



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2410 OF 2012**

**JACKSON OMONDI MELA ..... CLAIMANT**

*VERSUS*

**VISHAK CONSTRUCTION COMPANY LIMITED ... RESPONDENT**

Mr. Mageto for Claimant

Mr. Misati for Respondent

**JUDGMENT**

1. The suit was brought vide Memorandum of Claim dated 29<sup>th</sup> December 2012 seeking;
  - i. one month salary in lieu of notice Kshs. 14,400.00;
  - ii. accrued leave days for 7 years Kshs. 43,200.00;
  - iii. unremitted NSSF deduction Kshs. 14,400.00;
  - iv. unremitted NHIF Kshs.11,520;
  - v. house allowance Kshs.77,700.00;
  - vi. overtime of 3456 hours Kshs.345,600.00; and
  - vii. compensation of twelve (12) months salary in the sum of Kshs.172,800.00.
2. The Claimant alleges that he was employed on 1<sup>st</sup> October 2010 as a labourer, but the position changed to one of a store keeper. He states that he worked continuously until 26<sup>th</sup> November 2012, a period of more than two (2) years. At the time of termination, he earned a daily wage of Kshs.450 paid weekly.
3. The Claimant states that the Respondent did not follow the provisions of **Section 40** in declaring him redundant and therefore he is entitled to the compensation claimed and the terminal benefits set out in the statement of claim.
4. The Claimant was not granted leave for the period he worked because he was regarded a casual. He claims payment in lieu of leave days not taken therefore, being at least twenty one (21) days per year as provided in the Employment Act 2007.
5. Furthermore the Claimant was not registered with NHIF and NSSF and the employer did not deducted the dues monthly. The Claimant seeks payment of the contribution in respect thereof.

6. The Claimant avers that he was not paid house allowance as required under **Section 31** of the Employment Act, which provides payment of 15% of the basic salary as house allowance.

7. Finally the Claimant states that he worked from 7 a.m. to 8 p.m. in the evening daily and was not paid overtime. He seeks payment for the extra hours worked.

8. Respondent filed a Memorandum of Response dated 18<sup>th</sup> December 2012 on the same date wherein, Respondent avers that it employed the Claimant on casual basis.

9. The Respondent further states that it terminated the employment of the Claimant due to reduced work and the Claimant was to be considered for re-employment when there was work as had happened in the past.

10. The Respondent denies all the particulars set out under paragraphs 8, 9, 10, 12, 13, 14, 15 & 16 of the Memorandum of Claim.

The Respondent however admits that it did not deduct NHIF and NSSF dues from the salary of the Claimant since the contract of service was of a temporary nature and for short periods on day to day basis for less than two months.

11. That the Respondent communicated the reasons for termination by a letter dated 30<sup>th</sup> November 2012. However, the Claimant produced the notice dated 25<sup>th</sup> November 2012, which was received by the Claimant on 26<sup>th</sup> November 2012.

12. The Claimant was a store keeper and was targeted for retrenchment due to inadequate work.

13. The notice was not sent to the Labour Office in terms of **Section 40** of the Employment Act.

14. RW1 Daniel Okaka Wamola, the head of stores told the Court that the Claimant worked from 7.30 a.m. to 5 p.m. in the evening. That there were five (5) store keepers who worked six (6) days a week from Monday to Saturday. That on Saturdays they stopped work at 2 p.m.

15. That they got off-days and at times did not work. He denied that the store was open at night. RW1 denied that the Claimant worked overtime. He confirmed that the store men were reduced from five (5) to four (4) when workload went down.

17. **Determination**

- i. Was the Claimant a casual employee as claimed by the Respondent?
- ii. Is the Claimant entitled to the reliefs sought?

18. **Status of Claimant**

The Claimant had no letter of employment. He worked as a storekeeper at the time of termination. The employer was a construction company and he took care of and distributed materials such as cement, steel, files and other building materials. These materials were required all the time during construction hence, the Claimant worked for long hours without leave and with no payment of overtime.

19. **Section 37** of the Employment Act provides;

*“(1) notwithstanding any provision of this Act, where a casual employee -*

- a. *works for a period or a number of continuous working days which amount in 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.”*

20. **Section 35(1)(c)** provides;

*“where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty eight days next following giving of notice in writing.”*

21. From the evidence adduced in this case, the Claimant qualifies as a permanent employee, whose salary is deemed to be paid monthly. He was thus entitled to one month’s notice or payment in lieu of notice upon termination.

22. Furthermore, the Respondent admits that the Claimant was laid off due to reduction of work. The Claimant was thus retrenched within the meaning of **Section 40** of the Employment 2007. Under **Section 40**, the Claimant was upon termination entitled to payment of one month’s salary in lieu of notice and in addition was entitled to payment of fifteen (15) days salary for each completed year of service.

23. The Claimant was further entitled to at least twenty one (21) days leave for each completed year of service in terms of **Section 28(1)(a)** of the Employment Act, the Court having found that the Claimant was a permanent employee in terms of the provisions of Employment Act.

#### 24. **Remedy**

The Court having found that the claimant was a permanent employee in terms of the provision of Employment Act awards the Claimant;

- i. one month salary in lieu of notice in the sum of Kshs.14,400.00
- ii. accrued leave for three (3) years in the sum of Kshs.43,200.00.
- iii. the equivalent of fifteen (15) days salary for three (3) years being severance pay in terms of **Section 40** of the Employment Act in the sum of Kshs. 43,200.00.

25. The Claimant has failed to establish that the monthly salary of Kshs.14,400.00 did not include house allowance or that the salary was below the set minimum wage including 15% of housing allowance for the position of a shop keeper.

The claim for house allowance is therefore refused.

26. The Claimant worked for more than eight (8) hours on week days and was therefore entitled to payment of overtime or grant of paid off-days.

The Respondent was therefore unable to rebut the claim for payment of overtime by the Claimant and the Court finds the same as sufficiently proved and awards the Claimant overtime calculated at (1 hour x 6 days x 4 weeks x 3 years) Kshs.4,984.00.

27. With regard to the claim for compensation, it is common cause that the Claimant was retrenched and was told the reason for the termination.

This was done without giving notice or notifying the Labour Office.

The Claimant was selected for retrenchment out of five storekeepers.

28. The procedure for effecting the retrenchment was flawed and for this reason, the Court awards the Claimant five (5) months salary, being compensation for unfair termination contrary to **Section 45(2)(c)** of the Employment Act in the sum of Kshs.72,000.00.

29. In the final analysis the award of the Court is as follows;

- i. one (1) month's salary in lieu of notice Kshs.14,400.00
- ii. payment in lieu of leave days not taken Kshs.43,200.00.
- iii. severance pay Kshs.43,200.00
- iv. overtime, Kshs.4,984.00.
- v. Compensation equivalent to five (5) month's salary Kshs.72,000.00

**Total award; Kshs.177,784.00.**

The award to be paid with interest at Court rates from date of judgment till payment in full.

The Respondent to also pay the costs of the suit.

30. In addition, the Respondent is to provide the Claimant with a certificate of service within fourteen (14) days from date of the judgment.

**Dated and Delivered at Nairobi this 29<sup>th</sup> day of May, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**