



**REPUBLIC OF KENYA**

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

**CAUSE NO.315 OF 2014**

**LIVINGSTONE OUNDO ..... CLAIMANT**

**VERSUS**

**POLYPIPES LTD (STEEL DIVISION) ..... RESPONDENT**

**JUDGEMENT**

The issue in dispute is the unfair termination of the Claimant by the Respondent and failure to pay terminal benefits.

1. The claim is that the Claimant was employed by the Respondent in February 1998 at a daily wage of Kshs.457.00 which added up to Kshs.11, 882.00 per month. There was no appointment letter and the Claimant remained in the continuous employment of the Respondent until 17<sup>th</sup> January 2013 when he was unlawfully terminated. He was not paid any terminal dues.

2 . The Claimant is seeking;

*a) Notice pay of one month's salary at Kshs.11, 882.00;*

*b) Leave accrued at kshs.124, 761.00;*

*c) Service pay Kshs.89, 115.00.*

*Total due Kshs.225, 758.00*

3. That due to the unlawful termination of employment, the Claimant is seeking compensation, costs and interest.

4. In evidence, the Claimant testified that upon employment by the Respondent on 1<sup>st</sup> February 1998 he worked diligently as a Mill Steel Finisher until 17<sup>th</sup> January 2013. He reported to work with his colleague Kennedy Sikinyi when the Respondent told them that there was no work. When the Claimant and his colleagues asked for their dues, the Respondent stated that no such dues were due.

5. The Claimant also testified that he would work for a whole week and went over time when there was more work to be completed. He would take a 1 or 2 days break and then resume work.

6. Initially he was paid per week and then this changed to every two weeks. He was paid and signed a voucher and later was paid through the bank.

7. On 17<sup>th</sup> February 2013 he was terminated and was not paid any terminal dues. Every day when he reported at work, he was made to register at the gate. The Respondent kept all work records.

8. In cross examination, the Claimant testified that the Respondent had a change of name from Premier Roll Mill Limited. With change of name and management, his salary was improved. That the casual contract attached to the memorandum of defence is not signed and in 2012 he was paid a daily wage of Kshs.375.00. that when work was low or materials reduced he would be sent home for rest but most times he would be at work. Upon his termination of the grounds that there was no work, a few employees were left behind.

9. The Claimant also testified that in most of the documents submitted by the respondent, the signatures are not his, the ID numbers are wrong though the salary paid is correct. Every cash payment was signed for. Later salaries were forwarded to the bank where the Claimant would collect.

10. The Claimant also called his witness, Kennedy Kibega. He testified that he worked with the Claimant until the date of termination. He was a Top Man just as the Claimant was. They were placed at the Respondent to work for 2 to 3 days in a week as casuals. They would work for few days but when off they Respondent did not allow them to out and look for alternative work as they would be called on short notice to report back. Due to the nature of work allocations, the Claimant and the witness were and would not be able to look for alternative work. The Respondent wanted them to be nearby so as to be available for work when required. When there was more work they worked overtime and were paid. Such pay was after every 6 days of work. That the Respondent housed the Claimant and his colleagues and thus there was no house allowance.

## **Defence**

11. In defence, the respondent's case is that they never employed the Claimant at a daily wage of Kshs.457.00 and only engaged him as a casual and on the understanding that he would remain on casual terms and depending on operational needs would be allocated work and be entitled to a daily wage of Kshs.424.00 per day. Such engagement did not commence in February 1998 as the Respondent was incorporated in 2001 and therefore not possible that the Claimant was engaged before such date.

12. The Claimant has never worked continuously for the Respondent as claimed. There was no unlawful termination since the term of service was casual and depending on operational need. When the Respondent business went down in January 2013 there was no alternative but to end the engagement with the Claimant which was terminated in accordance with the Employment Act and the contract between the Respondent and Claimant.

13. The remedies sought are not due and the claim should be dismissed with costs.

14. In evidence, the Respondent witness was Simon Wambugu Gitau, the Personnel Clerk. He testified that he was employed by the Respondent as a Security Guard and then promoted to his current position. The Respondent was incorporated on 30<sup>th</sup> August 2002, two years after the collapse of Premier Mill in 1999.

15. That he worked with the Claimant after his employment in 2009 as a Security Guard. The Claimant was employed as a casual. The witness was placed at the gate and would see the Claimant attending work and take records. The Claimant was paid weekly but from January 2012, he was paid every two weeks via his bank account. Each day wage was Kshs.424.00.

16. In 2012 the Respondent business started going down and in 2013 it was closed down. There was no notice that there was low business. At this time the Claimant would be at work for 10 days a month and each day while at work he would work for 8 hours and where there was overtime, this was paid for. There was no contract binding the parties as work was not regular. Production work where the Claimant was only available for 3 to 4 days in a week. There was no continuous work.

17. Since 2013, the Respondent workforce reduced from 400 to 15 employees who are in management to manage the close down.

## **Submissions**

18. Both parties filed their written submissions.

19. The Claimant submissions reiterated the claim.

20. The Respondent submit that though the Respondent employed the Claimant , he was a casual employee as defined under section 2 of the Employment Act – a person engaged and paid at end of day and one not engaged for a period of over 24 hours at a time. That the evidence by the Claimant that he was employed by the Respondent from 1998 is not correct as the Respondent was only incorporated in 2001.

