



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 757 N OF 2009**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 28<sup>th</sup> January 2016)**

**BOAZ OGWENO, JOSHUA MWAU & 21 OTHERS .....CLAIMANT**

**VERSUS**

**THE MANAGING DIRECTOR, BAKERS CHOICE**

**AND CONFECTIONARY LIMITED .....1<sup>ST</sup> RESPONDENT**

**BAKERS CHOICE & CONFECTIONARY LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimant filed his Memorandum of Claim on 2/12/2009 through their representative Boaz Ongweno. The Claimants claim unfair termination and failure by the Respondent to pay them their terminal dues. The Claimants aver that they were former employees of the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent is the Managing Director of the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent is a company established under the Companies Act Cap 486 and situated at Emali Township, Makueni.
2. The Claimants aver that they were employed by the 2<sup>nd</sup> Respondent on various dates and occupations as per the schedule they have attached herein as (Boaz 1).
3. The Claimants aver that on or about May 2008, they were approached by KUDHEIHA Workers Union for purposes of recruiting them into the union. They joined KUDHEIHA and continued to make contributions to the Union.
4. In August 2008, when the 1<sup>st</sup> Respondent realized their Union Membership, they demanded that each Claimant writes a letter revoking the Union Membership or else face dismissal.
5. The Claimants declined to withdraw the Union Membership and on 25/8/2007, they were locked out of the Respondents' premises. On 27/8/2008, they reported a dispute to the District Labour Office at Machakos. That their Union advised the Labour Officer to handle the matter under the Ministry's mandate but the District Labour Officer advised the claimants to go back and settle the matter with the Respondents which he knew was not possible.
6. The dispute was never settled and the Claimants were dismissed without any notices or payment of their terminal dues. The Claimants aver that they worked for Respondents without going on

leave for upto 6 years and also worked without weekly rest days and work on public holidays was never compensated.

7. The Claimants want this Court to find that their termination was unfair and want Court to order them compensated by payment for each claimant of 1 months salary in lieu of notice, annual leave, overtime both or weekly rest days and public holidays, 15 days severance pay for each completed year of service, gratuity at 15 days per each year of service, issuance of Certificate of Service and 12 months compensation for unlawful termination.
8. Each Claimant have computed their claim in the claim accordingly under paragraph 2.00 of the claim all totaling 5,858,569. They also ask for costs of this claim.
9. The firm of Namada and Company Advocates later filed their notice of appointment and took over the presentation of this claim.
10. The Respondents filed their Memorandum of defence on 11/8/2010 through the Federation of Kenya Employers. It is the Respondents position that the 23 claimants were engaged by the Respondents as Casuals at one time or the other for interrupted periods of time between 2003 and 2008. That the Claimants were engaged in general work and were paid at the end of each day's work at the rate of 200/= to 300/= daily depending on the section of work performed.
11. The Respondents annexed some copies of daily causal attendance records of the Claimants annexed as Appendix 1 (a) – 1 (g).
12. The Respondents contend that since the Claimants were engaged on a daily basis, their employment was terminated at the end of each day and they were therefore not entitled to any notice or any other form of pay except leave whenever they worked continuously for a period of two months or more.
13. That in 2008, August, the Respondent stopped engaging them on casual basis and they were informed as such and were paid ex-gratia token of appreciation for the service rendered to the Respondent as per Appendix 2. That the Claimants were now engaged in fixed term contracts and paid piece rates or on daily rates as per Appendix 3. That after this, the Claimants reported a dispute to the Minister for Labour but the Conciliator didn't resolve the matter.
14. It is the Respondents case that the Claim has no merit and should be dismissed accordingly.
15. I have considered the averments of both parties and the issues for determination are as follows:
  1. ***Whether the Claimants were casual or permanent employees.***
  2. ***Whether they were fairly and unlawfully dismissed.***
  3. ***What remedies if any the Claimants are entitled to.***
16. On the 1<sup>st</sup> issue, the only documents produced in Court to show that Claimants worked for Respondents are the daily attendance sheets Appendix 1(a) to 1(g) which show a non-uniform attendance of several days in a month for some Claimants for a few months in the year 2003 and 2004.
17. The Respondents were unable to call any witness so that the veracity of the said documents could be tested but the period the Claimants worked range from 1999 to 2008 and picking out the few months in 2003 and 2004 is not a clear or adequate representative sample of the true position. I would have expected the Respondent to produce over the latest year of 2008 and none of those attendance sheets were produced.
18. The Claimants position is that they worked throughout and never were they sacked. The Respondent is the custodian of the records of employment and it would have been prudent to

produce the master roll in Court to show the attendance of the Claimants.

19. In absence of these records, this Court assumes that had the record been produced, it would have been prejudicial to the Respondent.
20. The Claimant in his evidence had stated that they used to be paid weekly. It therefore follows that though the Claimants were casual, their contract could only be terminated upon issuance of 7 days notice or per payment of 7 days salary. The Claimants were never given any notice nor paid the 7 days.
21. Other than this, the contracts were terminated after June 2008 when the New Employment Act 2007 came in force and so the contract came into the ambit of the employment Act 2007. Under this law, the casual jobs were converted to permanent and reasons for termination were to be given but none was given. Exhibit 3 (Respondents documents) just show fresh contracts given to some of the Claimants for periods of like 2 months with effect from August to October 2008.
22. It is my finding that failure to give reasons and follow due process before terminating the Claimants made the termination unfair.
23. I find that due to the above omission, the termination was unfair and unjustified and I award each Claimant equivalent of:
  1. **1 months salary in lieu of notice**
  2. **6 months salary as compensation for unlawful termination**
  3. **Costs of this suit.**

The exact amounts are as follows:

