



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 909 of 2011**

**WILLIAM OPETU.....CLAIMANT**

**VS**

**MUKESH PATEL.....RESPONDENT**

**AWARD**

**Introduction**

1. By a Memorandum of Claim dated 6th June and filed in Court on 8th June 2011 the Claimant sued the Respondent for unfair termination of employment and failure to pay terminal dues. The Respondent filed a Memorandum of Reply on 13th July 2011.

2. At the interlocutory stage the Respondent raised a preliminary objection on the ground that the Claimant was a casual employee and that there was no conversion of his employment from casual employment to term contract. The Court overruled the preliminary objection on the ground that the grounds raised carried contentious points of fact to be tested in a full trial.

3. The case therefore proceeded to hearing on 22nd March 2013 with Mr. Makokha instructed by Namada & Co Advocates appearing for the Claimant and Mrs. Otaba instructed by Hamilton Harrison & Mathews Advocates appearing for the Respondent. The Claimant testified on his own behalf and the Respondent did not call any witness. Both parties filed written submissions.

**The Claimant's Case**

4. According to the Claimant, he was employed as a day labourer effective 31st August 2010 to 1st March 2011 at a daily wage of Kshs. 250. He testified that he performed general house work including cleaning of the Respondent's compound and would work from 6.00 am to 6.30 pm seven days in a week, including Sundays and public holidays. The Claimant denied that he worked half day as claimed by the Respondent. He however admitted that on some Sundays, he would work half day. On 1st March 2011 the Respondent terminated the Claimant's employment without notice and without lawful cause. It was the Claimant's case that he was terminated after asking for a letter of appointment.

5. The Claimant therefore claimed the following:

- a) A declaration that the Claimant's termination was unfair and unlawful
- b) One month's salary in lieu of notice @ 250x30 days.....Kshs. 7,500
- c) Unpaid house allowance @ 15% for 7 months.....7,875
- d) 12 months' salary as compensation for unfair termination.....90,000

e) Costs and interest

### **The Respondent's Case**

6. In his Memorandum of Reply the Respondent stated that the Claimant was hired at the beginning of each day between 1st October 2010 and 1st March 2011 for specific domestic tasks which involved washing dishes and ironing clothes. The terms of engagement was that the Claimant would be engaged for no more than half a day on each day and would be paid Kshs. 250 as wages at the close of each working day.

7. It was the Respondent's case that the Claimant's employment was terminable by either party at the close of each working day without notice. The Respondent denied that the Claimant asked for a letter of employment and maintained that the Claimant was a casual employee and was therefore not entitled to any notice or terminal dues.

### **Findings and Determination**

8. The first issue for determination in this case has to do with the nature of the Claimant's employment with the Respondent. The Respondent's defence was hinged on his averment that the Claimant was a casual employee engaged and paid on a daily basis and was therefore not entitled to any of the reliefs sought.

9. Section 2 of the Employment Act, 2007 defines a casual employee as:

***“a person the terms of whose employment 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”***

10. The law on casual employment was restated by Lady Justice Onyango in the case of **Wilfred Bukachi Opwaka Vs Ready Consultancy Company Limited (Industrial Court Cause No 471 of 2012)** as follows:

***“The law relating to casual employment is contained in Section 37 of the Employment Act. An employee employed on casual terms who works continuously for one month is deemed to be converted to monthly contract terms at the expiry of one month. “***

11. The principle here is is very clear and does not need further elucidation. The Claimant testified that he worked continuously for the Respondent from 31st August 2010 to 1st March 2011. According to the Respondent's Memorandum of Reply the Claimant was hired at the beginning of each day between 1st October 2010 and 1st March 2011. The Respondent did not produce any records to confirm the effective date of the Claimant's employment as required under Section 10 of the Employment Act. I have therefore adopted the dates given by the Claimant in this regard.

12. Further, the Respondent stated that the Claimant worked half day but did not provide any documentation showing the hours worked on each day. The Respondent did not call any evidence to controvert the Claimant's evidence that he worked from 6.00 am to 6.30 pm on each day. Moreover, the Court considered the tasks assigned to the Claimant and came to the conclusion that these tasks could not be accomplished in half a day. Consequently, I find that the Claimant worked full day continuously for more than a month and that therefore his employment was converted from casual employment to term contract by operation of law.

13. In his written submissions the Respondent questioned the Claimant's right to bring a claim for unfair termination of employment in view of the fact he had served for less than thirteen months envisaged under Section 45(3) of the Act. This provision has however been subjected to constitutional scrutiny in the case of **Samuel G. Momanyi Vs. the Hon. Attorney General & SDV Transami Kenya Ltd (2012 eKLR)** and declared unconstitutional on the ground that it is discriminatory against employees who have served for less than thirteen months. It cannot therefore be used to deny the

Claimant his right to sue for unfair termination of employment.

14. Having established the status of the Claimant's employment and his right to bring this claim I will now deal with the remedies sought. The Claimant claimed 12 months' salary as compensation for unfair termination.

15. Section 43 of the Employment Act, 2007 provides that:

***(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

16. The Claimant testified that his employment was terminated after he asked for a letter of appointment. The Respondent did not controvert this evidence or offer an alternative reason for termination of the Claimant's employment. I therefore find that the termination of the Claimant's employment was unfair within the meaning of Section 45 and award him three months' salary in compensation. I also award him one month's salary in lieu of notice.

17. The Claimant also claimed house allowance for his entire period of service. He claimed that at recruitment, the Respondent had promised to provide him with accommodation, a promise which was not honoured.

18. Section 31(1) of the Employment Act provides that:

***An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

19. The Claimant was paid a daily wage of Kshs. 250 which would translate to a monthly pay of Kshs. 7,500. The Respondent produced the Regulation of Wages (General) (Amendment) Order, 2010 which set the minimum monthly salary (exclusive of house allowance) applicable to the position held by the Claimant at Kshs. 6,743. Loading a housing allowance of 15% to this salary would result to 7,754 which I have adopted as the Claimant's gross monthly salary for purposes of this claim. The figure of Kshs. 254 being the difference between the monthly salary of Kshs. 7,500 and the obtaining minimum salary of Kshs. 7,754 (inclusive of house allowance) will be treated as an underpayment. That dispenses with the claim for house allowance.

20. Having established conversion of the Claimant's employment to term contract, the Claimant is also entitled to prorata leave which though not specifically pleaded is his right under Section 28(1)(b) of the Employment Act.

21. The final effect of this Award is therefore as follows:

- a) Three months salary in compensation for unfair termination.....Kshs. 23,262
- b) One month's salary in lieu of notice.....7,754
- c) Salary underpayment (254x6).....1,524
- d) Prorata leave.....2,709

**Total.....35,249**

The Respondent will pay the costs of this case.

Orders accordingly

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF MAY 2013**

**LINNET NDOLO  
JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**