



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

**AT MOMBASA**

**CAUSE NO. 456 OF 2015**

**JOSEPH AMENYA MASARA.....CLAIMANT**

**VS**

**AIMCO ENTERPRISES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of employment by the respondent on 12.9.2014. The respondent has denied that she unfairly terminated the claimant's employment and averred that the claimant worked as an independent contractor and was lawfully terminated due to lack of work at her premises. She further denied ever converting the claimant's contract into regular employee with a monthly salary.
2. The suit was disposed of by written submissions on the basis of the pleadings documents and witness statements filed.

**Claimant's case**

3. The claimant contended in his statement that he was employed by the respondent from April 2010 as Supervisor/Foreman earning a daily wage of kshs.800. That his duties included supervising, blending, loading and off-loading of tea bags. That in July and August 2014 the respondent unilaterally converted him into a regular employee and reduced his salary from kshs.800 per day to kshs.4,500 per month. That when the claimant and some other employees protested, and the respondent's Director Mr. Ahmed dismissed him.
4. The claimant contended that the termination was unfair because it was not done in compliance with section 41 of the Employment Act (EA). He therefore prayed for compensation for unfair and wrongful termination including 12 months salary, one month salary in lieu of notice, accrued leave, overtime, Sunday worked and certificate of service.

**Defence case**

5. Mr. Moses Ouma, the respondent's operations officer recorded statement herein as the only defence witness. He stated that he had been the operations officer there since 2013. That he knew the claimant as

an independent contractor who worked for the respondent as and when work was available at the respondent's premises. That the claimant disappeared in 2014 because there was too little work at the respondents premises to sustain independent contractors.

6. In the submissions filed by her counsel, the respondent changed his story and contended that the claimant was her employee and that he absconded work without notice. That she still considers the claimant as her employee and maintained that he is still welcomed back to work. That the dispute herein had previously been filed at the Labour office and the Labour officer directed her to pay kshs.70,400 to the claimant. That before she paid the said sum, the claimant filed this suit.

### **Analysis and Determination**

7. There is no dispute that the claimant was employed by the respondent as a Supervisor from April 2010 to 12.9.2014 when he was summarily dismissed by the respondents Director Mr. Ahmed for protesting against the reduction of his wages from kshs.800 daily to kshs.4,500 per month. That the said Director Mr. Ahmed never denied the allegation by the claimant that he dismissed him verbally for protesting against low pay. The issues for determination are:-

**a. Whether the termination of the claimant's employment contract was unfair.**

**b. Whether the relief sought by him should be granted**

### **Unfair termination**

8. The claimant was dismissed by Mr. Ahmed for joining other employees to complain against poor payment. The respondent has not proved that such ground was a valid reason for his summary dismissal. It has not been alleged that the claimant participated in an illegal strike or sit in. All what Mr. Ouma, the only defence witness stated was that there was little work and the claimant disappeared. He was not present when the claimant was being dismissed by Mr. Ahmed. He has also not denied that there is a Director called Mr. Ahmed at the respondent. He has also not proved that Mr. Ahmed complied with section 41 of the Employment Act before dismissing the claimant.

9. Section 41 of the Employment Act provides that before terminating the services of an employee for gross misconduct, the employer must first explain the offence to the employee in the presence of another employee or shop floor union representative of his choice, and thereafter invite the two to air their representations for considerations before the dismissal is decided. That mandatory procedure was not complied with.

10. Under section 45 (2) of the Employment Act, termination of employment is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case, the respondent did not discharge that burden of proof and I therefore find and hold that the termination of the claimant's employment by the respondent on 12.9.2014 was unfair and unjust.

### **Reliefs**

#### **Notice**

11. Under section 49 (1) an unfairly dismissed employee is entitled to salary in lieu of notice. The claimant prayed for kshs.24,000 as one month salary in lieu of notice based on his daily wage of kshs.800 per day. The respondent never adduced any evidence to disprove that the claimant's salary was kshs.800 per day before she unilaterally tried to reduce it to kshs.4,500 per month. I therefore award to the claimant kshs.24,000 as in lieu of notice.

#### **Service Pay**

12. The claimant worked for 4 years and prayed for kshs.48,000 being equal to 15 days salary per year of

service. The same award was made by the Labour officer and I don't see any reason as to why I should not make the same award. I therefore award to the claimant kshs.48,000 as service pay for the 4 years served.

### **Accrued Leave**

13. The claimant prayed for leave for 4 years. He never gave any evidence to prove that he never took any leave. I therefore decline to grant him that claim.

### **Sundays worked**

14. The claimant prayed for pay in respect of Sundays worked. He however never proved that he never used to take any off day on any other day of the week. Consequently I also dismiss that prayer.

### **Overtime**

15. The claim for overtime was not particularized in the pleadings and proved in evidence. It is therefore dismissed.

### **Compensation for unfair dismissal**

16. The court has a discretion under section 49(1) of the Employment Act subject to considerations provided under sub section (4), to order compensation to an unfairly dismissed employee like in this case. After considering the fact that the claimant worked for a considerable period of 4 years and also the fact that he could not possibly get an alternative employment within 3 months, I award to him kshs.72,000, being 3 months salary as compensation for unfair and unjust termination of his employment contract by the respondent.

### **Certificate of service**

17. The claim for certificate of service is also granted because that is a statutory right provided under section 51 of the Employment Act.

### **Disposition**

18. For the reasons stated above, I enter judgment for the claimant in the sum of **kshs.144,000.00** plus costs and interest.

**Signed, Dated and Delivered this 29th day of July 2016**

**ONESMUS MAKAU**

**JUDGE**