



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 60 of 2012**

**JOHN BISHI.....CLAIMANT**

**VERSUS**

**HEDGE FARM LTD.....RESPONDENT**

**JUDGEMENT**

The claimant has sued the respondent, his former employer seeking terminal benefits and compensation for unfair termination of employment. The summary of the claimant's case is that he was employed by the respondent in August 2006 as a Security Guard on Kshs 6,000/= month salary and worked for four years without going for any leave. That his employment was terminated without notice and reason on 3/7/2010.

The respondent's defence is that the claimant was only employed for eight months between October 2009 and May 2010 as a casual worker and paid Kshs. 200/= wage at the end of every day worked. That he never worked continuously but only depending on the availability of work and as such no terminal benefits were payable to the claimant.

The case was heard on 11.3.2013 when the claimant testified as CW1 and Mr. Boniface Mutuku Kavoo testified on behalf of the respondent as RW1.

According to the CW1, he worked for the Respondent from August 2006 upto 2.6.2010 when he was terminated with another colleague. That his wage was Kshs. 200/= which was paid daily at the end of each day but sometimes the pay was after two or seven days.

That the termination was on ground that work had reduced. He produced a letter of termination dated 3.6.2010 marked as exhibit 1. He was however, not paid any terminal dues like the other workers laid off.

On cross-examination he said that he was never given any appointment letter but he used to sign for every payments.

He confirmed that he was casual and not in continuous employment and that he was only called whenever there was need. He also confirmed that he received daily payments unless there was a problem which at times led to laying down tools.

He denied joining the respondent only in 2009 and insisted that he worked for the respondent since 2005 on deployment by another Learned Guards and then in August 2006, he was hired by the Respondent.

He insisted that RW1, was a tractor driver for the Respondent did not know particulars of his (claimant) employment as the records of his employment were with other senior officers of the Respondent.

The claimant concluded by saying that he worked for four days every week continuously for the four years he was employed by the respondent. That the letter of termination was given when the claimant on duty in the evening and had to go back home. He said that his Trade Union and the Labour Office were not notified before the termination.

RW1 in response avered that he was the manager for the Respondent and that he was the custodian of all the records of the respondent for workers. He said that the records showed that the claimant was employed for only 8 months from October 2009 to May 2010. That he worked from Monday to Sunday and that is why he qualified for NHIF contributions as per respondent's exhibit 1-8.

That the claimant's daily wage was Kshs. 100 plus Ksh. 30/= for over time.

He denied the authenticity of the termination letter adduced as exhibit 1 by the claimant saying that the author was not qualified and no official letterhead or stamp was evident on the letter.

He denied that the claimant had worked for four years and that he was entitled to leave or service pay or any notice before termination of employment. He however, confirmed that he did not know how the employment was terminated although he confirmed that the author of the termination letter was his predecessor in the office. He also confirmed that he saw records of demand from the claimant's union but he had no powers to pay. He also confirmed that some laid off employees were paid terminal dues except the claimant whose claim was not genuine for want of continuous service.

After the hearing, each party filed written submissions which I have carefully considered in this judgement alongside the pleadings and the testimonies by the witness.

It is not in dispute that this court is seized of the jurisdiction to entertain the dispute because the parties concerned were related as employer and employee. The reason for this finding is the provisions of article 162(a) of the constitution and section 12 of the Industrial Court Act.

The issues for determination are as follows:-

1. Whether the claimant's employment contract was a term contract within the meaning of 37 of the employment Act (hereinafter called the Act)
2. Whether the said contract was unfairly terminated by the Respondent.
3. Whether the relief sought in the Claim ought to be granted.

In answering the first issues, I have considered the provisions of section 10 of the Act as regards the obligation on the part of the employer to draw a contract of employment and/or keep particulars thereof.

This court finds that the respondent has failed to rebut the claimant's allegation that he served as her employee since 2006. The respondent has also failed to disprove by records that the claimant earned Kshs. 200/= as his daily wage on different intervals of between one day and a week. The records of employment produced was only for 8 months between October 2009 and May 2010 and they related only to NHIF remittances. No evidence was adduced to rebut the evidence that in 2005 a company called Learned Guards provided security services to the respondent. Consequently it is my finding that the claimant served the respondent since 2005 first as an outsourced guard and then from August 2006 as an employee of the respondent until May 2010.

I have, however, also considered the claimant's own admission on oath that he never worked continuously but only 4 days in a week. That he used to work only during when work was available. That he was paid at the end of the day's work except when there were delays of upto 7 days.

