



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1290 of 2012**

**JOHN MWANIKI KILUMO.....CLAIMANT**

**VS**

**KAK ENTERPRISES..... RESPONDENT**

**AWARD**

This suit was brought on 30<sup>th</sup> July, 2012 claiming for payment of terminal benefits and compensation for unlawful and unfair dismissal as follows:-

- (a) 60 days salary in lieu of notice @ 600/= per day
- (b) Accrued leave for 109 months
- (c) Severance pay for 10 years served at 26 days per year
- (d) Overtime for 10,137 hours at 75/= per hour
- (e) Issuance of Certificate of Service in terms of Section 51 of the Employment Act, 2007.
- (f) 12 months' salary being maximum compensation for unfair dismissal.

The Memorandum of Claim was served on the Respondents on 8<sup>th</sup> August, 2012 but the Respondent did not enter appearance nor file a Statement of Defence to the claim.

In spite of the default, the Respondent was served with a hearing notice on 6<sup>th</sup> November, 2012 for 13<sup>th</sup> November, 2012. The matter accordingly proceeded to formal proof on the day. The Claimant gave a sworn testimony in support of the particulars of claim which may be summarized as follows;

That he was employed by the Respondent as a mason on a casual basis on 18<sup>th</sup> February, 2003. He was paid a daily wage of Kshs.350/=. This was increased to Kshs.400/= per day in 2007 and later on increased to Kshs.600/= per day in 2011.

He was not given a letter of appointment but worked continuously until 17<sup>th</sup> March, 2012 when his services were unlawfully terminated by the Respondent.

That he worked daily from Monday to Friday from 7.30 a.m. – 6.00 p.m.; from 7.30 a.m. – 4.30 p.m. on Saturdays and 7.30 a.m. to 1.00 p.m. on Sundays.

He further told the court that he was not given leave for the entire period he served the Respondent adding that those who sought to go on leave were instantly dismissed.

That his services were terminated when he demanded to be paid for work done on Sunday. The Respondent refused to pay him and so he declined to work the Sunday that followed leading to the termination of his services.

Upon termination he was only paid salary for the days worked and the Respondent declined to pay severance pay for the 10 years he had continuously served and payment in lieu of leave days not taken.

The Respondent did not pay 1½ salary for overtime done on week days and Saturdays and also did not pay double rates for work done on Sundays and Public holidays as per the requirements of the law.

The Claimant reported the dispute to the Ministry of Labour upon termination. Conciliation meetings were held three times, but the matter was not resolved.

He relies on the Regulation of Wages, Building and Construction Industry Order 2004, which was still in force during the period he served the Respondent.

In terms of Regulation 5(1) thereof a normal working week in the Industry consists of 45 hours at the rate of 8 hours per day from Monday to Friday inclusive and 5 hours on Saturdays.

Regulation 6(1)(a) provides that overtime is payable at 1½ times normal rate of wage per hour in respect of normal working hours and twice in respect of overtime worked on a Sunday.

Regulation 7(2) also provides that the rate applicable to work done on a gazetted public holiday is double the normal rate.

For the period he served, the Claimant was not registered with National Social Security Fund. That though he was paid daily rate, he was for all intents and purposes, a permanent employee within the meaning of Section 37(1)(a) & (b) of the Employment Act 2007, as he worked continuously for 10 years and was involved in building residential houses and office partitions throughout the period. The Respondent was usually subcontracted by bigger Construction Companies.

Indeed Section 37(3) states:-

*“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 been employed as a casual employee”.*

The clause applies to the Claimant in its totality and the employment of the Claimant could only be terminated upon giving of applicable notice in terms of Section 35(1)(c) and for a lawful reason unless summary dismissal was justified in the circumstances of the case.

In terms of Section 43(1) of the Employment Act, the employer bears evidential burden of proof to demonstrate the reason or reasons for termination and where the employer fails to do so, the termination *“shall be deemed to have been unfair within the meaning of Section 45”.*

Section 45(2) provides that; “A termination of employment by an employer is unfair if the employer fails to prove:-

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

(i) *related to the employee's 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”.*

The Respondent having failed to file any response to the particulars of the claim and having therefore failed to rebutt the evidence adduced by the claimant, has failed to discharge its onus aforesaid and the court finds that the claimant's employment was unlawfully and unfairly terminated.

The claimant has on a balance of probabilities proven that he is entitled to:-

(a) One month's salary in lieu of notice in the sum of Kshs.12,000/=

(b) Accrued leave for 10 years at 26 days a month in the sum of Kshs.120,000/=

(c) Severance pay for 10 years at the rate of 15 days salary per year in the sum of Kshs.60,000/=

(d) Overtime of 10,137 hours worked on weekdays @ 75/= per hour

= Kshs.760,275/=

No prayer or computation was done for the hours worked on Sundays and public holidays. Saturday was a working day for the claimant and the overtime worked is presumed to be included in item (d) above.

In addition, the court having found that the Claimant's services were unlawfully and unfairly terminated award ten(10) months' salary as compensation for the termination in the sum of Kshs.120,000/=.

**Total sum payable to the Claimant is Kshs.1,072,275 (One million, seventy two thousand, two hundred and seventy five shillings only).**

**It is so ordered.**

**DATED and DELIVERED** at Nairobi this 13<sup>th</sup> day of March, 2013.

Mathews N. Nduma  
**PRINCIPAL JUDGE**