



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

**AT MOMBASA**

**CAUSE NO. 89 OF 2014**

**GEORGE OUMA ATIENO .....CLAIMANT**

**VERSUS**

**1. KITUI FLOOR MILLS LTD**

**2. READY CONSULTANCY LTD .....RESPONDENTS**

**J U D G M E N T**

**INTRODUCTION**

1. The claimant has sued the two respondents seeking payment of Ksh.247,517 being terminal benefits plus compensation for wrongful and unfair termination.
2. The 1<sup>st</sup> respondent never filed any defence to claim but the second respondent filed her defence denying liability for the alleged unfair dismissal and averred that the claimant is the one who absconded work after the employees and the 1<sup>st</sup> respondent differed over payment methodology.
3. The suit was heard on 3/7/2014 when the claimant testified as CW1 and the 2<sup>nd</sup> respondent called Gloria Edegwa as RW1. The 1<sup>st</sup> respondent did not participate in the proceedings.

**CLAIMANT'S CASE**

4. CW1 stated that he was employed by the 1<sup>st</sup> respondent in 2005 as a Turn boy on causal basis. His wage was ksh.210 per day which later increased to ksh.413. From 2009 the 1<sup>st</sup> respondent recruited 2<sup>nd</sup> respondent her agent for recruiting and paying workers including the claimant.
5. From April 2013 the claimant's duties were changed to that of loading lorries and arranging the store. He worked continuously between 2005 and 2013 and his pay was per day. He had also been provided with uniform.
6. On 30/7/2013 the mode of payment was changed from daily wage to piece rate at ksh.1.70 per bale for loading. When it reached 3 pm of the 30/7/2013 the supervisor for the 1<sup>st</sup> respondent instructed the claimant and other workers to arrange the stakers in the store for no pay. When the workers refused the supervisor for the 2<sup>nd</sup> respondent ordered the workers to surrender their uniform and wait for their pay outside the compound. At 5pm the 2<sup>nd</sup> respondent's supervisor paid the workers their day's wage. The

repossession of the uniform meant that he and his colleagues were dismissed according to CW1. He denied ever deserting work. He instructed lawyer who served a demand letter dated 10/12/2013 (Exh. 2).

7. He prayed for salary in lieu of notice, leave for the years served and for service pay for the period 2005 to 2010 when he was not a contributor to the NSSF. He further prayed for compensation for unfair termination.

8. On cross examination by the counsel for the 2<sup>nd</sup> respondent, CW1 maintained that he was dismissed by the supervisor and Director of the 1<sup>st</sup> respondent. The reason for the dismissal was refusal to agree on the new mode of payment from the daily wage of ksh.413 to piece rate of ksh.1.70 per bale loaded. He confirmed that he was dismissed with all the other loaders and they never returned to work. Thereafter he reported the matter to the labour officer and a meeting was held between him and the parties herein and the labour officer told him to return to work but the date for returning was not given.

### **DEFENCE CASE**

9. RW1 is the Operations Manager for the 2<sup>nd</sup> respondent. She confirmed that CW1 was initially employed by the 1<sup>st</sup> respondent until 2<sup>nd</sup> respondent was contracted to supply labour and supervise workers. 2<sup>nd</sup> respondent was also obligated with paying the outsourced workers on daily basis. RW1 stated that CW1 was employed by the 2<sup>nd</sup> respondent from march 2009 to July 2013 as a Turnboy earning ksh.471 daily.

10. On 30/7/2013 the mode of payment changed to piece rate at the rate of 1.70 per stake in the store. The agreement was made between the 1<sup>st</sup> respondent's Directors and the workers representatives but CW1 was not there. The work went on well on 30/7/2013 but on 31/7/2013 the workers downed their tools at 3pm and demanded for a pay increase. The Director of the 1<sup>st</sup> respondent requested them to complete the work and send their representatives to discuss but the request was rejected. The Director then got annoyed and ordered the workers to go out and then directed that they be paid. The Director also told the workers that if they did not want to work they should leave the premises and the workers left after receiving their pay for the day.

11. RW1 later talked to the Director of the 1<sup>st</sup> respondent who agreed to revert to former mode of payment by daily wage of ksh.471 per day. As a result all the workers gradually returned to work except the CW1. According to her CW1 came back 3 times bringing demand letters but not to work. CW1 did not return to work even after the union advised him. RW1 maintained that CW1 was never dismissed from work. She also denied that CW1 worked continuously and contended that CW1 used to disappear from work even for a month and return to work.

12. On cross examination by the claimant's counsel, RW1 maintained that Cw1 was employed by the 2<sup>nd</sup> respondent. She did not have any evidence to prove that CW1 used to go for leave. She stated that 2<sup>nd</sup> respondent used to pay NSSF and NHIF in respect of the CW1. She maintained that all other employees returned to work except CW1. She admitted that no letter was given to CW1 to return to work. According to Rw1, the piece rate mode of payment enabled the workers to earn more than ksh.500 per day depending on ones effort.

13. After the close of the hearing the parties filed written submissions except the 1<sup>st</sup> respondent. The court has considered the pleadings, evidence and the submissions and reached the decision herein below.

