



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

**CAUSE NO. 1470 OF 2013**

*(Before D.K.N. Marete)*

**SHADRACK KAHUNGANI MUKWANA .....CLAIMANT**

Versus

**WINES OF THE WORLD LIMITED .....RESPONDENT**

**JUDGEMENT**

This matter came to court vide a statement of claim dated 9th September, 2013. The issues in dispute are therein cited as;

1. *Whether the Claimant was entitled to a Contract of Service?*
2. *Whether the Claimant was entitled to a Termination Notice?*
3. *Whether the Claimant's dismissal was lawful and fair?*

The respondent does not file a response but has in place respondent witness statement made by one, Irene Ogolla the Human Resource Assistant of the Respondent. She (respondent) further files written submissions dated 24th June, 2014 wherein she denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on or about 10th August, 2010, he was employed by the respondent as a Store Assistant at a wage of Ksh.450.00 per day. He was forced to work from Monday to Saturday inclusive of gazetted public holidays with no compensation or overtime. He was not issued with a formal contract of employment despite working for one year.

On 19th January, 2012, he reported to work only to be informed that he was no longer in the employment of the respondent. This termination, he submits, was actualized by malice and negligence on the part of the respondent which is particularized as follows;

**Particulars of negligence**

- a. *Failing to issue the Claimant with formal contract which stipulates and lays the basis of the Claimant's dismissal.*
- b. *Failing to inform the Claimant the reason for termination.*
- c. *Failing to issue the Claimant with a termination letter.*

- d. *Failing to form a disciplinary hearing if necessary to hear the Claimants case and affording the Claimant an opportunity to defend himself before dismissing the claimant.*

He further pleads loss and damage as herein under;

**Particulars of loss and damage**

- a. *The Claimant's year was wasted as he was never issued with a certificate of service despite his efforts towards building the Respondent.*
- b. *The Claimant was never informed of the reasons for his dismissal thereby causing him untold emotional turmoil.*
- c. *The Claimant was never issued a formal contract despite working for the*
- d. *The Claimant was not paid his terminal dues despite being faithful and exemplary service to the Respondent.*

The claimant prays for relief as follows:-

- a. *A Declaration that the claimant's employment to the Respondent was one of a contract of service.*
- b. *A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful hence null and void.*
- c. *The Respondent be ordered to reinstate the Claimant and treat him in all respects as if the Claimant's employment had not been terminated.*

In the alternative:-

- d. *Terminal dues including*

- i. *12 months salary in compensation – Ksh.129,600/=*

- ii. *1 month salary in lieu of Notice Ksh. 13,500/=*

- iii. *Unpaid annual leave (21 days) Ksh. 9,450/=*

**TOTAL**

**Ksh.152,550/=**

- e. *Costs of this suit.*
- f. *Interest on (d) and (e) above at court rates.*

The matter came to court severally until the 12th June, 2014 when the parties agreed to dispose off the matter by way of written submissions. The claimant in his written submissions reiterates his claim. He submits that his dismissal was unlawful and that he was not given a chance to defend himself against termination.

The claimant annexes a letter of recommendation marked SMK1 as indication and evidence his of employment and prove that this claim is not fraudulent. He submits that the termination of employment was unlawful in terms of S.45 of the Employment Act, 2007. This provides as follows;

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

(a)*that the reason for the termination is valid;*

(b)*that the reason for the termination is a fair reason-*

- i. *related to the employees conduct, capacity or compatibility; or*

- ii. based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where-

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

e. the existence of any previous warning letters issued to the employee.

He also submits a transgression of his rights as expressed under Section 41 (1), Employment Act, 2007 as follows;

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

The respondents deny the claim and posit that the claimant was not entitled to a letter of contract, him not having been a full time employee and who worked on a day to day basis. He would be employed on a need basis and was not necessarily in full time employment. The attached letter is a letter of recommendation was fraudulently obtained from the respondent on the guise that it was required to facilitate a search for the claimant's employment. He did not work for the timeliness required under S.35 (1) and was therefore not a permanent employee. He is therefore not entitled to the relief sought.

The issues for determination are four fold as hereunder;

1. What was the nature of the employment of the claimant?
2. Was the termination of the claimant wrongful, unfair and unlawful?
3. Is the claimant entitled to the reliefs sought?
4. Who bears the cost of this cause?

The first issue for determination is the nature of the employment of the claimant by the respondent. The parties in their witness statements and written submissions adduce divergent positions on the employment of the claimant. The claimant alleges that he was in permanent employment but this was not documented as the respondent did not in any way issue a letter of employment to him. The respondent on the other hand disputes this allegation and submits that the employment of the claimant was casual in nature and on a need basis. The claimant would be deployed and employed when the respondent required his services and therefore a case for termination would not arise in the circumstances. The claimant entirely disagrees with this and submits a case for permanent employment and therefore consequential unfair termination of his employment.

