



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 480 OF 2013

(Consolidated with Cause No. 482 of 2013; 486 of 2013; 487 of 2013 and 479 of 2013)

ERIC MWANGI 1ST CLAIMANT
NEWTON MARENDE..... 2ND CLAIMANT
DANIEL WAMBUA..... 3RD CLAIMANT
IYAYA MESHACK..... 4TH CLAIMANT

VERSUS

MANJI FOODS INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. Causes No. 480 of 2013; 482 of 2013; 486 of 2013; 478 of 2013 and 479 of 2013 were consolidated by consent of the parties with Cause No. 480 of 2013 being the lead file.
2. The parties further agreed to dispose of the consolidated matter by way of Written Submissions.
3. The Claimants filed consolidated submissions on 15th October, 2014 whereas the Respondent filed Consolidated Submissions on 19th November, 2014.
4. The court notes that the Claimant in Cause No. 479 of 2013, Peter Otieno elected not to pursue his claim and the same is dismissed for want of prosecution.

Facts of the Claims

5. The Claimants were all employed by the Respondent vide oral agreements on various dates as stated in the Memorandum of Claim. The Claimants worked continuously until their employment was terminated on 28th January, 2013. The Claimants state the said terminations were unlawful and unfair and seek payment of terminal benefits enumerated in the various Memoranda of Claim as follows;

Eric Mwangi

- a. Payment in lieu of Notice - Ksh.17,640.00
- b. Service pay -Ksh.48,510.00
- c. Payment in lieu of leave -Ksh.67,914.00
- d. House allowance – Ksh.174,636.00
- e. Overtime - Ksh.582,120.00
- f. Compensation (12 months’ salary) – Ksh.211.680.00

Newton Marende

- a. Payment in lieu of Notice - Ksh.17,640.00
- b. Service pay - Ksh.44,100.00
- c. Payment in lieu of leave - Ksh.61,740.00
- d. House allowance – Ksh.158,760.00
- e. Overtime - Ksh.529,200.00
- f. Compensation (12 months’ salary)– Ksh.211.680.00

Daniel Wambua

- a. Notice pay - Ksh.17,640.00
- b. Service pay - Ksh.49,245.00
- c. In lieu of leave - Ksh.68,943.00
- d. House allowance – Ksh.177,282.00
- e. Overtime - Ksh.590,940.00
- f. Compensation (12 months’ salary) – Ksh.211.680.00

Iyaya Meshack

- a. Notice pay - Ksh.17,640.00
- b. Service pay - Ksh.42,630.00
- c. In lieu of leave - Ksh.59,682.00
- d. House allowance – Ksh.153,468.00
- e. Overtime - Ksh.511,560.00
- f. Compensation (12 months’ salary) – Ksh.211.680.00

6. The following facts are common to all the Claimants

- i. at the time of termination they earned Ksh.17,640.00 per month
- ii. they claim to have no written agreements
- iii. they claim not to have been paid service pay upon termination
- iv. they claim not to have been paid housing allowance during their employment with the Respondent
- v. they claim to have worked overtime and they were not paid for the same
- vi. they claim not to have been granted leave days or paid in lieu thereof
- vii. they were not given notice or paid in lieu thereof
- viii. they seek compensation for unfair treatment

Response

7. The Respondent’s common response to the claim is as follows;

- i. the Claimants were employed and worked as casuals
- ii. they were therefore not entitled to service pay, leave pay, house allowance and overtime as claimed, or at all
- iii. the Respondent states that the Claimants absconded from duty when they were required to produce national identity cards to allow proper identification in view of the recent security threats
- iv. the Respondent denies therefore that any of the claimant’s employment was terminated by the Respondent, or at all.

8. The Respondent relies on documentation which they say shows the Claimants were casuals and avers that to the contrary the Claimants have not produced any contact to show they were in permanent and pensionable employment.

9. That the Claimants did not at any one time enjoy continuous employment for a period exceeding three (3) months as provided by **Section 37 of the Employment Act** for them to be considered as permanently employed to enable their employment status be converted from casual to permanent.

10. That the claimants were paid daily wages.

11. **Issues for determination**

1. Whether the Claimants were casual employees or not?
2. Whether the Respondent terminated their service or they absconded?
3. Whether the Claimants are entitled to the remedies sought, or at all?

12. **Issue 1**

All the Claimants except Meschack Iyaya worked for the Respondent as motor vehicle loaders, at the Respondent's loading zone between the year 2008 to January, 2013. Iyaya Meshack was employed on 16th March, 2008 as a store/transport/turnman and worked as such until 28th January, 2013.

13. It is not in dispute that the Respondent regarded all the Claimants as casual workers and therefore did not register them with the National Social Security Funds (NSSF) or with the National Hospital Insurance Fund(NHIF).

