



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**  
**CLAIM NO. 31 OF 2013**

**(Before Hon. Lady Justice Maureen Onyango)**

- 1. PETER MARANI AGANDA**
- 2. RODNEY ESHIWANI ONYANGO**
- 3. SILUS WAFULA ..... CLAIMANTS**

**-Versus-**

**JALARAM WHOLESALERS COMPANY ..... RESPONDENT**

**J U D G E M E N T**

The Claimants filed their claim against the Respondent on 26th February, 2013 alleging that their employment had been wrongfully terminated by the Respondent.

The 1st Claimant, Peter Marani Aganda claimed that he was employed as a driver on 5th December 2008 at a salary of Kshs.6,500/- per month, whereas the 2nd and 3rd Claimants, Rodney Eshiwani and Silas Wafula respectively alleged to have been employed on 8th August 2008 as general labourers at a monthly salary of Kshs.9,000/- each. They alleged that their employment was unlawfully terminated on 11th August, 2012.

They sought to be paid terminal dues as particularized in their respective memoranda of claim.

On 20th March 2013 the Respondent filed an answer to the claim in which it denied the Claimants claim.

The Respondent however admitted having employed the Claimants on casual basis and paid their wages at the end of each working day.

The hearing of this claim commenced on 31st March, 2014 before Honourable Lady Justice Hellen Wasilwa when Peter Marani Aganda testified, before I took over the matter after the necessary directions that the matter do proceed from where it had reached.

Peter Marani aganda testified that he did not have any letter of appointment or any other evidence that he was employed by the Respondent on permanent basis. During cross-examination he also admitted that his name does not appear in the muster roll.

The 2nd claimant, Rodney Eshiwani Onyango testified that he worked as a general labourer earning

Kshs.9,000/- per month. Like the 1st Claimant he had no letter of appointment or any other form of evidence of employment with the Respondent.

The 3rd Claimant did not give evidence.

The Respondent called one witness; Vincent Kimoi who adopted his witness statement dated 18th March, 2013 and filed in court on 20th March 2013 as his evidence.

The witness stated that he was a supervisor at the Respondents business premises and his work included maintaining the Muster Roll and that the names of the casuals were never entered in the Muster Roll.

He stated that the Respondent employed about 10 employees on a permanent basis during the period in question and further stated that the Claimants were casual workers and were paid their wages daily.

The issues for determination are the following:-

- (1) Whether the 3rd Claimant's suit should be deemed abandoned for his failure to give evidence.
- (2) Whether the Claimant's were casuals.
- (3) Whether the Claimants are entitled to the remedies sought.

### **Whether the 3rd Claimant's Case should be deemed abandoned**

There is no dispute that all three Claimants were employees of the Respondent and that their services were terminated. The Respondent admitted in both the defence and in the statement of Vincent Kimoi (RW1) that all Claimants were employed by the Respondent, the 1st Claimant as driver and the 2nd and 3rd Claimant's as loaders.

The Respondent's contention that the 3rd Claimant's case has not been proved as he did not testify is therefore not tenable as there is admission that he was an employee of the Respondent.

### **Whether the claimants were Casual Employees**

Section 2 of the Employment Act defines a Casual Employee as a "a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time."

Section 37 provides for conversion of casual employment to term contract under subsection (1) as follows;

- (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.

The Respondent argues that the 2nd and 3rd Claimant's were casual employees hired only when there were goods to off-load and payment was made immediately after the particular assignment at the rate of Shs.400 per loader while the 1st Claimant who was a driver did not at any time work for a continuous period longer than a month.

Under cross examination RW1 stated that the Claimants started working for the Respondent in 2012 and left in 2013. He stated that the Respondent does not keep records for casual employees.

Having admitted that the claimants were casual employees of the Respondent from 2012 to 2013, but did not work continuously, it is the onus of the Respondent to prove that they did not work continuously by providing a record of the days worked and payments made to the Claimant's daily as alleged by the Respondent. Both sections 10 and 74 of the Employment Act require employers to keep records of employees including the dates of commencement of employment, hours of work, the rate of pay, intervals for payment, the date of which employee's period of continuous employment began and other terms such as annual leave, public holidays including calculation of entitlement upon termination. As admitted by RW1, none of these records were kept by the Respondent. Section 10(7) of the Act provides that where an employer fails to keep the prescribed employment records the burden of proving or disproving an alleged term of employment shall be on the employer.

