



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 2007 of 2011

HARRISON MESHACK LUSIMBO

GILFRINE NOAH MASIO.....CLAIMANT'S

VERSUS

MAREBA ENTERPRISES LIMITED.....RESPONDENT

JUDGEMENT

By a Memorandum of Claim dated 18th July 2011 supported by verifying affidavit sworn by the Claimants **HARRISON MESHACK LUSIMBO AND GILFRINE NOAH MASIO** on the same date, the Claimants seek the following orders against the Respondent **MAREBA ENTERPRISES LIMITED**.

(a) A declaration that the Respondent's dismissal or termination of the Claimants' employment was arbitrary, unfair, unlawful and inhumane and the Claimants are entitled to payment of their due terminal benefits and compensatory damages.

(b) An order for the Respondent to pay the Claimants' their terminal dues and compensatory damages:-

Harrison Meshack Lusimbo, 1st Claimant Kshs.333,000/=.

Gilfrine Noah Masio, 2nd Claimant Kshs.520,800/=.

(c) Costs of this case plus interest thereon.

The Claim by the 1st Claimant **HARRISON MESHACK LUSIMBO** was withdrawn on 25th April 2012 and the case proceeded when the claim of the 2nd claimant **GILFRINE NOAH MASIO**. The Claimant testified in support of his case and his claim is that he was employed as a casual employee in 1992 and worked until 3rd February 2011 when he was told to go home until he is called back after he asked for his wages for the week from Mr. Mukono the Accountant. He worked cautiously and was paid a daily rate of Shs.400 at the time he left employment. He was never called back. He eventually decided to report a dispute to the Ministry of Labour who summoned the Respondent severally but the Respondent failed to attend all the meetings or to pay the Claimant as requested in the wage demands from the Ministry of Labour. He worked for the Respondent continuously from Monday to Saturday from 8 a.m. to 4.30 p.m. and was paid weekly. His work was to make bricks and roofing tiles for the Respondent which makes building materials. He was never paid Shs.2400 for the last week worked

up-to 3rd February 2011. He was not registered as a member of NSSF.

In cross examination the Claimant denied that he quarreled with anybody, that he worked intermittently. He also denied leaving work on his own volition.

The Claimant claims one months' salary of Shs.12,000/= in lieu of notice, leave for 10 years worked of Shs.228,000, service/gratuity for 19 years at Shs.136,800 and 12 months compensation of 144,000/= making a total claim of Shs.520,800. The Respondent called 2 witnesses **RW1 NJENGA MWANIKI** who is the Respondent's Production Manager who testified that he had worked for the Respondent since 1974 and knew the Respondent who worked as a hard mix operator. He confirmed that the Claimant worked from 1992 and was paid weekly. He confirmed the Claimant's last salary was 400/= per day. The Claimant left work on a Saturday after disagreeing with him over rate of pay for loading a lorry. The Claimant wanted to be paid Shs.200 while he offered 100. The Claimant got annoyed and went to demand his payment for the week but he was not paid on that day. He confirmed that the Claimant was not a member of NSSF or NHIF.

He said the Claimant was asked to go home and never called back because he was banging tables. He did not know how much the Claimant was owed by the Company but this was known by Mr. Mukono the accountant. **RW2 CHARLES ODHIAMBO** testified that he was an accountant with the Respondent where he had worked for 6 months. He did not know the Claimant and the information he had was from accounts records. The records showed the Claimant was a casual. According to the records the Claimant was not owed any money by the Respondent as casuals were paid daily. He said no casual is entitled to leave, that the claimant was not entitled to notice. As far as he was aware the Claimant was paid Shs.100 per lorry.

From the evidence on record, it is clear that the Claimant started working for the Respondent in 1992 and left employment on 3rd February 2011. This was confirmed by both the Claimant and RW1 Mr. Njenga Mwaniki. RW 2 Charles Odhiambo's evidence to the effect that the Claimant worked from 4th June 2010 to 2nd February 2011 cannot be taken seriously as he was only using records available to him, having joined the company long after the Claimant left employment. He contradicted most of the evidence as given by both the Claimant and the RW1. His evidence must therefore be treated with caution.

It is also clear from the evidence of the Claimant and RW1 that the Claimant worked continuously from Monday to Saturday from 8.00 a.m. to 4.30 p.m., was paid weekly at a daily rate of Shs.400, was not a member of NSSF and never took leave.

The issues for consideration are the following:-

- 1] the legal status of employment of the Claimant at the time he left employment.
- 2] whether the Claimant is entitled to any of the prayers in his claim.

The Employment Act 2007 defines a casual employee 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 than twenty four hours at a time". The Claimant who was paid at the end of each week was therefore not a casual.

Section 37 of the Employment Act provides for conversion of a casual employee to monthly contract of employment after working continuously for 1 month or intermittently for 3 months. The claimant therefore qualifies to be a monthly employee. By virtue of Section 37 [3] he is "entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee".

The terms and conditions of service referred to in Section 37[3] include annual leave, termination notice and service pay. Having worked continuously for 19 years the Claimant was also entitled to a fair hearing in accordance with Section 41 of the Employment Act before his services were terminated. Since this was not done, his termination was unfair.

I now consider the specific heads of claim:-

1] Notice

Having found that his employment was by operation of law converted to monthly terms of employment, the Claimant is entitled to payment of 1 months' salary in lieu of notice by virtue of Section 49[1][a] of the Employment Act.

I therefore find that the Claimant is entitled to 1 month's salary in lieu of notice. He was paid a daily wage of Shs.400 per day thus Shs.12,000 per month. I give judgement in the sum of Shs.12,000.

2] Leave

Section 28 of the Employment Act provides for 21 days annual leave per year. The Claimant is therefore entitled to 21 days each for the 19 years that they worked for the Respondent. This works out to [Kshs.400x21x19] 159,600.

I Award Shs.159,600 to the Claimant on account of annual leave.

3] Service Pay

Section 35[5] provide for payment of service pay. The rate is not provided in the Act. The courts have automatically adopted the rate

provided for redundancy of 15 days salary for each year worked. The Claimant has not explained why he is demanding 18 days for each year worked. I award [15x400x19] Shs.114,000 as service pay.

4] Compensation

Having found that the Claimant was unfairly terminated, he is entitled to compensation for unfair termination. He had worked for 19 years subjected to casual employment terms and I think he deserves the full compensation of 12 months.

I therefore award him award him; shs.144,000 being 12 months' salary.

In conclusion I give judgement to the Claimant Mr. Gilfrine Noah Masio in the sum of Shs.429,600 with costs.

Orders accordingly.

Read in open Court and signed on 16th day of January, 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

In the presence of:-

.....Claimant

.....Respondent