



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

**AT NAIROBI**

**CAUSE NO. 174 OF 2011**

**MR. JOHN MWANZIA MBITHUKA ..... CLAIMANT**

VERSUS

**MR. MUKESH MALDE**

**(MANAGING DIRECTOR) ..... 1<sup>ST</sup> RESPONDENT**

**M/S SLAPPER SHOE INDUSTRIES LTD. ... 2<sup>ND</sup> RESPONDENT**

Mr. Kadere for Claimant

Mr. Ambenge for Respondents

**JUDGMENT**

1. This suit was filed by way of a Memorandum of Claim dated 8<sup>th</sup> February 2010. The basis of the suit is that the Claimant was employed by the Respondent on 21<sup>st</sup> January 1989 and worked continuously for the Respondent until his employment was unlawfully and unfairly terminated on 1<sup>st</sup> October 2005.

2. This suit though filed in the year 2010 is governed by the repealed *Employment Act Cap 226* of the *Laws of Kenya*.

The suit was filed within six years from the date the cause of action arose and therefore it is not statute barred since the law of limitation applicable to the matter is the *Limitation of Actions Act cap 22* of the *Laws of Kenya*.

3. Furthermore, in terms of *Section 93(1)* of the *Employment Act 2007* (Transitional Provisions), this suit is competent and shall be determined in terms of the substantive law that appertained under *Cap 22*, provided the terms and conditions thereof are not inconsistent with the provisions of the *Employment Act, 2007* and if inconsistent;

**“shall be read and construed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties thereto shall be subject to those provisions accordingly.”** See *Section 93(1)A* of the *Employment Act, 2007*.

4. I have read the decisions relied on by the Applicant in **Industrial Court Cause No. 1378 of**

**2011 Erastus Njoroge Vs. English Press Limited and Industrial Cause No. 164 (N) 2009 Ayub Asamba Vs. Telkom(K) Limited** and found that the said decisions were made *per in curium* and in ignorance of the *Transitional Clauses* of the *Employment Act, 2007* referred to herein before.

The preliminary objections raised against this suit lack merit and are dismissed.

### **Main suit**

5. Regarding the main suit, the Claimant seeks payment of the following terminal benefits;
- i. notice pay in the sum of Kshs.13,650/= (1 month salary);
  - ii. payment in lieu of leave not taken;
  - iii. shift allowance;
  - iv. severance pay for the 20 years completed service; and
  - v. 12 months salary being compensation for the unlawful and unfair dismissal.

### **Evidence**

6. The Claimant testified under oath and told the Court that he started working for the Respondent in 1986, but was employed on permanent basis in 1989.

7. That at the time of termination on 1<sup>st</sup> October 2005 he earned a basic salary of Kshs.10,650/= and house allowance of Kshs.3,000. He worked as a machine attendant and his Managing Director was **Mr. Mukesh Malde** the 1<sup>st</sup> Respondent and he is the one who terminated his services.

8. That on 30<sup>th</sup> September 2005, upon serving night shift, he was told to await the Personnel Manager **Mr. James Maina** and the Director **Mr. Mukesh Malde** in the morning.

9. That he was given a letter of termination on the spot which is Appendix 3 to the Statement of Claim. The letter dated 1<sup>st</sup> October 2005 reads;

#### **“Dismissal**

**This is to inform you that you have been summarily dismissed from the Company due to gross misconduct. You have the right to Appeal according to the Trade Disputes Act.**

**The Management wishes you success in your future endeavour.”**

It is written by Mr. James Maina, Personnel Officer.

10. The Claimant was paid for the days worked including overtime and shift allowance upon termination in the sum of Kshs.14,804. In terms of the pay-slip for the month of November 2005, he was registered with NSSF and NHIF and deductions were made in respect thereof.

11. The Claimant told the Court that he did not commit any offence and was not told the reason for the dismissal. He said that he was not given an opportunity to defend himself and the dismissal was therefore unlawful and unfair. He reported the matter to the Ministry of Labour but the dispute was not resolved.

12. He told the Court that he was not given any annual leave but only got occasional off-days. He was also not paid shift allowance though the payslip he produced shows otherwise. He said he claims 240 leave days for the period of 10 years. He testified that he was entitled to Kshs.216 shift allowance per month and claims it. He also claims payment of gratuity for 20 years even

though he admits that he was registered with NSSF and NHIF.

He also claims maximum compensation for unlawful and unfair termination.

13. He was subjected to close, cross examination by **Mr. Ambenge** for the Respondents. He said that he cannot remember the days he went on leave. That he wrote a letter of demand in vain and also the report to the Ministry of Labour did not resolve the matter. He insisted he was not told what misconduct he had committed.

14. The Respondent did not call any witness to testify in order to rebut the testimony by the Claimant. To this extent, the testimony by the Claimant remains wholly uncontroverted. The final submissions filed by the Respondent were mainly on the points of law already disposed of by the Court in this judgment.

15. The Court finds that the Claimant has proved his claim as set out in the Memorandum of Claim and awards him as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally as follows;

- a. Kshs.13,650/= being one (1) month's salary in lieu of notice;
- b. Ten (10) months' salary being compensation for the unlawful and unfair termination purely because no valid reason was established for the dismissal and it is clear that the dismissal was not in terms of a fair procedure. This award is in the sum of Kshs.130,500/=;
- c. The Claimant is awarded payment in lieu of leave days not taken for a period of six (6) years at the rate of 21 days salary for each completed year of service. The rest of the period is statute barred. The Award is for a sum of Kshs.57,330/=.

16. The claims for service gratuity and payment for shift allowance have not been proved because the Claimant was registered with NSSF and therefore gratuity is not payable and the pay-slip produced shows that the Claimant was paid shift allowance.

The two claims are therefore dismissed.

**The total Award is Kshs.207,480/=.**

The sum is to be paid with interest at Court rates from date of judgment until payment in full.

The Respondents are also to pay the costs of the suit.

**Dated and Delivered at Nairobi this 16<sup>th</sup> day of July, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**