In the present case the only evidence adduced by the Respondent is a muster roll which does not contain the names of the Claimants and is therefore of no probative value in respect of the employment records of the claimants. The Respondent did not as much as deny the Claimants specific averments in their respective claims which is that the 1st Claimant was employed on 5th December 2008 and terminated on 1st October 2011, the 2nd claimant was employed on 8th August 2008 and terminated on 11th August 2012 and the 3rd Claimant was employed on 8th August 2008 and terminated on 11th August 2012.

For the foregoing reasons, I find that the Claimants has worked for the Respondent for the periods stated in their respective claims and their contracts were converted to term contracts by virtue of section 37(1) of the Act.

#### **Whether the Claimant's are entitled to the remedies sought,**

The Claimants prayed for the following remedies:--

##### **a) 1st claimant - Peter Marani Aganda**

i. 1 month pay in lieu of Notice	Kshs. 13,610
ii. Leave due	
21 days x 2 years + 10 months x 13,610	Kshs. 31,145
iii. Service Benefit	
15 days x 2 years x 11,835/30 days	Kshs. 11,835
iv. Resting days	
4 days x 34 months x 13,610/30	Kshs. 61,698
v. Overtime	
45 hours per week	
12 hours x 6 days = 72hours -45hrs	=25hors O.T
27hrs x 4 weeks =108hrs p.m	
108 x 1.5 x 11,835	=9,832 p.m
9,832 p.m x 34 months	Kshs. 35,505



**Total Claims**

**Kshs.149,330**

Section 37(2) and (3) provide for entitlements of casual employees whose terms have been converted to term contracts as follows:-

(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.

The Claimants are therefore each entitled to one months salary in lieu of notice, annual leave, service pay as provided under section 35(5) and rest days. I however find that none of them proved that they worked overtime and dismiss the claims under that head.

I therefore award each of the Claimants the following :-

**1st claimant - Peter Marani Aganda**

1. Pay in lieu of Notice	Kshs. 13,610/-
2. Annual Leave at 21 days per year for 34 months	Kshs. 31,145/-
3. Service Pay for 2 years at 15 days per year	Kshs. 11,835/-
4. Rest Days	Kshs. 61,698/-
<b>Total</b>	<b>Kshs.118,288/-</b>

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**2nd Claimant - Rodney Eshiwani Onyango**

1. Pay in lieu of notice	Kshs. 8,049/-
2. Annual Leave	Kshs.19,503/-
3. Service Pay	Kshs.10,498/-

**Total** **Kshs.38,050/-**

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**3rd Claimant - Silas Wafula**

1. Pay in lieu of notice	Kshs. 8,049/-
2. Annual Leave	Kshs.19,503/-

3. Service Pay

Kshs.10,498/-

**Total**

**Kshs.38,050/-**

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The Claimants shall also have costs of the suit.

I have noted that the amounts claimed are less than the prescribed statutory minimum rate of pay for the year 2013 when RW1 alleges that all 3 claimants were terminated. I have however decided not to invoke the provisions of section 26(2) of the Employment Act and 47(1) of the Labour Institutions Act due to lack of clarity in the evidence adduced by the Claimants on the exact date on which they left employment or on the year of the general order that they used in calculation of the terminal benefits claimed. The two sections provide as follows:-

Section 26 of the Employment Act;

#### **26. Basic minimum conditions of employment**

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

Section 47 of the Labour Institutions Act

#### **Contents of wages order.**

47. (1) A wages order shall—

(a) set minimum rates of remuneration;

(b) specify the matters in which an employer may make deductions from employee's wages and specify the maximum amount of deductions;

(c) specify the maximum amount which may be deducted from an employee's wages in respect of rations supplied by the employer;

(d) provide that an employer may only make a deduction in respect of rations supplied if authorised in writing by a labour officer;

(e) regulate task based work and piece work; Rev. 2013] Labour Institutions No. 12 25

(f) regulate outwork, casual work and contract work;

(g) set minimum standards for sanitation for employees who reside on the premises of their employer; and

(h) regulate any other matter concerning remuneration or conditions of employment.

**Judgement Dated signed and delivered this 26th day of May, 2016**

**MAUREEN ONYANGO**

**JUDGE**