



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2479 OF 2012**

**MATHEW MUTUA.....CLAIMANT**

**VERSUS**

**ALL PACK INDUSTRIES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 10<sup>th</sup> December 2012 seeking resolution of a dispute he framed as unlawful termination of employment and refusal to pay terminal benefits. The Claimant averred that he was employed on 18<sup>th</sup> January 2006 by the Respondent as a general worker and was paid Kshs. 6,999/- per month. He served the Respondent diligently and resourcefully for 6 years until his termination on 18<sup>th</sup> January 2012. He averred that he was summoned to the Human Resources Management office and summarily dismissed verbally. He averred that the dismissal was unfair, inhumane and callous. He sought payment in lieu of notice, annual leave, pay for rest days and public holidays. He also sought a declaration that the termination was unlawful as well as compensation and any other relief or order deemed suitable.
2. The Respondent opposed the suit and filed a Response to Memorandum of Claim on 11<sup>th</sup> September 2013. In the response the Respondent averred that the Claimant was employed as a general worker for one month in the month of May 2007. The Respondent averred that the Claimant was paid Kshs. 6,999/- plus a house allowance of 1,050/- a month. The Claimant's salary was reviewed and at the time of leaving the Respondent was earning Kshs. 21,966/-. The Respondent denied summarily dismissing the Claimant. The Respondent averred that the Claimant was paid for overtime from time to time. The Respondent averred that the Claimant had gone for leave during his employ with the Respondent and was not entitled to any dues.
3. The Claimant testified on 27<sup>th</sup> November 2014 and stated that he was employed by the Respondent as a casual worker from 2003 and in 2007 was employed on contract. He used to perform general work and the contract was for one year and was renewable. He stated that he worked continuously until January 2012 and his salary was Kshs. 12,608/-. He stated that he went to work as usual on 18<sup>th</sup> January 2012 and when he returned from lunch he was summoned to the HR office where he was notified that his services were no longer required. He was not informed of this prior to that time. He admitted that he went on leave and testified that there were some years he did not get leave. He said he would work during Easter, Christmas Day, Mashujaa Day, Madaraka Day, Christmas Day, Labour Day, New Years day and even during Id-ul-fitr. He stated that he would be paid on those days. He stated that if he worked on Sunday he would be paid overtime.

4. In cross exam he testified that he had a yearly contract and the contract was renewed in May. He stated there were 5 months remaining on the contract. He confirmed that he was paid overtime. He confirmed that he would go on leave when he applied for leave.
5. The Respondent called Mwacheda S.G. Robert the head of HR at the Respondent. He testified that he was in his fourth year of service. He stated that the Claimant was an employee of the Respondent on contractual basis till the contract ended. He testified that the Claimant was paid overtime for the days the Claimant was at work during holidays or Sundays. He stated that OT1 is ordinary overtime and OT2 is overtime on a Sunday or public holiday. The payslips demonstrated the Claimant was paid overtime. He referred to the exhibits the Respondent had produced and stated that the Claimant had gone on leave as and when he applied for it.
6. In cross-examination the witness testified that the Claimant had no arrears on benefits or salary. He stated that all the dues were paid and that the Claimant's contract had expired in May 2011 and after that there were smaller contracts that were given. The witness did not however produce them as they were not in Court. He testified that the Claimant was paid Kshs. 6,999/- as basic plus house allowance of Kshs. 1,050/- and overtime which was variable. He stated that the Claimant was paid all his dues and bonus in January when his last payment was made.
7. Parties filed written submissions as follows - the Claimant filed his submissions on 6<sup>th</sup> March 2015 and the Respondent on 24<sup>th</sup> March 2015. The Claimant submitted that he sought Kshs. 443,970/- as compensation for unlawful termination of employment and related statutory benefits. He also sought costs incidental to this suit. He submitted that the testimony adduced was that he was employed as a general worker on a yearly contract effective May of each year and the contract was renewed from 2007. He reported to work on 18<sup>th</sup> January 2012 and worked until 11.30am when he was summoned to the supervisor's office alongside other employees and was informed that he had been dismissed. He asked why and was told that the supervisor was only executing orders from his superiors. He submitted that he was not given an explanation or a hearing prior to his termination.
8. The Respondent submitted that the Claimant's contract was not renewed and therefore his claim was misplaced. It was submitted that the Respondent was not obliged to issue a 3 month notice prior to termination. The Respondent submitted that the contract of the Claimant lapsed and was not renewed. The Respondent submitted that the Claimant went on leave and off days and that he was duly paid for his services. The Respondent admitted that at the time of the termination of contract there was a subsisting contract that was to expire in 3 months. The Respondent relied on the case of **Denis Ombese Nyakundi v Branded Fine Foods Ltd [2015] eKLR** for the proposition that the Claimant in that case was entitled to payment of notice and equivalent wages for the remainder of the contract. The Respondent submitted that the Claimant had failed to prove his claim for the rest days, public holidays, annual leave, 3 months in lieu of notice and 12 months compensation.
9. The Claimant was dismissed on 18<sup>th</sup> January 2012. This was admittedly without notice. The Claimant asserts that he was entitled to 3 months notice while the Respondent asserts the Claimant's contract had expired. In the testimony of the witnesses who testified for either side it was apparent there was no hearing prior to termination and the termination was abrupt. No reasons were ascribed to it. The Respondent submitted that the Claimant was entitled to only the notice and the unexpired period of the contract which was three months. Curiously the Respondent did not exhibit the last contract. The previous contracts expired in the month of May. It was clear the contract the Claimant was serving was to expire in May 2012. The Claimant was entitled to notice and none was given. He would be entitled to payment in lieu of notice. He was less than candid when he stated that he never went on leave. In reviewing the evidence adduced by the Respondent it was clear that as at January 2012 he only had a balance of 29 days. The Claimant would be entitled to recompense for these days not taken. He was to serve until May 2012 and in the premises would recover on the unexpired period of the contract to wit, the months of February, March, April and May. The Respondent did not terminate the contract properly and in the

premises I would grant him 3 months compensation. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. One month salary in lieu of notice Kshs. 8,049/-
- b. 4 months for unexpired contract Kshs. 32,196/-
- c. 3 months salary as compensation Kshs. 24,147/-
- d. pay for 29 days of leave not taken Kshs. 8,049/-
- e. Certificate of service.
- f. The compensation in a, b and c above to be subject to statutory deduction of PAYE and NSSF in terms of Section 49 of the Employment Act.

Orders accordingly.

Dated and delivered at Nairobi this 11<sup>th</sup> day of May 2015

Nzioki wa Makau

**Judge**