The issue of casual employment was extensively handled by this court in *inter alia*, the case of **Peter Gikaria Wambugu vs. Muhotetu Farmers Co. Ltd. (2014) eKLR** where the court made an interrogation on Section 37 of the Employment Act, 2007 and came up with the following observations;

*“The parties in their written submissions reiterated their positions as earlier pleaded. In reference to the first issue, this is answered by the claimant’s evidence and submissions in support of his case. The claimant’s case is that he was a permanent employee and worked on times between 1st September, 2004 to 20th March, 2010 when he fell ill and was hospitalized. He was paid on a monthly basis. The claimant’s evidence and that of his witness is uncontroverted and unchallenged. It was not in any way shaken at cross-examination. Moreover, the claimant’s witness, CW2 testified that he was both a member and elected official of the respondent and therefore acquainted with the issues in dispute. This testimony and evidence of the two claimants witnesses is flowing and clearly brings out the claimant’s case.*

*The respondent did not call any witness or tender other evidence to contradict that of the claimant and therefore the claimant’s version carries the day.*

*The issue of the nature and term of employment is further buttressed by section 37 of the Employment Act, 2007 which provides that even in a case of casual employment, where one is engaged for a period or a number of continuous working days amounting to not less than a month, the law shall move on to deem this to be one where wages are paid on a monthly basis.*

Section 37:

1. Not with standing any provisions of this Act, where a casual employee-
  - a. Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
  - b. ....

*the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.*

2. ....
3. An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially be employed as a casual employee.
4. ....
5. ....

*In the instant case, there is no determination as to whether the claimant employment was casual or term and this is a disputed fact. The parties hold diametrically opposed positions on this subject and therefore the need for its determination.*

*I therefore disapprove the respondent's case for casual employment and find that the claimant was employed on a monthly basis for all his term. Section 37 of the Employment Act, 2007 is applicable in the circumstances."*

The question and issue for determination therefore is whether the circumstances in the **Peter Gikaria Wambugu** case above cited are relevant and applicable to the current situation. I wish to explore this in the foregoing part of this judgment.

Who in the circumstances would this court be forced to believe and walk along with? The court in this case is persuaded that the right direction is to seek guidance on the civil law principle of a balance of probabilities. On a balance of probabilities, who of the two parties in this situation is likely to be telling the truth?

This court is of the view that on a test of the balance of probabilities, the respondent's case and testimony would carry the day. Parties are always duty bound not only to state their cases in pleadings but also to prove the same in evidence. This is a cardinal principle of all legal disciplines. We cannot at all be seen to deviate from this well articulated principle of law and practice. It is proven and has been effective in situations of this nature. I therefore find that the employment of the claimant was on a need basis and therefore casual.

The 2nd issue for determination is whether the employment of the claimant was unfair, wrongful and unlawful. Again, this court is treated to various testimony and evidence on the subject. The claimant's case is that he reported to work only to be informed that he was no longer an employee of the respondent.

The respondent's case as presented in the respondent witness statement of Irene Ogolla is as follows;

*At all times material to this suit I was the Human Resources Assistant at the Respondent Company herein and fully conversant with the facts of this case.*

*I remember well that the Claimant was engaged by the Respondent company on diverse dates between June 2011 and December 2011. During the said engagement, it was the mutual intention of both the claimant and respondent that the claimant would take up the tasks assigned to him as a casual worker. This meant that when help was needed, the claimant would be called to assist at the store which involved arranging the stores, loading and offloading vehicles among other related duties. In return he would be paid a stipend at the end of the week for the days worked and as mutually agreed between the parties.*

*From the time the claimant joined the respondent company until his departure, the terms of engagement remained the same. In view of this the issue of overtime and off time could not have arisen as he was only called to work when the respondent required him to do so provided it was agreeable to the claimant. I also wish to state that as far as I am aware, claimant did not at any time request for a written contract contrary to what he claims in his statement of claim. After December 2011, the claimant's services were no longer needed.*

*On 24<sup>th</sup> June 2013 the claimant came by the respondent company's offices and asked for a letter of recommendation. This was over one year after leaving the respondent company. He explained that he was trying to secure employment elsewhere and needed help. He also said to indicate in the letter that he had worked for the respondent company for at least a year (sic). He stated that this would increase his chances of getting a job elsewhere. I found it was a heartfelt request and saw no practical reason to reduce his chances of getting another job as I knew he had a family. I issued him with a letter of recommendation which was simply to help him get a job. The letter does not indicate that the claimant was a permanent employee, contrary to the claimant's*

*allegations I urge the court to note that in the statement of claim and the claimant's witness statement, the Claimant indicates that he started working for the respondent company in August 2011. The claimant also states that he was paid a daily wage of Kshs. 450 for which he has not shown any proof. To my knowledge he has also not shown any proof that he worked continuously for the respondent.....*

In her written submissions she enters a case for casual employment and posits that in the circumstances a case for unlawful termination of employment would not ensue as this is not anticipated under Section 35 (1) (a) of the Employment Act, 2007 as here under;

*“A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be –*

- a. *Where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;”*

This, the respondent submits, validates their case for lawful termination and therefore ousts the claimant's case. I agree.

The 3rd issue of determination is whether the claimant is entitled to the relief sought? On the findings on issue Nos.1 and 2 above this determination becomes spent. The claimant would not in the circumstances be entitled to the relief sought.

The last issue for determination is one on costs to the parties. This is tricky in the circumstances. I am compelled to find a case of each party bearing its costs of this claim. This is on the basis of the facts and circumstances of the case.

I therefore dismiss this claim with orders that each party bears its own of this cause.

**Delivered, dated and signed this 7th day of November 2014.**

**D.K. Njagi Marete**

**JUDGE**

Appearances.

1. Mr. Gomba instructed by Charles Gomba & Co. Advocates for the Claimant.
2. Mr. Ngunyu instructed by M/s Kinoti & Kibe Co. Advocates for the Respondent.