



**REPUBLIC OF KENYA**

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

**CAUSE NO. 148 OF 2013**

**FEISAL NDETTA NASHISAKO**

**CLAIMANT**

**v**

**BHACHU ENGINEERING WORKS LTD**

**RESPONDENT**

**JUDGMENT**

1. Feisal Ndetta Nashisako (Claimant) acting in person filed a verbose Memorandum of Claim on 1 February 2013 alleging that Bhachu Engineering Works Ltd (the Respondent) had unfairly terminated his employment and breached the terms of contract/statute (underpayment of wages and failed to pay for leave and overtime).

2. In a *Memorandum in Response* to Claim, the Respondent stated that the Claimant was employed on casual terms and denied unfair termination of employment and/or breach of contract.

3. On 15 September 2014, Mang'are & Associates filed a *Notice of Appointment* to come on record for the Claimant. The firm of Chwero & Co. Advocates filed a *Notice of Change of Advocates* on 11 June 2018.

4. The Cause was heard on 17 July 2018 when the Claimant testified and closed his case. The Respondent informed the Court that it would not lead any evidence.

5. Upon the Court's urging, the parties successfully negotiated and filed a consent on 30 July 2018 settling the issue of underpayments in the sum of Kshs 98,400/- and which consent was adopted as order of Court on the same day.

6. The Court has considered the evidence on record

**Unfair termination of employment**

7. The Claimant testified that he was employed by the Respondent on 29 October 2005 as a turner Grade 3. He also stated that he was not issued with a written contract until 1 April 2007.

8. He further stated that he was subsequently issued with other contracts until his employment was terminated on 1 August 2012 without any notice of termination or pay in lieu of notice.

9. In cross examination the Claimant denied that the contract expired by effluxion of time when shown a contract dated 1 August 2011.

10. The Court has looked at this last contract issued to the Claimant. It was signed by the Claimant and provided that it would run for 12 months.

11. The contract also provided that it could be renewed on expiry at the option of the parties.

12. In terms of the tenure of the contract, the Court is unable to agree with the Claimant that there was unfair termination of employment. The contract expired by effluxion of time and the failure to renew in the circumstances obtaining cannot amount to unfair termination of contract.

13. Compensation and pay in lieu of notice are therefore legally untenable remedies/entitlements.

**Leave**

14. The Claimant admitted that after getting the first written contract in 2007 he would take his leave and that the claim for leave related to the year 2006.

15. In the view of the Court, the head of claim for leave being anchored on contract got caught up by the limitation provision of section 4 of the Limitation of Actions Act (being the applicable law at the time) as the cause was lodged in Court after 6 years of accrual.

#### **Severance pay**

16. The separation was not on account of redundancy and therefore severance pay is not available to the Claimant.

17. If by severance pay the Claimant meant *service pay*, there is evidence he was contributing to the National Social Security Fund, and therefore would not be eligible for *service pay* by virtue of section 35(5) & (6) of the Employment Act, 2007.

#### **Overtime**

18. The Claimant did not lay any contractual or evidential foundation to the claim for overtime (including rest days as he admitted he did not work on Sundays).

#### **Conclusion and Orders**

19. Save for the consent on underpayments for **Kshs 98,400/-** which was adopted by the Court on 30 July 2018, the Court dismisses the other heads of reliefs.

20. Costs of Kshs 20,000/- to the Claimant.

**Delivered, dated and signed in Nairobi on this 16<sup>th</sup> day of November 2018.**

**Radido Stephen**

**Judge**

#### **Appearances**

For Claimant Ms. Njenga instructed by Chwero & Co. Advocates

For Respondent Ms. Opakas instructed by J.K. Kibicho & Co. Advocates

Court Assistant Lindsey