**CLAIMANT**

1. **BOAZ OGWENO**

1. 1 months salary in lieu of notice = 8,100/=
2. 6 months salary as compensation for unlawful termination =  $8,100 \times 6 = 48,600/=$

**TOTAL = 56,700/=**

2. **MUTHEU MUSEE**

1. 1 months salary in lieu of notice = 7,500/=
2. 6 months salary as compensation for unlawful termination

=  $7,500 \times 6 = 45,000/=$

**TOTAL = 52,500/=**

3. **HARRISON MUSYIMI**

1. 1 months salary in lieu of notice = 7,500/=
2. 6 months salary as compensation for unlawful termination

=  $7,500 \times 6 = 45,000/=$

**TOTAL = 52,500/=**

4. **JACOB MUTISYA**

1. 1 months salary in lieu of notice = 6,420/=
2. 6 months salary as compensation for unlawful termination

$$= 6,420 \times 6 = 38,520/=$$

**TOTAL = 44,940/=**

5. **GABRIEL MUNYAO**

1. 1 months salary in lieu of notice = 7,500/=
2. 6 months salary as compensation for unlawful termination = 7,500 x 6 = 45,000/=

**TOTAL = 52,500/=**

6. **AYUB MALOVA**

1. 1 months salary in lieu of notice = 7,500/=
2. 6 months salary as compensation for unlawful termination = 7,500 x 6 = 45,000/=

**TOTAL = 52,500/=**

7. **JOHN MALEVE**

1. 1 months salary in lieu of notice = 7,650/=
2. 6 months salary as compensation for unlawful termination = 7,650 x 6 = 45,900/=

**TOTAL = 53,550/=**

8. **JONATHAN MUCHUSU MAKETI**

1. 1 months salary in lieu of notice = 7,650/=
2. 6 months salary as compensation for unlawful termination = 7,650 x 6 = 45,900/=

**TOTAL = 53,550/=**

9. **DAVID MUTUKU**

1. 1 months salary in lieu of notice = 7,500/=
2. 6 months salary as compensation for unlawful termination = 7,500 x 6 = 45,000/=

**TOTAL = 52,500/=**

10. **JOSEPH KITIMA**

1. 1 months salary in lieu of notice = 7,500/=
2. 6 months salary as compensation for unlawful termination = 7,500 x 6 = 45,000/=

**TOTAL = 52,500/=**

11. **JOSHUA MWAU**

1. 1 months salary in lieu of notice = 8,100/=
2. 6 months salary as compensation for unlawful termination = 8,100 x 6 = 48,600/=

**TOTAL = 56,700/=**

12. **JOHN MBEVI**

1. 1 months salary in lieu of notice = 7,500/=
2. 6 months salary as compensation for unlawful termination = 7,500 x 6 = 45,000/=

**TOTAL = 52,500/=**

13. **JACOB KITHOKOI**

1. 1 months salary in lieu of notice = 8,100/=
2. 6 months salary as compensation for unlawful termination = 8,100 x 6 = 48,600/=

**TOTAL = 56,700/=**

**14. JUSTUS OTIENO OMENDA**

1. 1 months salary in lieu of notice = 7,710/=
2. 6 months salary as compensation for unlawful termination = 7,710 x 6 = 46,260/=

**TOTAL = 53,970/=**

**15. PETER ONYANGO OGOLLA**

1. 1 months salary in lieu of notice = 7,710/=
2. 6 months salary as compensation for unlawful termination = 7,710 x 6 = 46,260/=

**TOTAL = 53,970/=**

**16. BONIFACE KIIO**

1. 1 months salary in lieu of notice = 7,500/=
2. 6 months salary as compensation for unlawful termination = 7,500 x 6 = 45,000/=

**TOTAL = 52,500/=**

**17. FREDRICK KITILI**

1. 1 months salary in lieu of notice = 6,420/=
2. 6 months salary as compensation for unlawful termination  
  
= 6,420 x 6 = 38,520/=

**TOTAL = 44,940/=**

**18. SAMSON NTHIANI**

1. 1 months salary in lieu of notice = 7,710/=
2. 6 months salary as compensation for unlawful termination = 7,710 x 6 = 46,260/=

**TOTAL = 53,970/=**

**19. EVANS ONYANGO OMENDI**

1. 1 months salary in lieu of notice = 6,420/=
2. 6 months salary as compensation for unlawful termination  
  
= 6,420 x 6 = 38,520/=

**TOTAL = 44,940/=**

**20. CYPRIAN AGATIA SHANGO**

1. 1 months salary in lieu of notice = 6,420/=
2. 6 months salary as compensation for unlawful termination  
  
= 6,420 x 6 = 38,520/=

**TOTAL = 44,940/=**

**21. COLLINS KYALLO MULI**

1. 1 months salary in lieu of notice = 8,100/=
2. 6 months salary as compensation for unlawful termination = 8,100 x 6 = 48,600/=

**TOTAL = 56,700/=**

**22. BRIAN KATHUKU**

1. 1 months salary in lieu of notice = 6,420/=
2. 6 months salary as compensation for unlawful termination

= 6,420 x 6 = 38,520/=

**TOTAL = 44,940/=**

**23. JOSHUA KATUMO**

1. 1 months salary in lieu of notice = 7,650/=
2. 6 months salary as compensation for unlawful termination = 7,650 x 6 = 45,900/=

**TOTAL = 53,550/=**

**24. FRANCIS MWEMA**

1. 1 months salary in lieu of notice = 12,000/=
2. 6 months salary as compensation for unlawful termination = 12,000 x 6 = 72,000/=

**TOTAL = 84,000/=**

Read in open Court this 28<sup>th</sup> day of January, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Claimant

No appearance for Respondent