



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**  
**CAUSE NO. 178 OF 2013**

**STEPHEN KATANA KAINGU**

**CLAIMANT**

**v**

**PWANI OIL PRODUCTS LTD**

**1<sup>st</sup> RESPONDENT**

**INSIGHT MANAGEMENT CONSULTANTS LTD**

**2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. Stephen Katana Kaingu (Claimant) lodged a Memorandum of Claim against Pwani Oil Products Ltd (1<sup>st</sup> Respondent) and Insight Management Consultants Ltd (2<sup>nd</sup> Respondent) on 21 June 2013 and he stated the issue in dispute as *non-payment of terminal and contractual benefits, unfair, unlawful and unjust dismissal*.
2. The Claimant pleaded that he was employed by the 1<sup>st</sup> Respondent in April 2009 at a weekly wage of Kshs 2,490/- (Kshs 9,960/- monthly) paid in cash/through mpesa and that on 24 May 2013 he was dismissed verbally without cause or notice.
3. According to the Memorandum of Claim, the dismissal was in violation of Article 47(1) of the Constitution (right to fair administrative action), was not procedural and against sections 37, 41 and 43 of the Employment Act.
4. The Claimant further pleaded that he was not being issued with an itemized pay statement, paid house allowance and worked overtime without pay and that the 1<sup>st</sup> Respondent stopped remitting his National Social Security Fund contributions around August 2012.
5. As regards the 2<sup>nd</sup> Respondent, the Claimant pleaded that it was brought on board by the 1<sup>st</sup> Respondent in August 2012 to recruit employees but he declined to sign recruitment forms with it and that the 2<sup>nd</sup> Respondent started remitting NSSF contributions on his behalf from August 2012 though he was not aware he had been transferred to the 2<sup>nd</sup> Respondent.
6. The Claimant set out at paragraphs 22 and 26 the reliefs sought.
7. The 1<sup>st</sup> Respondent filed a lengthy Response on 24 July 2013 and it denied employing the Claimant, that Claimant was earning weekly Kshs 2,490/- or monthly Kshs 9,960/- or paying him in cash or through mpesa.
8. The wrongful, unjustified and unfair dismissal of the Claimant was also denied.
9. According to the 1<sup>st</sup> Respondent, the Claimant's employment with it ended on 30 October 2012

- and the Claimant was paid and signed for his full/final dues after which he was employed by the 2<sup>nd</sup> Respondent (an independent contractor), which it had contracted to provide labour and manpower to it and so it was wrongly joined to the suit.
10. The averments regarding NSSF were also denied.
  11. On the issue of Article 47(1) of the Constitution, the 1<sup>st</sup> Respondent pleaded that it did not apply to actions of limited liability companies.
  12. The 2<sup>nd</sup> Respondent though served, did not file a Response but opted to file a Memorandum of Appearance through Walker Kontos Advocates on 4 October 2013. Its attempts to get an adjournment to file a Response on 28 October 2013 when the Cause first came for hearing was rejected.

## **The evidence**

### ***Claimant***

13. The Claimant gave sworn testimony. He stated that the 1<sup>st</sup> Respondent employed him in April 2009 as a packer in the stores at a daily wage of Kshs 295/- paid weekly, but was not issued with a contract letter.
14. In the course of time the daily wage increased to Kshs 415/- but paid weekly (exh 1 statement from Safaricom Ltd produced and showed payments through mpesa from Chase Bank Ltd).
15. Regarding the dismissal, the Claimant testified that on 24 May 2013 he reported to work as usual and at around 10.30 am a Director of the 1<sup>st</sup> Respondent called Caleb Otieno ordered him to leave the premises and at the same time called a Mr. Ndolo, 2<sup>nd</sup> Respondent's Manager to inform him he no longer needed his services.
16. After 2 days the Assistant Human Resources Officer, Diana informed him his services had been terminated forcing him to seek legal advice. A demand was made and the 2<sup>nd</sup> Respondent replied on 11 June 2013 (exh. 3) but he knew nothing about the 2<sup>nd</sup> Respondent.
17. The Claimant further stated he was not given a termination letter or notice and denied signing a Full and Final Dues Certificate.
18. The Claimant prayed for pay in lieu of notice, outstanding leave for three years and compensation.
19. In cross examination, the Claimant, when shown an agreement between the Respondents stated he knew nothing about the agreement. He denied having known about the 2<sup>nd</sup> Respondent. He confirmed that a NSSF member statement (exh 4) indicated the 2<sup>nd</sup> Respondent was his employer though the ones printed on 17 January 2013 and 4 September 2012 showed 1<sup>st</sup> Respondent as the employer.

