



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 1077 OF 2013**

**BETWEEN**

**JOSEPHAT GICHUKI MWANGI.....CLAIMANT**

**VERSUS**

**BIDCO OIL REFINERIES.....RESPONDENT**

*Rika J*

*CC. Edward Kidemi*

*Ms. Samita instructed by Namada & Company Advocates for the Claimant*

*Ms. Thuo instructed by Guram & Company Advocates for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

1. Mr. Joseph Gichuki Mwangi was employed by the Respondent Company as a Panel Beater and Spray Painter, in July of 2007. He worked diligently and continuously, up to 4<sup>th</sup> April 2012. He was summarily dismissed by his Supervisor on this date, on the allegation that he had refused to clean up the workplace after panel beating. His salary was at the time of exit, Kshs. 16,410, per month. He prays against the Respondent for:-

- a. One month salary in lieu of notice at Kshs. 16,410;
- b. Annual leave pay for the whole employment period at Kshs. 65,640;
- c. Service gratuity at 18 days' salary for every year completed in service computed at Kshs. 39,384; and

d. Compensation the equivalent of 12 months' salary at Kshs. 196,920.

In total the Claimant seeks an amount of Kshs. 318,354. He asks for a declaration that termination of his contract was unfair and unlawful, costs, and interest. He lodged his Statement of Claim in pursuit of these prayers, on 15<sup>th</sup> July 2013.

2. The Respondent's position is that the Claimant was employed as a General Casual Worker in the Respondent's Motor Vehicle Maintenance Department. He worked intermittently, depending on the availability of work. He was not permanent. He finished his duties on 4<sup>th</sup> April 2012 and never reported back. He absconded. He was not summarily dismissed as stated in his Claim. He is not entitled to notice pay, annual leave pay, service pay, and compensation as he was a Casual Employee, who left employment of his own volition. The Respondent explained its position in a Statement of Response filed on 5<sup>th</sup> September 2013.

3. The Parties gave evidence and closed their respective cases on 4<sup>th</sup> March 2014. The Claimant was the sole Witness to his narrative, while the Respondent testified through its Industrial Relations Officer Zipporah Waruguru Mburu. The dispute was last mentioned on 3<sup>rd</sup> April 2014, when the Parties confirmed the filing of their Closing Submissions and were advised the Award would be delivered on 10<sup>th</sup> July 2014.

4. The Claimant testified he was not given a written contract on recruitment. He worked for a total of 5 years. He worked continuously for 5 days in a week. There were 2 rest days, Wednesday and Thursday. The Respondent only paid N.S.S.F contributions from 2011. The Claimant was registered under the Fund on 10<sup>th</sup> August 2011. He provided the Court with the N.S.S.F Statements of Account.

5. On 3<sup>rd</sup> April 2012, his Supervisor Kripal Singh asked the Claimant to clean up an area which had been made dirty by one of the Respondent's Panel Beaters in the course of duty. The Claimant collected all the spent sand-papers and put them in the dustbin. The following day, the Supervisor alleged the Claimant had disobeyed him, and refused to clean up. Singh informed the Claimant that he had found a replacement for the Claimant. The Claimant was told to leave. He was not paid anything in terminal benefits.

6. He stated on cross-examination that he had a gate pass to show he actually worked for the Respondent. He did not carry the gate pass to the Court. He was paid Kshs. 520 per day from the year 2002. There was no overtime pay. He did not have a Witness who could confirm that he was asked to leave by his Supervisor. He has never returned to the Respondent to ask for his dues. He did not work on 4<sup>th</sup> April 2012. He used to be paid after working for 5 days in a week. He had a Pass Out Form, which was given for emergency exits. He had one for 3<sup>rd</sup> April 2012. It was authentic. It is true he worked for the whole day on 3<sup>rd</sup> April 2012. Redirected, the Claimant testified he was not issued a written letter of employment by the Respondent. It was only him who was dismissed. The Pass Out Form was given when one left work early. The Claimant left work around 3.00 p.m. on 3<sup>rd</sup> April 2012.

7. Zipporah testified that the Claimant was employed from 2<sup>nd</sup> January 2009. He was paid Kshs. 374 basic wage and Kshs. 105 in overtime- total Kshs. 480 per day. The Respondent requires all its Employees to clean up their areas of work. The Claimant was not dismissed. He did not return after 3<sup>rd</sup> April 2012. He was supposed to return on 6<sup>th</sup> April 2012. He did not return. There were over 2000 Employees working for the Respondent. In the case of dismissal, the Team Leader would report the case to the Human Resources Office. No case of dismissal with respect to the Claimant was brought to the attention of the Respondent's Human Resource Office. Lack of cleanliness would not warrant dismissal of an Employee. The Claimant was a Casual Employee, and not entitled to the prayers sought.

8. Zipporah confirmed on cross-examination that the payroll indicated the starting date with regard to the Claimant's employment, as 1<sup>st</sup> January 2007, not 2<sup>nd</sup> January 2009. He ceased working on 3<sup>rd</sup> April 2012, after 5 years. He was still a Casual Employee. He was a skilled Employee, and was paid as such. Overtime was paid uniformly. He worked 5 days a week. He left work on his own volition. The

Respondent prays the Court to dismiss the Claim.