The foregoing version of days worked contradicts with the the version given by the RW1 when he said that the claimant was working from Monday to Sunday between October 2009 and May 2010 and that is why he qualified for NHIF and NSSF Contributions by the employer.

The question in mind is for how long did the claimant work for 4 days in a week depending on the need and when did he work continuously even without a rest day.

This court blames the respondent for that lacuna in the evidence. I will therefore resolve questioning by finding that from August 2006, the claimant worked 4 days in a week continuously until September 2009 when he started to work 7 days a week till May 2010. The number of days worked in aggregate were more than three months and as such his contract of employment was a term contract within the meaning of section 37 of the Act. Accordingly, the contract was for all purposes subject to the provisions of the Employment Act and more particularly section 10 and 35 of the Act.

Consequently, the Respondent was under obligation to cause the contract to be in writing and to produce it in court to disprove any alleged terms by the employee including the daily wage of Kshs. 200/=. This was not done. The exhibits produced by the defence only showed the record of NHIF returns for October 2009 to May 2010 and cannot therefore be used to disprove the allegation that the claimant's daily pay was initially Kshs.140 which was increased to Kshs. 200/= per day to make it Kshs. 6000/= per month.

As regards the second issue of unfair termination, the claimant has produced exhibit 1 – a letter for termination by the predecessor of the RW1 dated 3.6.2010. The ground for termination was that the Respondent was closing down vegetable (mchicha) project and therefore the security staff including the claimant was to be reduced. In my view that sounded like termination through redundancy. The termination was without notice as the letter says that the termination was effective from the date of date of the letter.

The relevant provision for declaring an employee redundant is section 40 of the Act which among other things require that a one month written notice be served to the employee's Trade Union and the area Labour Officer before the intended redundancy. This was not done and therefore the termination based on the reason given in exhibit 1 aforesaid was unlawful and therefore unfair.

The RW1 has challenged the authenticity of the exhibit 1, the termination letter on ground of competence of the author and for lack of official letter head and stamp. He did not however prove to this court whether the respondent had an official letter head and stamp (seal). He also did not say who is the custodian of such letter head and stamp. He did not also tell the court who has the competence to write termination letter on behalf of the respondent. The RW1 did not also demonstrate to the court what effort the respondent has made to nullify the said termination letter or even to have the author charged for making and writing the letter without authority if at all that was true.

In view of that deficiency and in view of the facts that the neither the author nor the director of the respondent have disowned the said termination letter (exhibit1), this court finds that the said letter is authentic and corroborates the claimant's allegation that he was terminated without notice, unlawfully and unfairly. It was unfair because it breached section 35 of the Act which requires that a notice be served on the employee in case of a normal termination. It also contravened section 40 of the Act on the issue of procedure for redundancy. The termination also breached section 45 of the Act which prohibits unfair termination of employee's employment considering the reason for the termination and the procedure followed.

Finally, I now answer the question of what remedy ought to be ordered in favour of the claimant. In view of the court's findings in the first and the second issues above, I grant prayers 1, 2, 3, 5 (a), (b), (c), (d), 6 and 8 in in the Claim save for the following modifications;-

(a) The claimant was entitled to 21 days leave per year for 4 years had he served without 3 off days a week ( $21/30 \times 6000 \times 4 = 16800/=$ )

(b) One month salary in lieu of Notice .....6,000/=

(c) Service pay for August 2006 – August 2009 = 3 years ( $15/30 \text{ days} \times 3 \times 6000$ ).....9,000/=

(d) Compensation for unfair termination (12 x 6000).....72,000/=.

In the end, this court enters judgment in favour of the claimant and as against the Respondent in the following terms;-

- a) The Claimant's employment by the respondent is hereby declared to be a term of contract within the meaning of section 37 of the Employment Act.
- b) The termination of the claimant's employment by the respondent is declared to be unlawful and unfair within the meaning of section 35, 40 and 45 of the said Act.
- c) The claimant is declared to have been entitled to annual leave after every twelve(12) months of continuous service. This however will not be paid for because in all fairness, the claimant only worked for 4 days a week initially and rested for 3 days.
- d) The Respondent is ordered to pay Kshs. 87,000/= to the claimant.
- e) The Respondent is ordered to issue a Certificate of Service to the claimant covering the period between August 2006 to May 2010.
- f) The Respondent will also pay costs of the suit plus interest.

**Signed, Dated and Delivered** on the 12<sup>th</sup> day of April 2013.

**Onesmus N. Makau**  
**JUDGE**