



**REPUBLIC OF KENYA**

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

**CAUSE NO.509 OF 2014**

**AMOS MANOA ERASTUS..... CLAIMANT**

**VERSUS**

**BOC KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The issues in dispute are the wrongful, unlawful, illegal, unilateral and uncontractual retirement, redundancy and or termination of employment and withholding of his notice pay, and terminal dues.
2. The Claimant was employed by the Respondent as a casual worker in August 1982 where he worked in various departments especially deliveries, loading, platforms sales, painting, cleaning and handling cylinders for air, medical and industrial uses. He also attended various trainings offered by the Respondent internally and international where his performance was found satisfactory and awarded certificates and salary increments. The Claimant was never given an employment card and his salary was paid in cash but thereafter by cheque and then by bank transfer as at December 2013. The last salary was Kshs.45, 143.00. That he was unionisable and subject to the collective bargaining agreement.
3. The claim is that despite the Claimant serving his probation period, the Respondent refused and or failed to issue him with his employment contract. His NHIF, NSSF and PAYE were never remitted. The Claimant was never paid a house allowance, commuter allowance and other statutory dues owed to him by virtue of his employment.
4. On 31<sup>st</sup> December 2013 the Claimant was verbally and without notice terminated from his employment or declared redundant or unlawfully retired by the respondent. This was after serving for 30 year continuously including weekends and Sundays and without taking leave or break. No terminal dues were paid. The claim is for;
  - a. 1 month notice pay at kshs.45, 143.00;
  - b. House allowance at kshs.2, 437,772.00;
  - c. Service pay at Kshs.902, 860.00;
  - d. Accumulated leave for 30 years at kshs.1, 354,290.00;
  - e. Accumulated leave allowance for 30 years at kshs.288, 000.00;
  - f. Long service allowance kshs.324, 000.00;

- g. Baggage allowance Kshs.17, 000.00;
- h. Overtime for weekends worked at kshs.7, 923,600.00;
- i. Overtime for Saturdays worked at Kshs.4, 230,720.00;
- j. Overtime for Sundays worked at Kshs.8, 461,440.00;
- k. Overtime for public holidays worked at Kshs.1, 789,920.00;
- i. General damages for wrongful dismissal at 12 months at Kshs.541, 716.00;
- m. NSSF at kshs.144, 000.00;
- n. NHIF at kshs.115, 200.00;
- o. Transport allowance Kshs.1, 080,000.00;

5. The Claimant also states that his termination was unfair as there was no due process, he was never given notice, a hearing or given any reasons for the same. The act of termination was unilateral and he was never paid any of the owing terminal dues. That the failure to be given reasons for the retirement, retrenchment and or termination denied him his rights and natural justice. He is seeking a declaration that his employment was unfair pursuant to section 45 of the Employment Act and be paid damages.

6. The Claimant also testified in support of his claim. He stated that he joined the Respondent in 1982 when they were under the trade name of EA Oxygen and the name changed to the current. He remained at the same place in Cylinder transport for hospital gases. He later moved to Platform Sales and then to Mechanical Gases for industrial and hospital gases. Due to good performance he was promoted to the department of Industrial and medical Cylinder gases. He later moved to cleaning and painting cylinder so that customers would have quality goods.

7. The Claimant also testified that he received training from the Respondent which made him good at his job. He was however never given a written contract. However causals would be taken on a daily basis and also paid daily. Mr Mbao took casuals and wherever there was a container to be offloaded or loaded, he got casuals and paid them.

8. The Claimant also testified that he remained at his position without taking a holiday, off or leave. In a day he worked on over 150 cylinders. In his areas they were only two employee with Mr Noah Chavangi. When the Respondent terminated him, other employees contributed money for hi long service upon learning that the Respondent did not pay him anything.

9. The Claimant also testified that He was not unionised. When he saw his payslip attached to the defence of the respondent, he noted that his NSSF, NHIF and other statutory dues were never remitted. Mr Mbao never gave him a pay slip. Casuals had no pay slip. The kind of work he did required long service and training. His termination was verbal through Ms Sarah the human resource manager. There was no pay in lieu of notice.