### ***1<sup>st</sup> Respondent***

20. The 1<sup>st</sup> Respondent called its Legal Officer, Emma Awino Ogula. She stated that she knew the Claimant and that he worked under the 2<sup>nd</sup> Respondent and that the 1<sup>st</sup> Respondent had a contract with the 2<sup>nd</sup> Respondent to outsource/provide it with workers and that the 2<sup>nd</sup> Respondent was responsible for paying the workers and their benefits.
21. Prior to the agreement the Claimant was employed by the 1<sup>st</sup> Respondent but was terminated and paid Kshs 6,000/- on 30 October 2012 and released/transferred to the 2<sup>nd</sup> Respondent but the Claimant was not privy to the agreement or made aware of its provisions.

### ***2<sup>nd</sup> Respondent***

22. Although it did not file a Response the 2<sup>nd</sup> Respondent called Florence Waithera Kuibita, its Operations Manager to testify. She testified that the Claimant was the 2<sup>nd</sup> Respondent's employee seconded to the 1<sup>st</sup> Respondent, engaged on a daily basis from 1 November 2012 to about 24 May 2013 and so was not issued with a letter of employment.
23. On the termination, she stated that the Claimant was verbally terminated by the 1<sup>st</sup> Respondent's

Manager though it was possible he was terminated by a Julius Ndolo, 2<sup>nd</sup> Respondent's Supervisor based at the Jomvu plant of the 1<sup>st</sup> Respondent, but she did not know under what circumstances. She further stated the 2<sup>nd</sup> Respondent could not be liable for Claimant's 3 years outstanding leave and one month notice did not arise since the Claimant was a casual.

## **Issues**

24. From the pleadings, evidence and documents the issues arising for determination are whether decision to terminate is subject to Article 47(1) right to fair administrative action, which Respondent was Claimant's employer, whether the Claimant was a casual employee, whether Claimant was entitled to a written contract, whether the termination was unfair and if so appropriate remedies.

### ***Whether decision to terminate is subject to Article 47(1) right to fair administrative action***

25. The Claimant raised this issue as a ground of the Claim in the Memorandum of Claim. However, it was not taken up during trial. Similarly the Claimant did not raise it up in submissions.

26. Because the parties did not make full and proper argument on the question it is unnecessary for the Court to discuss the issue. The central questions arising for determination can, in the view of the Court be resolved on other parameters.

### ***Which Respondent was Claimant's employer***

27. The Claimant's case was that he was engaged by the 1<sup>st</sup> Respondent in April 2009 and he did not know and had nothing to do with the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent admitted having a relationship with the Claimant but only upto 30 October 2012 after which he was paid final dues and taken over by the 2<sup>nd</sup> Respondent.

28. The 2<sup>nd</sup> Respondent admits that the Claimant was its employee from 1 November 2012 though the Claimant vehemently denied it.

29. The NSSF Provisional Members Statement of Account printed on 17 January 2012 and 4 September 2012 indicates the 1<sup>st</sup> Respondent as the Claimant's employer and that he was employed on 1 November 2010.

30. The Agreement for the Provision and Management of Personnel between the Respondents made on 1 November 2012 is clear the 2<sup>nd</sup> Respondent would provide the 1<sup>st</sup> Respondent with workers.

31. Based on the documents and evidence the Court reaches the conclusion that the Claimant was an employee of the 1<sup>st</sup> Respondent upto 30 October 2012 and that with effect from 1 November 2012 until the time of termination he was an employee of the 2<sup>nd</sup> Respondent, a fact readily admitted by the 2<sup>nd</sup> Respondent's witness.

32. The Court in light of the conclusion reached finds it unnecessary to discuss whether the agreement between the Respondents should have been brought to the attention of the Claimant and other employees who were terminated and taken on board by the 2<sup>nd</sup> Respondent.

### ***Whether the Claimant was a casual employee***

33. A casual employee has been defined in the Employment Act and there is no need for the Court to set out that definition here. The evidence presented before Court is that from 1 November 2012 up to 24 May 2013 (some 7 months or so) the Claimant was in the employment of the 2<sup>nd</sup> Respondent. There was no suggestion from the 2<sup>nd</sup> Respondent that there was any break.

34. In this regard, section 37 of the Employment Act becomes implicated and the employment of the Claimant was deemed converted into a term contract to which section 35 of the Act was applicable.

