



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 169 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 1<sup>st</sup> September 2017)**

**TAILORS AND TEXTILE WORKERS UNION.....CLAIMANT**

**VERSUS**

**MANCHESTER OUTFITERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimants herein filed their Memorandum of Claim on 12/2/2011 on behalf of Maina Mwangi alleging termination of the said Mwangi and refusal by the Respondent to pay him his terminal dues.

2. The Claimants insist that they have a valid and existing CBA with the Respondent which binds their conduct. It is their evidence that Mwangi was employed on 2.5.2009 as a Machine Operator at a monthly salary of 10,600/= without house allowance.

3. They contend that Mwangi served the Respondent diligently until 20.1.2013 when he was terminated having been told to leave his working place without any explanation or known reasons from his Manager one Halit Mehta.

4. The Claimant avers that Mwangi's services were terminated without any notice and without being paid his terminal dues. No NSSF and NHIF deductions were made by the Respondent. Mr. Mwangi reported the matter to Claimant's Branch Secretary and General Secretary who in turn reported the dispute to the Ministry for Labour as per Appendix 2.

5. The Minister appointed one Mr. Litaba as the Conciliator (Appendix 3). The Conciliator attempted a conciliation which bore no fruit. The recommendation of the Conciliator were not followed. The Claimant then filed this claim wherein they claim:

**1. Payment of 1 months' salary in lieu of notice = 10,600/=.**

**2. 3 years 9 months unpaid Leave 37,338.50/=.**

**3. Wages for 21 days not paid prior to termination = 10,600/=.**

**4. 12 months' salary as compensation for unlawful and unjustified termination=127,200/=.**

5. **Damages of 12 months salary for breach of contract = 127,200/=.**
6. **Overtime, public holidays and rest day = 30,000/=.**
7. **Unpaid house allowance for 3 years 9 months = 71,550/=.**
8. **Gratuity at 15 days for each year worked = 15,900/=.**
9. **Leave travelling allowance for 3 years 9 months = 6,277/=.**
10. **Interest at the rate of 16% p.a from date of dismissal plus costs and issuance of a Certificate of Service.**

6. The Respondents on the other hand filed their reply to the Claim on 26.4.2016 through the firm of Kaka Kamau & Company Advocates. They deny the Claimants' claim and state that Mr. Mwangi is a stranger to the Respondent and they want this case dismissed accordingly.

7. Both parties filed their submissions. The Claimant has submitted that the Respondent cannot shift the onus of proving the employment contract because they are the ones who are mandated by law to keep employment records. Pursuant to part x of Employment Act Section 79.

8. They also refer to Section 37 of Employment Act 2007 which indicates that one cannot remain a casual for over 3 months.

9. The Respondents on their part submitted that the Claimants' evidence has contradictions because it is not clear whether Grievant was paid per month or per week. They submit that the Claimant has not proved his case and that he has not established that he was ever employed by the Respondent. They want this case dismissed accordingly.

10. I have considered evidence from both parties plus the submissions filed. The issues for determination are as follows:

1. ***Whether the Grievant was an employee of the Respondent.***
2. ***If yes, what was the nature of the contract between the Grievant and Respondent?.***
3. ***How was the relationship terminated if at all?***
4. ***What remedies to grant in the circumstances.***

11. On the 1<sup>st</sup> issue, the Respondent have argued that the Grievant is a stranger to them because he didn't produce his payslip or any documents to show that he was their employee. The Grievant however stated that it is the duty of the Respondent to produce such documents. They cited Section 79 of Employment Act. Section 79 of the Employment Act states as follows:

***“An employer shall keep a register in which the employer shall enter the full name, age, sex, occupation, date of employment, nationality and educational level of each of his employees and a return of employees for each calendar year, ending on 31<sup>st</sup> December containing such information shall be sent to the Director not later than 31<sup>st</sup> January of the following year”.***

12. Indeed this Section quoted in mandatory terms obliges the employer to keep a register of all employees including their personal data and submit the same by 31<sup>st</sup> January of each year to the Director of Employment.

13. The Respondent should therefore have in their custody details of all their employees which they

should have produced to Court to prove that the Grievant was not in their employment. They cannot shift this burden upon the Claimant and indicate that he should prove he was employed by the Respondent.

14. The Respondent and Grievant had occasion to appear before the Conciliator. They had been asked to present a Memorandum on the Grievant's case. In their submission they only stated that the case was premature and that the negotiation machinery had not been exhausted. They never denied employing the Grievant but only stated that they were unable to trace his documents. That being the position, the failure by the Respondent to provide their employment records in general makes their contention weak and it is therefore my finding that the Grievant was the Respondent's employee.

15. On the 2<sup>nd</sup> issue, there has been suggestion that the Grievant was a casual employee of the Respondent. This is perceived from the report of the Conciliator Appendix 5. Section 37 of Employment Act 2007 however states as follows:

***“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”.***

16. From the Conciliator's report it is stated that the Grievant was employed in May 2009 and was terminated in January 2013. He was therefore in continuous employment with Respondent for over 3 months. He cannot therefore have remained a casual for all that period despite being referred to as such.

17. It is my finding that the Grievant was a permanent employee of the Respondent and ceased to be a casual from September 2009.

18. Having indicated that the Grievant was not a casual employee, it was the duty of Respondent to issue him with an appointment letter. Section 9 of Employment Act 2007 states as follows:

***(1) “A contract of service:-***

***(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or***

***(b) which provides for the performance of any specified work which could not 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, shall be in writing.***

***(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)”.***

19. The letter of appointment if it existed would have been able to point out how the relationship would terminate. There is no such letter and there is no indication that the Grievant was issued with a termination letter. No notice was ever issued to him before termination nor was there any disciplinary hearing before such termination or dismissal. This is in contravention of Section 45 (2) of Employment Act which provide as follows:

***“(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 employees 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”.**

20. I find that indeed the Grievant was unlawfully and unfairly terminated and is therefore entitled to the following remedies:

**1. 1 months' salary in lieu of notice = 10,600/=.**

**2. Leave for 2012/2013 = 10,600/=.**

**3. Wages for 21 days of May 2013 before termination =  $21/30 \times 10,600 = 7,420/=$ .**

**4. 12 months' salary as damages for unlawful termination =  $10,600 \times 12 = 127,200/=$ .**

**5. 45 months house allowance = 15% of 10,600 x 45 months = 71,550/=.**

**6. Service pay of 15 days salary for each year worked =  $5300 \times 3 = 15,900/=$ .**

**Total = 243,270/=**

**7. Issuance of Certificate of Service.**

**8. The Respondent will also pay costs of this suit.**

Read in open Court this **1<sup>st</sup> day of September, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Omondi for Claimant - Present

No appearance for Respondent