10. In cross-examination, the Claimant testified that he has defined himself in the claim as having been employed as a causal because he was never told which category of employee he was while serving the respondent. He was however trained by the Respondent and was awarded certificates. He was issued with pay slips with different amounts;

2<sup>nd</sup> July 2012 was paid Kshs.30, 598.00;

January 2012 was paid kshs.35, 300.00;

February 2012 was paid Kshs. 41,000.00; and

July 2012 was paid Kshs.45, 000.00;

11. That in 2012, each month he was paid different amounts. The Respondent made the payments. He has an invoice submitted. Every time he was doing his painting job, he was paid for his work. He was not aware that for each cylinder that he worked on, he was paid kshs.11.00 but he saw the invoices. He did not ask why his salaries were different amounts each month. In 2013 he turned 56 years old after serving the Respondent for 30 years. He never paid any union dues. In December 2013, the human resource manager told him not to report in January 2014. No letter was issued. The Claimant thus restated his claims. He asserted that the claims are based on the collective bargaining agreement and the policy at the respondent.

## **Defence**

12. In defence, the Respondent states that they employed the Claimant as a piece-rate worker on various diverse dates the same being dependent on the availability of work and was never taken as a permanent employee. The Claimant was paid for all the piece-rate work performed where he would raise an invoice. The monies paid were agreed upon and was inclusive of allowances and his service was without complaints for the duration served.

13. The Claimant worked well and was rewarded for his work over the years leading to retirement in December 2013. The Claimant was not unionised and cannot claim dues under the CBA that was negotiated between the Respondent and the union to cover its members. The Claimant was not engaged as a casual employee as his competencies and hard work were assessed on the piece-rate.

14. The claims set out are therefore not due, upon the piece rate work no contract was due.

15. The claim for 12 years is time barred by virtue of the Limitation of Actions Act and section 47 of the Employment Act.

16. The Claimant performed his piece rate work to satisfaction and hence his continued retention and payment. The Claimant retired at 55 years on his own volition and thus not entitled to the Claimant set out. The claim is frivolous and should be dismissed with costs.

17. In evidence, the Respondent witness was James Njoroge who testified that he is the Operations manager of the Respondent and knew the Claimant well. The Claimant was in the Painting department of the Respondent for a long time. When the witness joined the Respondent in 1994, he found the Claimant in the same department. The Claimant duties were to paint and clean cylinders. He was on piece rate work. His payment was upon a claim at month end upon his supervisor's approval and the Claimant would raise an invoice for payment. The Claimant was paid based on the number of cylinders cleaned and painted. He stopped work in December 2013.

18. The witness also testified that the Claimant went to him and said that he had done enough work and wanted to leave. He asked to know why he was leaving so abruptly but the Claimant insisted that he had to leave. The claim that he was retired at age 55 is not correct.

19. The Claimant was paid each month based on his invoices. The quality of cylinders were assessed by his supervisor and the number of cylinders worked on formed the basis of payments which were different each month. The payment slips had basic pay only. Taxes due were removed without the NSSF or NHIF or union dues being affected as the Claimant was not a permanent employee of the respondent.

20. The Claimant was not entitled to notice or payment in lieu thereof as he was on piece rate work. No allowances were due or paid for the entire duration the Claimant worked with the respondent. Save for payments for work done, no other dues are owing. The Respondent trained the Claimant so as to make him competent for his work as he had no prior training and admitted that he was a class 7 leaver. The

Claimant became competent at his work and therefore the Respondent retained his services. The Claimant never applied to be a permanent employee of the respondent.

## **Submissions**

21. The Claimant submit that based on his pleadings and evidence, he was by operation of the law a permanent employee of the respondent. The Respondent documents list the Claimant as their employee and therefore he was not a casual employee. That the evidence by the Respondent that the Claimant would invoice for his payments based on the cylinders cleaning and painted is not accurate as the Claimant did not have a computer nor skills necessary to generate a complex document.

22. The Claimant also submit that section 37 of the Employment Act protects the Claimant who performed duties of a continuous nature for 30 years and therefore his contract automatically converted to permanent terms. Under section 74 of the Employment Act, the Respondent was under a duty to keep work records for the claimant. The failure to deduct and remit statutory dues renders the Respondent liable to pay service due.