### **ANALYSIS AND DETERMINATION**

14. It is not in dispute that the claimant was employed as a turnboy by the 2<sup>nd</sup> respondent in March 2009. It is also a fact than he served on casual basis being paid a daily wage until July 2013. It is also not in dispute that from 30/7/2013 the mode of payment was changed from that of daily wage to ksh.471 to piece rate at ksh.1.70 per loaded bale. It is also not disputed that CW1 was not involved in the

discussions which led to the change of the mode of payment. It is also not in dispute that from 2009, the 2<sup>nd</sup> respondent was contracted to outsource labour, supervise and pay their wages. It is not disputed also that 2<sup>nd</sup> respondent found CW1 already working for the 1<sup>st</sup> respondent and CW1 did not sign any new contract with the 2<sup>nd</sup> respondent from 2009. It is also not in dispute that from 2010 CW1 began to contribute to the NSSF and NHIF. There is further no dispute that CW1 was never given any paid leave from 2005-2013. Lastly there is no dispute that on 30<sup>th</sup> or 31<sup>st</sup> July there arose a disagreement between the workers including CW1 and the Director and supervisor of the 1<sup>st</sup> respondent concerning the payment which led to the Director demanding that the workers leave his premises and surrender uniform.

15. The issues for determination are which of the respondents employed the claimant and how was the employment terminated. Lastly the court must determine whether the claimant is entitled to the relief sought

### **The Employer**

16. CW1's position is that his employer is the 1<sup>st</sup> respondent while 2<sup>nd</sup> respondent is only an agent for the recruitment and payment of workers. The 2<sup>nd</sup> respondent on the other hand has maintained that she was contracted by 1<sup>st</sup> respondent to provide outsourced labour and as such CW1 was her employee from 2009 till 2013. She also contended that she used to remit NSSF and NHIF for the workers including CW1 between 2010 and 2013.

17. No receipts were produced by the 2<sup>nd</sup> respondent to prove her relationship with the 1<sup>st</sup> respondent on the one hand and the CW1 on the other hand. RW1 however admitted that CW1 was employed by 1<sup>st</sup> respondent before 2009 when she was contracted by the 1<sup>st</sup> respondent. She also confirmed that the mode of payment and the rate depended on the decision of Director of the 1<sup>st</sup> respondent. She did not produce any documentary proof that she paid the NSSF and NHIF as the employer or as an agent. On the other hand CW1 proved that he was recruited by 1<sup>st</sup> respondent in 2005 and continued working until 2013. He also produced a work injury claim form dated 15/8/2005 to prove that 1<sup>st</sup> respondent was his employer.

18. In the circumstances the court finds that CW1 was employed by the 1<sup>st</sup> respondent while the 2<sup>nd</sup> respondent played the role of an agent for the 1<sup>st</sup> respondent in partially supervising and paying the daily wages. Indeed there is no dispute that the 1<sup>st</sup> respondent's Director is the one who determined CW1's pay and he is the one who dismisses him.

### **Nature of termination**

19. The claimant's case is that he was dismissed without notice and without being given any reason. Under Section 37 of the Employment Act CW1 had become entitled to at least 28 days written notice prior to his dismissal. Likewise the employer had acquired the same right to be served with at least 28 days written notice prior to termination by the claimant.

20. In the present case, 1<sup>st</sup> respondent terminated the CW1's employment and purported to employ him on piece rate basis. When CW1 objected, he was told by the Director of 1<sup>st</sup> respondent and supervisor to surrender his uniform and vacate the work premises. In this court's view that was termination by the Director of the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent had no power to contradict her principal over the decision. It is therefore not correct for the 2<sup>nd</sup> respondent to allege that CW1 deserted or absconded work without notice.

21. The correct position is that CW1 was summarily dismissed for failure to accept new status as a piece rate worker. It was not due to any misconduct or poor performance or incapacity. Consequently, this was not a case of unfair termination but of wrongful dismissal. Dismissal is wrongful when it is done in breach of contract term and obligation related to service of notice before termination of employment. As already observed above, Section 37 of the employment Act had already entitled CW1 to at least 28 days

written notice prior to the termination.

### **Reliefs awarded**

22. In view of the findings above regarding the nature of the claimants employment vis a vis the provisions on Section 37 of the Employment Act, the court makes declaration that CW1 was on a permanent employment having worked continuously for 7 years for the 1<sup>st</sup> respondent. The court further make declaration that the claimant was entitled to annual leave after every 12 consecutive months he served as guaranteed under Section 28 and 37 (2), (3) and (4) of the Employment Act being 21 days leave per year.

23. The court declines to declare the termination to be unfair instead declares it wrongful for the reasons stated earlier above. The court therefore proceeds to award one month salary in lieu of notice being ksh.471x30=14130. Accumulated leave for the period of service which is within the limitation period of 3 years is to be compensated. This should be 3 years multiplied by 21 day by ksh.471=Ksh.29673. The claim for gratuity is dismissed because the claimant was covered by NSSF for the period falling within the limitation period of that cause of action that is to say 3 years prior to filing the suit. The court did not think that 2<sup>nd</sup> respondent was liable in this case but because of her pleadings and evidence by RW1, the court yorks her with the 1<sup>st</sup> respondent in bearing liability.

### **DISPOSITION**

24. For reasons stated above judgment is entered for the claimant against the respondents jointly and severally declaring the termination of the claimant's employment wrongful and awarding him ksh.43803 plus costs and interest. Orders accordingly.

**Dated, signed and delivered this 24<sup>th</sup> October 2014**

**O. N. Makau**

**Judge**