### ***Whether Claimant was entitled to a written contract***

35. The Claimant served the 2<sup>nd</sup> Respondent for some 7 months. Pursuant to section 9(1) and (2) of the Employment Act, the 2<sup>nd</sup> Respondent was under an obligation to draw up a written contract with the prescribed particulars to govern its relationship with the Claimant.
36. The Claimant was as by statute entitled to a written contract and the 2<sup>nd</sup> Respondent was in breach of the law in failing to cause a written contract to be drawn up.

### ***Whether the termination was unfair***

37. Sections 35, 36, 41, 43, 45 and 47(5) of the Employment Act have placed certain legal burdens upon employees and employers in complaints of unfair termination.
38. Under section 35 of the Employment Act, the 2<sup>nd</sup> Respondent was under an obligation to give the Claimant at least 28 days notice of intention to terminate his services or pay him in lieu of notice.
39. The 2<sup>nd</sup> Respondent was also under a duty to notify the Claimant of the reasons for termination and to give him an opportunity to make representations before the decision to terminate was taken.
40. The 2<sup>nd</sup> Respondent did not demonstrate that it complied with the procedural fairness safeguards of section 41 of the Employment Act. The 2<sup>nd</sup> Respondent's witness who testified stated she was not privy to the circumstances of the verbal termination.
41. The conclusion the Court reaches is that the 2<sup>nd</sup> Respondent did not follow a fair procedure before terminating the services of the Claimant. The termination was procedurally unfair.
42. Sections 43 and 45 of the Employment Act on the other hand require an employer to prove the reasons for termination and that the reasons were valid and fair reasons. In the instant case no reasons at all were proffered to the Claimant or to the Court. The termination was substantively unfair.

### ***Appropriate remedies***

#### ***One month pay in lieu of notice***

43. Pursuant to sections 35(1)(c) and 36 of the Employment Act, the Claimant is entitled to one month pay in lieu of notice. The Claimant's pleaded and unchallenged evidence is that he was earning Kshs 9,960/- per month.

#### ***Unpaid outstanding leave***

44. The Claimant despite pleading a claim for Kshs 29,880/- as outstanding leave did not lay any evidentiary foundation for this head of claim. He served the 2<sup>nd</sup> Respondent for about 7 months and on a pro rata basis would have been entitled to 11 days leave. Commuted into cash this comes to Kshs 4,596/-.

#### ***Unremitted National Social Security Fund deductions***

45. No evidentiary foundation/basis for this head of claim was placed before Court. In any case, this is a matter to be taken up by the National Social Security Fund pursuant to its statutory mandate since the law has mandated it to go after unremitted contributions and penalize the failure.

#### ***12 months compensation***

46. This is one of the primary remedies where the Court reaches a finding of unfair termination/wrongful dismissal. The remedy is discretionary and section 49(4) of the Employment Act has set out some factors the Court ought to consider in exercising the discretion.
47. The Claimant served the 2<sup>nd</sup> Respondent for a relatively short time. He stated that he has not secured alternative employment but does odd jobs.
48. Putting the above cited factors into consideration, the Court is of the view that an award equivalent to 10 months gross wages assessed at Kshs 99,600/- would be just.

## ***Certificate of service***

49.The Claimant is entitled to a certificate of service as of right.

## **Costs**

50.The Claimant filed his submissions on 14 April 2014 within the agreed timeline. The 1<sup>st</sup> Respondent filed its submissions on 9 May 2014 outside the agreed timelines. The 2<sup>nd</sup> Respondent failed to file its submissions. In this regard it should bear the costs of the Claimant.

## **Conclusion and Orders**

51.The Court finds and holds that at the time of termination the Claimant was an employee of the 2<sup>nd</sup> Respondent and that the termination of the his services was unfair and awards him and orders the 2<sup>nd</sup> Respondent to pay him

- |                                    |               |
|------------------------------------|---------------|
| a. One month pay in lieu of Notice | Kshs 9,960/-  |
| b. Prorata leave for 7 months      | Kshs 4,596/-  |
| c. 10 months wages as compensation | Kshs 99,600/- |

TOTAL	<b>Kshs 114,156/-</b>
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52.The Claim for unremitted NSSF contributions is dismissed.

53.The 2<sup>nd</sup> Respondent to pay the Claimant costs of the Cause.

**Delivered, dated and signed in open Court in Mombasa on this 6<sup>th</sup> day of June 2014.**

**Radido Stephen**

**Judge**

**Appearances**

Mr. Asewe instructed by Nyagaka S.M & Co. Advocates for Claimant

Mr.Muumbi/Ms. Ogula instructed by Omari, Muumbi & Kiragu & Co. Advocates for 1<sup>st</sup> Respondent

Mr. Karungu instructed by Walker Kontos Advocates for 2<sup>nd</sup> Respondent