14. Being casuals, the Claimants were not granted leave for the period they served, were not paid house allowance as provided in the General Wage Order nor were they paid overtime for the work done beyond eight (8) hours a day. This is because according to the Respondent they were paid daily for the number of hours worked and were re-engaged on a daily basis upon their return to the loading zone.

15. The general defence by the Respondent was to provide daily wage payment records in a list of documents filed on 19th November, 2014.

16. The documents do not constitute a continuous record but are separate sheets dated variously indicating the hourly rates paid to the Claimants and others per day.

17. The Claimants signed for the daily payments.

18. The Claimants insist that they worked continuously from various dates in 2008 until the date their employment was terminated in January, 2013.

19. There is agreement that the Claimants indeed worked for the Respondent between the year 2008 and 2013. The only difference in the evidence is that the Respondent states that the service was not continuous, whereas the Claimants state that it was. In fact, the Respondent contends that none of them worked for a period of three (3) months continuously.

20. **The Law**

Section 37(1)(a) provides;

“Notwithstanding any provisions of this Act, where a casual employee-

- a. *works for a period of 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 the contract of service.”

21. From the common facts of this case, the Claimants worked for a period or a number of continuous working days which amount in total to the equivalent of not less than one month.

22. It is also not in doubt that the loading work/turn boy work done by the Claimants is work that could not reasonably be expected to be completed within a period of working days amounting in total to the equivalent of three months or more.

23. As a matter of fact all the Claimants did the same work for number of days amounting in aggregate to the equivalent of about five (5) years or more.

24. The court therefore finds that the contracts of service for the Claimants are deemed to be one where wages are paid monthly and **Section 35(1)(c)** applies to the contracts of service of the Claimants.

25. The consequences of this finding are as follows;

- a. in terms of **S.37(2)**, the Claimants were entitled to one paid rest day for every continuous six days of work
- b. in terms of **S.37(3)**, the Claimants would be entitled to such terms and conditions of service as if they had not initially been employed as casuals and
- c. In terms of **S.37(4)**, notwithstanding any provisions of the Act, the Industrial Court has powers to vary the terms of service of the Claimants and declare that they were employed on permanent terms.

26. Consequently, the court finds that for all purposes and intent, the Claimants were on permanent terms of employment having served the Respondent for a period exceeding five years in aggregate.

27. Therefore, the Claimants were entitled to;

1. 21 leave days for each completed year of service in terms of **Section 28(1)(a) of the Act**;
2. payment of service pay for each completed year of service, in terms of **Section 35(5)** as read with **Section 35(6)**.
3. payment of overtime, upon proof for the number of hours worked beyond eight (8) hours per day and
4. would be entitled to compensation for unlawful and unfair termination of employment in terms of Part VI of the Act.

28. Consequently, the Claimants have proved on a balance of probability all their claims except the claim for payment of overtime and house allowance because no evidence was adduced on the number of hours worked overtime daily and for the entire period of five (5) years served. No evidence was led to show whether or not the salary of Ksh.17,640.00 did not include house allowance. In any event the amount is above the minimum wage for General Labour.

29. The claim for payment in lieu of leave is limited to a claim for payment in lieu of 21 leave days for five (5) years for each of the Claimants.

30. The service pay to all the Claimants will be calculated at the rate of 15 days salary for each completed year of service. This is grounded on the case law and labour practice in this jurisdiction and the provisions of **Section 40(g)**, which though enacted for purposes of retrenched employees, serve as a useful guide in the case.

Unfair termination

31. With regard to the issue of unfair termination, the Respondent states that the employees failed to turn up for work when they were asked to produce their identity cards to prove identification in view of security concerns.

32. This evidence has not been refuted specifically by the Claimants who have instead offered a general denial without detailing the circumstances and the reasons for the termination.

33. The court finds that the Claimants have failed to meet the threshold set under **Section 47(5) of the Act**, which reads;

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the ground for the termination of employment or wrongful dismissal shall rest on the employer.”

34. It is the court’s considered view that the Claimants have not adduced any evidence to prove that unfair termination of employment had taken place.

35. It was therefore unnecessary for the employer to justify the reason for the termination as the court is not satisfied that a termination by the employer took place in the first place.

36. The claims for compensation for unfair termination are accordingly dismissed.

37. In the final analysis, the court awards each Claimant as follows;

- a. Ksh.17,640.00 - notice pay
- b. Service pay for 5 years - Ksh.44,100
- c. Ksh.61,740 leave pay(1/2 salary for 5 years)

Total award to each Claimant is Ksh.123,480.00

38. Each Claimant is to be paid interest at court rates on the award from date of Judgment till payment in full.

39. The Respondent is also to pay to each Claimant, costs of the suit.

Dated and Delivered at Nairobi this 17th day of April, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE