim for service pay. The respondent denies that the Claimant worked on public holidays and states that if he did, he was properly compensated.

The Claimant testified in court that he was not paid overtime and that he worked on all public holidays except on Christmas. During cross-examination, he testified that he was not paid for the last week he worked for the Respondent and that he did not recall being asked to write a statement on the cause of the strike when he was called by the human resource manager on 17<sup>th</sup> August 2011. He affirmed that he heard the strike was on Sunday 16<sup>th</sup> August 2011 during the day. He also confirmed that he was given a Certificate of Service by the Respondent.

In evidence, the Respondent called Mr. Simon Wachira who testified that the workers staged a strike was on 16<sup>th</sup> August 2011 at night. He denied that the respondent summarily dismissed the Claimant. It was his testimony that the respondent wanted to pay the Claimant for the two days worked together with his accrued leave days but he refused to collect the money. In cross-examination, he testified that the respondent carried out a disciplinary hearing but he did not file or produce any proceedings as proof. He admitted in evidence that the respondent did not give the Claimant a notice to show cause letter and confirmed that the evidence before Court showed the Claimant worked for 7 days, on a Sunday night shift and for the Tuesday that is blank, he explained they treated that as a breakdown.

### **Claimant's Submissions**

The Claimant submits that he was a permanent employee earning Kshs.15,400/= and for the one year 6 months that he worked for the Respondent, he never went on leave nor was he paid any dues at all. That he reported to work early morning on 16/08/2011 and together with other workers, were told to go back home as there had been a boycott the previous night. That he was not at work on the alleged night of boycott and so the allegations that he agitated other workers is not a tangible reason for termination of his employment.

He submits that even though the Respondent denied that he worked seven days a week, it failed to produce employment records like a daily register showing that the Claimant was only present at work for six days and that he rested on Sundays. That the Employment Act clearly provides for employers to keep all the records of all their employees, which the Respondent failed to do. He relies in the case of Abisalom Ajusa Magomere vs Kenya Nut Company Limited ELRC Cause No. 2525 of 2012 where the Learned Trial Judge awarded the claimant 12 month's salary in compensation in addition to 1 month's salary in lieu of notice. The claimant was further awarded service pay for every year worked, salary for 7 days worked in the month that he was dismissed and costs of the suit.

The Claimant finally submits that he proved his cause and ought to be compensated as prayed in his Claim and that he be awarded costs and interest from the date of filing suit.

### **Respondent's Submissions**

The Respondent submits that the Claimant was a Casual and that he confirmed the same in evidence when he testified that he was paid on a weekly basis. Further, that **Section 37(1) of the Employment Act** provides for conversion of casual employment to term contract and cites the case of Josephat Njuguna -vs- High Rise Self Group Nairobi Cause No. 12 of 2012 where Justice Abuodha held that –

*“The provisions of section 37 (1) therefore does not oblige an employee to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates.”*

Further, that the fact the Claimant worked for more than 3 months did not make him a permanent employee even though he is entitled to a month's notice of termination of service or payment in lieu of such notice. That the Claimant's averment that his salary was Kshs.15,400/= is unfounded and any calculation should be based on the undisputed daily wage of Kshs.550/=.

The Respondent submits that section 41(1) of the Employment Act requires an employer to explain to an employee the reason for termination before the employee is terminated on the grounds of misconduct. That it confirmed in evidence that the Human Resource Manager called the Claimant and requested him to write a letter explaining the reasons of the strike which the claimant refused to do. Further, that since section 44(1) of the Act does not clarify the method the employer should use in notifying the employee of the intended termination, verbal explanation of the reason of termination by an employer can stand and hence it followed procedure with the Claimant in this case. It also submits that the Claimant has not discharged the burden of proof that he was unfairly terminated as provided for under section 47(5) of the Employment Act.

The Respondent submits that the Claimant has not specified nor proved the particular holidays he worked and how he computed the figure for public holidays and that they confirmed in evidence that its factory does not open on public holidays. That having also proved in its documentary evidence that the Claimant did not work seven days a week and where he worked overtime he was paid accordingly, it submits that his claim for public holidays, rest days worked and 2 days' salary arrears worked must fail. Further, that the Claimant is also not entitled to service pay because being a member of NSSF, the Respondent is exempted from paying him by section 35(6) (d) of the Employment Act.

### **Determination**

The first issue for determination is whether the Claimant was a permanent or a casual employee. The second issue is whether the Claimant's termination was unlawful, unfair and untimely while the third issue is whether the Claimant was not paid his dues and is entitled to the claims sought.