*The Court Finds and Awards:-*

9. It was confirmed by the Respondent's Witness, and by the Payroll that the Claimant indeed worked for the Respondent from 2007. The Payroll indicates the starting date was 1<sup>st</sup> January 2007, although the Claimant testified he was employed from July 2007. He left under contested circumstances on 3<sup>rd</sup> April 2012. He testified he was dismissed by his Supervisor Kripal Singh by word of mouth, after he allegedly declined to clean up the area where Panel Beating had taken place. He testified he collected the left over sandpapers, but that the Supervisor confronted him the following day, alleging the Claimant had refused to heed the Supervisor's instructions to clean up. There was not much explanation given by the Respondent on this incident, the Respondent's Witness merely testifying that the Claimant was not dismissed, but left on his own volition. It was the Respondent's case that its Employees were required to clean up their areas of work. This did not shed any light on the allegation by the Claimant, pertaining to the cleaning up instructions issued by Kripal Singh.

10. The status of the Claimant's contract, after working for 5 continuous years, was transitioned from irregular employment to regular employment, where wages are deemed paid monthly. Section 37 of the Employment Act 2007 as quoted in *the Industrial Court Cause Number 671 of 2012 between Wilfred Bukachi Opwaka v. Ready Consultancy Limited [ Hon. Justice Maureen Onyango]*, entitled the Claimant to regular terms. He was entitled to the benefits due in a regular employment relationship, under the Act, having served for 5 years. The Court would be entitled to view him as a regular Employee, and extend to him the full benefits due to Regular Employees under the Employment Act.

11. The Respondent did not show to the Court valid reason or reasons, to justify termination of the Claimant's contract. It was not likely that the Claimant just went away of his own volition on 3<sup>rd</sup> April 2012, and never returned. The Respondent did not discount the Claimant's evidence that he was summarily dismissed by Kripal Singh on the allegation the Claimant disobeyed the former's instructions to clean up the workplace. It was for the Respondent to show to the Court, under Section 43 and 45 of the Employment Act 2007, why the Claimant's contract of employment was terminated. The assertion that the Claimant left of his own volition, did not seem to this Court credible, taking into account the Claimant's own evidence that he was summarily dismissed, and considering also, that he had up to that point, worked for 5 years, without any recorded disciplinary lapse.

12. Termination was not based on any valid reason. Procedural justice under Section 41 and 45 of the Employment Act was totally absent from the process. The Supervisor, even assuming the Claimant had disobeyed the order to clean up, had an obligation to lay out charges against the Claimant and hear the Claimant out. Unfortunately, Kripal Singh just asked the Claimant to disappear and brought in a replacement. Such a practice is no longer acceptable in the modern Kenyan workplace; it is a practice which has been relegated to the mists of antiquity. Termination was unfair and the Claimant merits compensation under Section 49 of the Employment Act 2007.

13. The Claimant testified he earned Kshs. 520 per day, paid over a period of 5 days in a week. The Respondent suggested it was Kshs. 480 per day. The payroll for the last month of employment, April 2012, showed a basic rate of Kshs. 444, and a fixed overtime component of Kshs. 125, with a gross of Kshs. 570 per week. The Claimant worked 5 days a week, and rested for 2 days each week. The Court thinks the correct rate, over a period of 20 days worked every month, would be  $Kshs. 570 \times 20 = Kshs. 11,400$ . It is not clear how the Claimant came to the figure of Kshs. 547 over a period of 30 days. In the demand letter before action, the Claimant gave his monthly rate at Kshs. 10,940.

14. In arriving at this Award, the Court adopts the amount of Kshs. 11,400 per month as the gross rate payable to the Claimant. **He is granted 1 month basic salary at Kshs. 444 x 20 = Kshs. 8,880, as notice pay.** The Claimant seeks compensation at the equivalent of 12 months' gross salary. **The Court finds termination was unfair, and grants him 6 months' gross salary at Kshs. 68,400 in compensation.** The Respondent did not contest that the Claimant never went on annual leave, or receive pay in lieu of annual leave. This was based on the Respondent's misperception of the Claimant's nature of employment. It was

argued that because he was a Casual Employee, he was not entitled to these benefits that are due to regular Employees under the Employment Act. The Court has concluded the Claimant was entitled to the full benefits extended to a regular Employee under the Act. He was entitled to annual leave, or pay in lieu of annual leave. ***The Court grants him annual leave pay for the period of 5 years worked at the rate of 21 days per year, computed as  $570 \times 21 \times 5 = \text{Kshs. } 59,850$ .***

15. The Claimant prays for 18 days' salary for every completed year of service at Kshs. 39,384. He was registered with the N.S.S.F on 1<sup>st</sup> August 2011. Any service pay would only be payable to the Claimant for the period between 2007 and 2011, a period of 4 years, not the 5 years claimed. The rate of 18 days' salary for each year completed in service is a reasonable rate. It has been held, that because there is no fixed rate on the number of days' salary payable under Section 35 of the Employment Act 2007, the practice is to adopt the 15 days' salary given under Section 40 on redundancy. The Court is not bound to follow the redundancy provision in enforcing service pay. The 15 days granted under Section 40, are the minimum number of days. The Court must appreciate that wage levels and cost of living indices have not remained static from the date the various wage orders were enacted, or from 2008 when the Employment Act 2007 became law. The Court cannot confine payment of service pay to the wage floor of 15 days, and continue to apply this minimum, even when other fundamentals have shifted. Rates above 15 days' salary, when pleaded by a Claimant, need to be considered. A prayer for 18 days' salary is reasonable and approved by this Court. ***The Claimant is allowed 15 days' salary for 4 completed years of service, at Kshs. 11,400 divide by 20 x 18 days = Kshs. 41,040, as service pay.*** In sum, the Court Orders:-

- a. ***Termination was unfair.***
- b. ***The Respondent shall, within 30 days of the delivery of this Award, pay to the Claimant the total sum of Kshs. 178,170 in terminal benefits and compensation.***
- c. ***No order on the costs and interest.***

**Dated and delivered at Nairobi this 10<sup>th</sup> day of July 2014**

**James Rika**

**Judge**