



**REPUBLIC OF KENYA**

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

**CAUSE NO. 953 OF 2012**

**NYABUTO MOREKA ..... CLAIMANT**

**VERSUS**

**NAIROBI BOTTLERS LIMITED ..... RESPONDENT**

**JUDGEMENT**

**Ms S.N. Ndirangu instructed by S.N. Ndirangu Kamau Advocates for the Claimant**

**Respondent – No Appearance**

1. The claimant, Nyabuto Moreka filed the claim on 5<sup>th</sup> June 2012. The Respondent though served with summons failed to enter appearance or file any defence. The Respondent further failed to appear for mention to take directions hearing and Court noting service upon the Respondent that was received and acknowledged on 2<sup>nd</sup> August 2012 vide Affidavit of Service sworn by Isaac Makhino Wafula and filed on 3<sup>rd</sup> September 2012, judgement was entered for the Claimant in default of appearance and defence on 17<sup>th</sup> December 2012. The Claimant proceeded for formal proof of the claim on 16<sup>th</sup> February 2015. Written submissions were filed on 23<sup>rd</sup> February 2015.

2. The claim is that the Claimant was employed by the Respondent from January 2004 to 8<sup>th</sup> October 2007 at the Warehouse and as a Bottle –Pre-inspector as noted on his Certificate of Service issued to him upon termination which Certificate is dated 8<sup>th</sup> November 2007. The Respondent thereafter occasioned outsourcing of services to Career Directions (K) Limited, who on the same day of termination employed the Claimant on a salary scale of Kshs.250.00 per day minus lunch which was lower than the previous earnings of kshs.409.00 per day. The Claimant was thus seconded to work for Career Directions (K) Limited who placed him to work at the respondent.

3. The claim is that, on the basis of his termination, he is entitled to terminal dues of severance pay, payment in lieu of notice and house allowance. That the termination of employment by the Respondent was unlawful and due process was not followed and thus seeks compensation for unfair termination. The claim is for a declaration of an unfair termination and compensation thereof; payment in lieu of notice; leave pay; house allowance and severance pay all computed at kshs.626, 803.00. The Claimant is also seeking costs of the suit.

4. In evidence, the Claimant stated that he was employed by the Respondent as Inspector checking what the vehicles carried was of good quality. He started as a casual employee and then became permanent staff and was paid Kshs.409.00 per day. In the first 3 months, he was paid after every two weeks and then this changed and payments were done on a monthly basis.

5. In January 2004 to 8<sup>th</sup> October 2007, the Respondent called the Claimant together with other employees, all in a hall and was told that they had sourced Career Directions Ltd to take over their duties. On this development, the Claimant opted to take his service pay as they were to be transferred by force and he knew the Respondent as his employer. A Certificate of Service was issued to him on 8<sup>th</sup> October 2007 but no terminal dues were paid.

6. The Claimant also stated that before he was issued with his Certificate, no terminal dues were paid or his leave days due compensated. That he worked for 7 days per week without rest day and the daily wages did not include house allowance. The Claimant was not taken by the new company, Career Directions Ltd, when they issued letters, the Claimant refused to sign. He has never been paid by the Respondent since his termination.

7. The Claimant therefore confirmed his claim seeking service pay; house allowance and overtime; and severance pay. No notice was given prior to the termination and this should be paid. There was no pay slip as all employees signed on a pay roll and the Respondent was left with the details.

8. In submissions, the Claimant reiterated his claim and noted that his claim is unchallenged and should be awarded as prayed. The claim is based on the provisions of sections 43 and 45 of the Employment Act where an employer is required to give reasons for termination which was not done in this case and thus the resulting termination was unfair and unjust.

### **Determination.**

9. The claim herein is undefended. Though served with summons, the Respondent opted not to enter appearance or file any defence. The Court thus proceeded to hear the claimant's case.

10. Based on the interlocutory judgement entered, the Court must consider the merits of the case, the applicable law in addressing the basis of the claims outlined by the claimant. This being a Superior Court of record, the Court has the duty to address its mind to all the facts and law upon which the claim is grounded upon.

11. In this regard therefore, the claim is based on the employment of the Claimant by the Respondent in 2004 to 8<sup>th</sup> October 2007 when he was terminated and a Certificate of Service issued. The basis of the termination based on the evidence of the Claimant is that he was moved by the Respondent to Career Directions Ltd, a new entity and employer without his consent and despite being issued with a letter of appointment, the terms were not commensurate to what he was earning while with the Respondent and thus he declined to give his approval and consent to join the new employer. He was thus terminated by the Respondent on 8<sup>th</sup> October 2007.

12. The claim herein is filed on 5<sup>th</sup> June 2012. The applicable law as at 8<sup>th</sup> October 2007 on the date of termination is the repealed Cap 226 of the Laws of Kenya and the new law on employment, the Employment Act, 2007 only became operational on 2<sup>nd</sup> June 2008 followed by its assent on 22<sup>nd</sup> October 2008. Though passed and published on 26<sup>th</sup> October 2007 vide Kenya Gazette Supplement No.107 (Acts No. 11), the operational date was only brought to the notice of the public and given legal force as herein noted.

13. The Claimant thus, having been terminated on 8<sup>th</sup> October 2007 before the Employment Act, 2007 became operational, can only rely on the repealed law Cap 226 as at the time of filing his claim on 5<sup>th</sup> June 2012, he had the requisite time under the Limitations of Actions Act, to file his claim as such that was to lapse on or before the 8<sup>th</sup> of October 2013.

14. In this regard therefore, the repealed law, Cap 226 made no provision for the concept of unfair termination as this is only introduced under the provisions of the new law – Employment Act, 2007. Based thus on the applicable law, the claim for compensation for unfair termination must fail.

15. The Claimant has admitted in his claim and evidence that he was employed as a casual employee which is also evidenced by the Certificate of Service produced. To be a casual employee under the provisions of Cap 226 that has since been repealed meant that such an employee lacked various legal protections that have now been introduced by the Employment Act, 2007. Even where the claim is heard when the Employment Act, 2007 has come into force, the Claimant can only rely on the repealed law, Cap 226, as this is the applicable law in his case and which does not provide for leave pay, house allowance or severance pay for a casual employee this being a category of employment that the applicable law did not give such rights and protections. Such rights could only be conferred through a written contract of employment. I find no such evidence.

16. The only due claim is that of notice pay. This shall be awarded at kshs.8, 180.00.

17. Just to digress but important to note, the converse to this claim is where the Claimant relies on the provisions of the Employment Act, 2007. To so rely, the claim is already time barred under the provisions of section 90 and cannot have any justified to be filed after a period of 5 years. Section 90 is framed in mandatory terms and any suit that is not filed within 3 years from the date when the cause of action arose, it automatically lapses.

**Therefore, judgement is entered for the Claimant and he is awarded notice pay at kshs.8, 180.00. On the grounds that the Respondent has been noticed, failed to entire appearance of file a defence, costs herein are award.**

**Delivered in open Court , dated and signed in Nairobi on this 19<sup>th</sup> day of May 2015.**

**M. MBARU**

**JUDGE**

**In the presence of**

**Lilian Njenga: Court Assistant**

.....

.....