

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 2224 OF 2012

FRANCIS NTHENGE MWOVWA.....**CLAIMANT**

VERSUS

AUTO SPRING MANUFACTURERS LIMITED.....**RESPONDENT**

JUDGMENT

1. The Claimant filed his suit against the Respondent on 5th November 2012. He averred that he was employed in December 1994 by the Respondent as a machine attendant and was earning Kshs. 394/- per day until early August 2007 when he was told to go home by the Respondent's manager. He lodged a complaint with the Ministry of Labour through his union the Kenya Engineering Workers Union and the Respondent failed to heed to the requests for meeting under the conciliation process. He thus sought one month's salary in lieu of notice Kshs. 10,890/-, payment in lieu of untaken leave for entire period of service Kshs. 130,680/- and service gratuity Kshs. 78,408/-. He also sought 12 months salary as compensation as well as costs of the claim and interest thereon and a declaration that the termination was illegal, unlawful and unfair.
2. The Respondent filed a Statement of Defence on 6th May 2013 and averred that the Claimant was employed intermittently between 1998 and 2008 as a general labourer in the production department. The Respondent denied that the Claimant worked continuously for the Respondent from 1994. The Respondent averred that the Claimant was among other casuals laid off after the financial difficulties experienced sometime in 2008. The Respondent denied the Claimant worked each day and thus was not entitled to leave or the other reliefs sought in his claim.
3. He was led in examination in chief by Ms. Akhaabi and testified that he was employed in December 1994 as a grinder and welder. He earned Kshs. 95/- at the start and this increased to 363/- at the time of departure. He was paid on Wednesday and Friday each week. He stated that he was told to leave by the supervisor Mr. Shadrack Nyandiko and that he would be called. He denied being employed in 1998. He testified that he was a union member and contributed union dues each month.
4. He was cross examined by Mr. Masese and testified that he worked as a grinder. He testified that there were many employees in his department and some were paid monthly and others on Wednesday and Friday. He testified that he was not paid monthly and the welder he worked with was among the staff who were retained.
5. The Respondent called Mr. Dennis Obwoyo Ongera the Human Resource Manager of the Respondent. He testified that the company ceased making motor vehicle bodies in 2008 and that the Respondent had three categories of staff – permanent, contract and casuals. There is also management staff. Permanent and contract staff are paid at the end of the month while casuals are paid at the end of that day. He testified that the casuals were paid daily and the payments made were countersigned by the casuals after the receipt of the money. He denied that casuals would be paid after 3 days since the Respondent was not sure of engaging the person the next day. The guiding principle for hire was if there was work. If there were no orders there was no need for casuals. He testified that the Claimant was a casual and the Respondent did not terminate the

Claimant's services but as there was no work the Claimant was not engaged after 2008. He testified that leave can only be earned if the employee is at work for 3 months at minimum and the Claimant was never in complete employment.

6. In cross examination by Ms. Akhaabi the witness testified that the documents attached to the Statement of Defence were for 2007 and 2008 and that the Respondent had volumes of documents and if the Claimant had been hired for longer it would have reflected. He testified that if the Claimant had worked for long he would have been converted to permanent. He testified that casuals can say they worked for years but they could have worked only 2 times in a year. He testified that there is a CBA in place and any casual who was working for 3 months or more is then permanent. He testified that the union asked for payments and the Respondent said no as the Claimant was not entitled.
7. The parties filed their written submissions and the Claimant submitted that the Claimant had testified that he was employed in 1994 as a machine attendant and that he was not given letter of appointment or a contract. He used to sign an attendance book initially and later there were payment vouchers which he would sign for purposes of being paid. It was submitted that the witness called by the Respondent joined the company 17 years after the Claimant and 3 years after the dismissal of the Claimant. It was submitted that no reason was given as to why all the payment vouchers were not produced in Court. It was submitted that the Employment Act placed a burden on the employer under Section 10 and 74 to produce records. It was submitted that the redundancy declared was not communicated to the Claimant as required and that there was no hearing as envisaged under Section 41 of the Employment Act. He urged the Court to award the sums sought in the claim and relied on the case of **William Opetu v. Mukesh Patel Cause 909 of 2011** where the Respondent had failed to controvert the Claimant's evidence or offer alternative reason for the termination and this was found to be unfair within the meaning of Section 45 of the Employment Act 2007.
8. The Respondent submitted that the Claimant had testified that he was employed in 1994 as a grinder and did not call any other witness and that the Respondent used to pay him Kshs. 94/- per day. According to his evidence he used to be paid twice a week. The Respondent submitted that the Claimant testified that he was the only grinder and used to pay his union dues directly and not through the Respondent. The Respondent submitted that it called one witness who testified that the Respondent had 3 categories of employees and the Claimant was a casual employee. The Respondent submitted that the Respondent's business started experiencing some financial difficulties and transferred the contract employees in the metal department which was not viable to other department while the casuals were informed there would be no further work for them. The Respondent submitted that it did not terminate the employment of the Claimant and neither did it declare him redundant. The Claimant it was submitted worked intermittently and was not a member of the union.
9. The claim before Court is one where the Claimant seeks reliefs he framed as unfair termination/dismissal and non-payment of terminal dues and compensation. The Claimant testified that he was employed as a grinder from 1994. The Claimant testified that he was a member of the Kenya Engineering Workers Union though no evidence of membership was availed. The Respondent averred the Claimant was employed in 1998 and was not a member of the union. The dispute was reported to the Minister in August 2009 by the Kenya Engineering Workers Union. In the memorandum attached the Respondent is stated to have introduced a system where employees would work for three weeks and rest for one week. It was stated the Claimant was locked out.
10. A lockout is defined as by the **Black's Law Dictionary Ninth Edition** as a employers' withholding of work and closing of business because of a labour dispute. A lockout is therefore a temporary [work stoppage](#) or denial of employment initiated by the company. This is different from a [strike](#). It may be implemented by simply refusing to admit employees into the company premises and it is the antithesis of a strike. The Claimant did not avail any other documentation other than the letter from the Union dated 21st August 2009 together with the written memoranda and the letter

of the Chief Industrial Relations Officer at the Ministry of Labour and Human Resource Development dated 19th August 2009 appointing a conciliator. It would seem that even no certificate was issued under Section 73 of the Labour Relations Act.

11. The Claimant was required to prove on a balance of probabilities that he was entitled to the remedies he sought in his Claim. He testified that he was seeking payment of leave for 12 years and service in addition to the payment in lieu of notice. The Claimant did not adduce any evidence that he was entitled to any leave or that there was leave not paid. His testimony was that he was paid his wages twice weekly. A casual employee is defined as a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period longer than twenty-four hours at a time. A casual employee is not entitled to annual leave as his hire is not guaranteed the next day. In the premises the claim on leave flops. Is a casual employee entitled to notice? I think not. As his employment is for the day of hire then the engagement ends at the close of that day and there is no need for notice that the services are at an end. In the premises the Claimant cannot claim any notice period. He was not engaged continuously for a year to enable him claim service. His own Union states that there was a time he worked for three weeks and was on rest for one week each month. This eliminates his claim for service due. He claims a lockout but the evidence on record as well as his testimony do not suggest such. He failed to prove his case on a balance of probability. In the final result I dismiss his suit with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of July 2014

Nzioki wa Makau

JUDGE