



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 120 OF 2013**

**[Formerly Cause No. 1259 of 2012 at Nairobi]**

**JOHN ODUOR .....1<sup>ST</sup> CLAIMANT**

**JUSTUS MOMANYI.....2<sup>ND</sup> CLAIMANT**

**-VERSUS-**

**UNITED MILLERS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 28<sup>th</sup> February, 2014)

**JUDGMENT**

The claimants **John Oduor** and **Justus Momanyi** filed the memorandum of claim on 25.07.2012 through B.I Otieno & Company Advocates. The claimants prayed for a sum of Kshs.801,448.70 being pay for underpayments, off duties due and not taken, day time normal overtime, night time normal overtime, and pro-rate leave.

The respondent filed the memorandum of response on 27.05.2013 through Obura Mbeche & Company Advocates. The respondent filed the supplementary memorandum of response on 11.09.2013. The respondent prayed that the claimants' claim be dismissed with costs to the respondent.

The case was heard on 2.12.2013. The claimants testified to support their case and the respondent called two witnesses, the respondent's General Manager Keith Cannon (**RW1**) and the claimants' workmate Peter Kegode Amuyungu (**RW2**).

The 1<sup>st</sup> claimant testified that he was employed by the respondent on 10.06.2009 as a soap bar dispensing machine operator. He worked on day shift from 8 am to 6 pm and night shift from 6 pm to 8 am. The respondent's workers established a worker's committee in 2009 which was dormant till revival in 2011. The committee was to address prevailing grievances of lack of payment on off days, payment for leave, underpayments and unfair dismissals. The labour officer advised that for leave, only 2009 and 2010 would be paid and payment would not be allowed beyond the past 3 years. Staff who worked on off days was entitled to double pay for the day.

The 1<sup>st</sup> claimant's further testimony was that the respondent started paying for off days on 1.6.2011 and before then, the payments had not been made. The 1<sup>st</sup> claimant further testified that in October 2011, the respondent discriminately increased wages of some members of the workers' committee to undermine the committee's objective performance in promoting the worker's plight. The workers wanted to change the committee's membership so that the claimant was selected to represent his Refinery Division together

with his two workmates to move the change agenda. The selected workers wrote to the respondent's management the letter **exhibit III** on the memorandum of claim setting out the workers' concerns. Upon receiving the letter, the General Manager decided to dismiss the claimant. It was 23.11.2011 that the members of the workers' committee conveyed to the claimants the General Manager's decision that the claimants had been dismissed forthwith. On 24. 11. 2011, the General Manager informed the claimants and 3 others were out of job until further communication.

The 1<sup>st</sup> claimant's evidence was that on 26.11.2011 under the General Manager's arrangement, the claimants met the officials of the workers' committee and there were no amicable resolutions after which, the General Manager directed the claimants to leave the premises to avert arrest by the police. After intervention by the labour officer, the 1<sup>st</sup> claimant was paid Kshs.12,994.00 and the 2<sup>nd</sup> claimant Kshs.13,941.00 as per **exhibit VA** on the memorandum of claim. At termination, the claimant stated he earned Kshs.335 for 8 hours job and Kshs.461 inclusive overtime.

The 2<sup>nd</sup> claimant testified that he was employed effective 28.4.2008 and he served as shortening machine attendant. At termination, he was paid Kshs.335 for 8 hours work. He worked 8.00 am to 6.00 pm on day shift and 6.00 pm to 8.00 am on night shift. Circumstances of his termination were similar to those given in the 1<sup>st</sup> claimant's testimony; the reason for termination being the call for change in the officials of the workers' committee and failure for ensuing grievances to be amicably resolved.

RW1 testified that he never terminated the employment of the claimants and that he asked the claimants to leave after the workers' committee failed to resolve their grievances and disputes in issue. RW2 testified that there were disputes involving the officials of the workers' committee including alleged bribery, discrimination and tribalism. RW2 stated that he was an official and the claimants wanted the officials removed. Discussions between the claimants and the officials did not yield a solution and the General Manager RW1 decided to terminate the claimants' employment.