It is not in dispute that the claimant was engaged as a casual employee and paid weekly based on the number of days worked. It is further not in dispute that he worked continuously from 19<sup>th</sup> February 2010 to 20<sup>th</sup> August 2011. Section 37(1) of the Employment Act provides for conversion of a casual employee to monthly contract as follows –

### **37. Conversion of causal employment to term contract**

#### **(1) Notwithstanding any provisions of this Act, where a casual employee—**

**(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or**

**(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.**

**(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.**

**(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.**

**(4) Notwithstanding any provisions of this Act, in any dispute before the**

**(5) Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.**

**(6) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.**

Based on the provisions of Section 37(1) the claimant's terms of employment converted to monthly terms upon completion of the first month of service being on 18<sup>th</sup> March 2010. The fact that the claimant was issued with a letter of termination means that the respondent acknowledged he was not a casual employee. A casual's contract terminates at the end of the day and does not require a letter of termination.

The term "*permanent employment*" is a misnomer as there is no employment that is permanent. This is because every contract of employment is terminable by notice as provided therein and if not provided, the provisions of Section 35 of the Employment Act on termination notice are presumed by virtue of Section 3(6) and 26 of the Act. The two sections provide that the terms in the Act are minimum terms that may not be derogated, and that the provisions in the Act are implied in every contract unless the contract provides for more favourable terms.

The claimant's terms thus converted to monthly contracts so that he became entitled to the provisions of Section 37(2) and (3), which provide for one weekly rest day and public holidays with pay. The employee would thus become entitled to rest on both weekly rest day and public holiday, with pay.

The claimant herein having worked continuously, was entitled to pay on all the weekly rest days and public holidays falling within the period. Whenever he worked on a public holiday, he was entitled to additional payment, over and above the daily pay, at double the hourly rate of pay for every hour worked on such rest day and public holiday. This is the import of Section 37(2) of the Act.

Having been converted to a monthly contract employee, and having worked for more than 13 months (refer to Section 45(3) of the Act), the termination of his employment was subject to Section 41 and 43 of the Act, which provide for fair procedure and proof of valid reason for termination.

The claimant having not been subjected to a fair hearing as envisaged in Section 41 and the reason for termination contained in his letter of termination having been denied by the claimant, the termination of his employment was unfair within the meaning of Section 45(1) and (2) of the Act which provide that –

### **45. Unfair termination**

**(1) No employer shall terminate the employment of an employee unfairly.**

**(2) A termination of employment by an employer is unfair if the employer fails to prove—**

- (a) that the reason for the termination is valid;**
- (b) that the reason for the termination is a fair reason—**
  - (i) related to the employee’s conduct, capacity or compatibility; or**
  - (ii) based on the operational requirements of the employer; and**
- (c) that the employment was terminated in accordance with fair procedure.**

I therefore declare the termination of the claimant’s employment unfair.

From the foregoing, the claimant is entitled to one month’s gross salary in lieu of notice, at Kshs.550 x 30 being Kshs.16,500 which I award him. He is further entitled to pay for each rest day and public holiday falling within the period he was in employment being 80 weeks at 80 x 550 for rest days at Kshs.44,000 and 16 public holidays at Kshs.8,800.

In making the awards for rest days and public holidays, I have made a presumption that the claimant did not work on any rest day or public holiday and awarded only what he is entitled to under Section 37(2) of the Act.

The respondent admitted that the claimant did not collect two days’ pay which I award him at Kshs.1,100. There was further no proof that the claimant either went on leave or was paid in lieu thereof. I award him pay in lieu of 16 months’ leave being 28 days at Shs.550 per day being Kshs.15,400.

Having been terminated unfairly and taking into account all the circumstances of his case including the fact that he was underpaid of which I take judicial notice but make no award as there was no prayer for the same, I award the claimant three months’ salary as compensation in the sum of Kshs.49,500.

### **Conclusion**

In conclusion, I find and declare that the claimant’s employment was converted to monthly contracts by virtue of Section 37(1) of the Act, that his employment was unfairly terminated and award him the following –

(i) Pay in lieu of notice	Kshs.16,500
(ii) Pay in lieu of annual leave	Kshs.15,400
(iii) Paid rest days	Kshs.44,000
(iv) Paid public holidays	Kshs.8,800
(v) Two days salary not paid	Kshs.1,100
(vi) Compensation	<u>Kshs.49,500</u>

**TOTAL KSHS.135,300**

The prayer for severance pay is rejected as the claimant was not declared redundant.

The respondent shall pay the claimant’s costs and interest shall accrue on decretal sum from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF NOVEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**