21. There was no employment contract between the parties and the Claimant remained a casual employee of the respondent. the master roll that the Claimant would sing when at work show that he would be employed form different periods ranging from 3 to 4 days a week. In **Silus Ochieng Osano versus Heavy Engineering Limited, Cause No.820 of 2013**, the court held that the Claimant was employed as a casual and did not have continuous employment to warrant the remedies sought.

22. That the Claimant was not unfairly terminated as his casual employment terminated each day and no notice was required. No service pay is due as claimed as the daily wage was not due to a taxable provision.

## **Determination**

Whether the Claimant was a causal employee or full time employee of the respondent

Whether the remedies sought are due

23. As the Respondent has submitted, the Employment Act, 2007 has defined who an ‘employee’ and ‘employer’ are and gone further to define the nature of *employment* that an employee or employer can engage into. In this regard, the Act allows parties in employment to have a *service contract, casual employment, fixed term contract*, or upon terms agreed upon by the parties. However where employment is said to be on *casual employment* section 2 of the Employment defines such a relationship as;

*“casual employee” means 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;*

24. The definitive features of a *casual employee* is therefore that such a worker is engaged on a daily basis; each day ends with a payment; and such engagement is not for a period longer than 24 hours. Was this the nature of employment between the parties?

25. The Respondent witness testified that the Claimant would be employed for 3 to 4 days in a week and where more work was required he was paid an overtime. That the Claimant was employed in the production unit which depended on available materials and the Claimant would be stopped when the work went down. The witness also confirmed that the Claimant was initially paid a daily wage but this changed from 2002 when such wages were paid every two weeks and through the bank.

26. In **Patrick Juma Ouma versus Kabuito Contractors, Cause No.1992 of 2011**, the court held that;

*Based on the evidence that the Respondent’s nature of work was dependent on available contracts and tenders from the government, it was their duty in law to engage their workers as appropriate based on the duration of the contract or tenders already confirmed. If the work available required service contracts or piece work performance, it was at their discretion to reduce the details into*

*writing to avoid any ambiguities and to ensure each party understood the terms and conditions of engagement. The continued enjoyment of the Claimant's labour continuously for a period exceeding 3 months as a casual is thus protected by the law and has consequences.*

27. In this regard, the Claimant called his witness Mr Kennedy who testified that he was a colleague to the Claimant. They would work for 3 to 4 days in a week but were paid every two weeks through the bank. That when there was no work they would be laid off.

28. The Claimant therefore continued to report to work on different dates and was available for the employment of the Respondent for periods running from 3 to 4 days in a week and when there was more work he worked overtime and was paid for it. The Claimant was paid every two weeks and not at the end of day. The nature of work allocated was in the production department but this work did not end once done as the Claimant would be required to attend to similar work each week.

29. The law has created a safeguard to an employee, who is engaged on casual terms continuously for over a month or engaging in work not likely to be finished in 3 months. Section 8, 9, 10, 18 and 37 of the Employment Act provides that; employment contract may be written or oral; where there is continuous work for periods over 3 months such must be put into writing; the employment contract must set out the terms and conditions of such employment; where the work relates to piece-work, a contract setting the terms and such piece work must be put into writing; and more fundamentally, section 37 converts casual contract of employment into full time service contracts where an employee is engaged continuously and for work not likely to end for more than 3 months.

*37. (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.*

30. I have gone through the records of the Respondent showing daily logs for work attendance;

In January 2013, the Claimant was at work for 3 days;

December 2012, the Claimant was at work for 3 days;

November 2012, the Claimant was at work for 4 days;

October 2012, the Claimant was at work for 6 days;

September 2012, the Claimant was at work for 7 days;

August 2012, the Claimant worked for 7 days;

May 2012, the Claimant worked for 9 days.

31. Going through the entire record from 2011 to 2013, the highest number of days the Claimant was at work was 9 days in each given month. Even the days worked in May 2012 at 9 days or the 7 days' work in August and September 2012 were not even and were staggered throughout the months.

32. Therefore such a record becomes a vital determining factor as to the nature of employment between the parties. Even where there was production work ongoing with the respondent, the Claimant was not

engaged continuously and for periods longer than 9 days in any given months and such 9 days in any case were not in the same series or sequence as these were spread out through the month.

33. It is therefore not all terminations of employment that must result in a claim for unfair termination. The characteristics of an employment must be assessed and each case judged on its own merits. The Employment Act recognises that *causal employment* is one form of employment and as such, it is not a violation of the law for the Respondent to engage the claim on casual terms based on the operational requirements of the business. The Claimant confirmed in his evidence that on 17<sup>th</sup> January 2013 he was told there was no work and that since the Respondent has been closing down. This was confirmed by the respondent's witness.

34. As such, I find no unfair labour practice with regard to the termination of the Claimant's employment as a casual employee with the respondent.

**Remedies**

35. On the remedies sought, casual employment is terminable at end of each day and no notice pay is due. Equally where employment is terminated lawfully, such is therefore justified and not subject to section 45 of the Employment Act provisions in terms of payment of any compensation.

36. As the Claimant remained on causal terms of employment, he was at work for 3 to 4 days in a week, when there was no work he was off, he cannot claim for annual leave. Similarly, no statutory deductions were effected due to the nature of employment and on the finding that the nature of such employment was on causal terms and there was no violation of the law, no service pay is due.

**The remedies sought are not available in this case.**

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

Delivered in open Court at Nairobi this 25<sup>th</sup> day of November 2016.

**M. MBARU**

**JUDGE**

In the presence of:

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