23. The Claimant has relied on the cases of **Joseph R matoka versus Severin Sea Lodge [2016] eKLR**; where the Court held that section 37 of the Employment Act apply with regard to an employee who has served for the same position for long. In **Margaret Wachuka Mwangi versus Nyale Estate Limited [2016] eKLR** which defines 'casual' employee. That the Claimant served the Respondent continuously for 30 years and is entitled to claims set out in his claim and his Certificate of Service.

24. The Respondent submit that section 2 of the Employment Act defines 'piece-rate work' which is different from casual or permanent or contract employment. The Claimant was retained by the Respondent as a piece-rate worker and was paid in accordance to the work done and by raising invoices. This did not change for the entire duration of employment and at the end the Claimant took the option to leave. Notice was not required as the nature of engagement was dictated by work done.

25. The provisions of section 37 of the Employment Act do not apply in this case. The claimant's work was specific and not converted to contract or permanent terms. The dues set out are not payable under the nature of engagement. The Claimant was not on the records of the Respondent and so no such records can be produced. All payments to the Claimant were acknowledged based on work done.

26. In **shadrack Kahungani Mukwana versus Wines of the World Limited, Cause No.1470 of 2013**, the Court held that the Claimant was employed on a needs basis and his claim dismissed. In **Charles Mutua Mwanzia versus Invesco Assurance Co. Ltd, Cause No.2048 of 2014**, the Court held that there was no employment relationship between the parties and the remedies of compensation, statutory remittances, leave or allowances were not due.

## **Determination**

27. In his pleadings, at paragraph 4, the Claimant has defined himself as a casual employee of the respondent. he has gone ahead to list the various positions/duties he held – deliveries, loading, platform sales, painting, cleaning and handling cylinders for air, medical and industrial uses. That he served the Respondent for over 30 years and left aged 55 years.

28. The Claimant asserts that he became permanent employee as the Respondent trained him so as to be able to perform his work well. That he handled delicate and dangerous materials and had to be good at his job so as to be able to handle the same. However he was not issued with a contract of employment. The Respondent in defence asserts that the Claimant was employment as a piece rate worker and was paid based on invoices submitted monthly and save for taxes due, no statutory dues were deducted or remitted.

29. The Court has therefore to assess the nature of the relationship between the parties. Such will enable a proper analysis of the claims in dispute.

30. The Employment Act recognises that an employee can be employed on a fixed contract terms, permanent terms, seasonal contract terms, piece work, or as a casual employee. Such are employment terms recognised in law.

Section 2 of the Employment Act defines **piece work** as;

*“piece work” means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance*

31. Therefore, piece-work employment is a recognised form of employment in law. Such an employee has his dues payable pursuant to the provisions of section 18 of the Employment Act thus;

**18. (1) Where a contract of service entered into under which a task or piece work is to be performed by an employee, the employee shall be entitled—**

*(a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or*

*(b) in the case of piece work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier. [Emphasis mine].*

32. In this case the Claimant admits that he was employed in the Cylinders department and was under the supervision of Mr Mbao. He was never issued with a contract. The Claimant does not deny that he was paid an irregular amount each month. Such amounts were initially paid in cash, then through a pay slip and then through his back account. The Claimant did not submit the payslips or his bank statement to challenge the fact that his salary was not constant and was based on work done as asserted by the respondent.

33. It is not lost to the Court that the Claimant remained at work for a long period of 30 years. He submitted a CBA that covered unionised employees of the respondent. He was not unionised and while in employment never claimed any of the entitlements under the subject CBA. This facts and the application of section 2 and 18 of the Employment Act noting the definition of *piece work* employee and the purviews of the nature of payments due to such an employee, I find the Claimant was one such employee.

## **Remedies**

34. On the above findings, upon the Claimant being paid for work done each month, he cannot claim for dues under any other form of employment with the respondent. The claims set out in the memorandum of claim must be declined on the basis that the Claimant was on *piece work* and has admitted to having been paid each month for work done.

**The claim is hereby dismissed. Each party shall bear their own costs.**

**Delivered in open court at Nairobi and dated this 19<sup>th</sup> day of September 2016.**

**M. MBARU**

**JUDGE**

In the presence of

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