The main issues for determination are as follows:

1. **Whether the claimants were machine assistants or general labourers.**
2. **Whether the claimants were unfairly terminated.**
3. **Whether the claimants are entitled to the remedies as prayed for.**

For the 1<sup>st</sup> issue, the court has carefully considered the documents on record and the evidence by the witnesses. It is clear from the claimants' evidence that at all material time before the termination of the employment there was no dispute on their designation. In particular, it was not one of the grievances in exhibit III on the memorandum of claim. In **exhibit IV** on the memorandum of claim, the claimants described themselves as representatives of casual workers. The court finds that the claimants were general workers and not machine assistants. The claims for underpayments were based on alleged employment as machine assistants or attendants and the prayer for underpayment will therefore fail.

Issue No. 2 is whether the claimants were unfairly terminated. There is no doubt that at all material time there were valid grievances which the respondent failed to resolve and instead erroneously abdicated that obligation by trying to pass it to the workers' committee. The grievances were not irresponsible and without foundation and in the opinion of the court they constituted genuine complaints and did not constitute a fair reason for termination as provided for in **section 46 (h) of the Employment Act, 2007**. RW1 testified that the respondent never terminated. The court has considered the circumstances of this case and finds that the claimants were entitled to consider themselves terminated when the respondent failed to resolve the grievances and when RW1 told them to leave the respondent's premises failing which, the police would be called in to arrest them. The court finds that the termination was constructive and unfair.

Issue No. 3 is whether the claimants are entitled to the remedies as prayed for. The court has already found that the claimants are not entitled to pay for underpayment as prayed for. The court makes the following further findings:

1. The claimants did not by evidence establish the claims and prayers of pay for overtime as pleaded. The evidence on record did not establish the days for which overtime was due. At paragraph 3 on page 17 of the claim, the claimants admitted that overtime was paid but for the alleged wrong grade of general worker. The court has found general worker to have been the correct designation and the prayers for pay for overtime shall fail.
2. As submitted for the respondent, **exhibit K** on the response shows payment of leave for 2009. Further, **exhibit VA** on the memorandum of claim shows the terminal dues paid included pay for leave and the claimants confirmed receipt of that pay. The court finds that the prayer for leave will fail.
3. It was testified that the respondent started to pay for off duty in June 2011. Taking the evidence into account, the court finds that the claimants are entitled to pay for off duty days for one day per week, from the date of employment to end May 2011 at the rate of the then prevailing due normal daily pay as general workers. The court finds that the evidence showed that there was no break in the service of the claimants and they are entitled to a paid off day for every six days they worked as provided for in **section 37(2) of the Employment Act, 2007**.
4. The claimants are entitled to a certificate of service as provided for in section 51 of the Act.
5. The court has found that the termination was unfair. The claimants had been in continuous service for more than 2 years. The court finds that their casual service converted to employment subject to provisions of the Employment Act, 2007 as provided for in section 37(1) and (3). The court finds that the claimants are each entitled to 12 months pay at the rate of 26 days and daily rate being Kshs.335.00, thus each **Kshs.48,240.00** making Kshs.96,480.00 for both claimants.

In conclusion, judgment is entered for the claimants against the respondent for:

1. **A declaration that the claimants were constructively and unfairly terminated from the respondent's employment.**
2. **The respondent to pay each of the claimants Kshs.48,240.00 for unfair termination.**
3. **The respondent to pay each of the claimants off duty days being one day per week, from the date of employment to end May 2011 at the rate of the then prevailing due daily pay as general workers.**
4. **The claimants to calculate the dues in order 3 and to serve the respondent for any objections to be resolved by the court within 15 days from the date of this judgment.**
5. **The respondent to pay the dues as ordered in this judgment by 1.4.2014, in default, interest to be payable from the date of this judgment till full pay.**
6. **The respondent to deliver to each claimant the respective certificate of service by 1.4.2014.**
7. **The respondent to pay costs of the suit.**

**Signed, dated and delivered in court at Nakuru this Friday, 28<sup>th</sup> February, 2014.**

**BYRAM ONGAYA**

**JUDGE**