



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO.1078 OF 2011**

PETER KIOKO MUTIO ..... CLAIMANT

**-VERSUS-**

M/S. BOB MILLS LIMITED .....RESPONDENT

**JUDGEMENT**

By a Memorandum of Claim filed in Court on 5<sup>th</sup> July 2011 the Claimant herein **PETER KIOKO MUTIO** has commenced suit against the Respondent alleging unlawful termination of employment and failure to pay him terminal benefits.

**He seeks the following orders;-**

- a. 30 days salary pay in lieu of notice at 367/35 per day = Kshs. 11,020.50
- b. Underpayments of wages as per legal notices = Kshs. 23,048.65
- c. One day worked on 12<sup>th</sup> July 2010 = Kshs. 367.35
- d. Annual leave for 1 year 6 months (31.5) days = Kshs. 11,571.00
- e. Weekly rest days (80) days at 367/35 per day = Kshs. 29,388.00
- f. Severance pay for 1 year (15) days at 367/35 per day = Kshs. 5,510.25
- g. 19 Public Holidays at 367/35 per day = Kshs. 6,979.65
- h. 12 Months' salary compensation at 367.35 = Kshs.132,246.00
- i. An order that the Respondent do issue a Certificate of Employment to the Claimant.
- j. Cost of action.
- k. Interest from 12<sup>th</sup> July, 2010 when the Claimant was terminated until the amount is paid in full.

The Respondent filed its Reply to the Memorandum of Claim on 20<sup>th</sup> July 2011 in which it denies the claim and alleges that the Claimant was employed on casual terms and further that the Claimant absconded from work.

The case was heard on 2<sup>nd</sup> December 2012. The Claimant appeared in person while the Respondent was represented by Mr. Gathu.

The Claimant testified that he was employed by the Respondent on 22<sup>nd</sup> December 2008 until 12<sup>th</sup> July 2010 when he was dismissed for no reason, that he was not paid anything. He testified that he was paid Shs.250/= per day at the start.

The pay was increased to 295 in August 2009 which is the amount he earned until he left employment. He alleged that he was underpaid, was not given notice, leave for 1 year 6 months, and was never paid when off duty. He further testified that he was no paid service and was paid normal rate of pay for work done on public holidays. That he worked on all public holidays including Christmas day. He worked as a machine attendant on a machine called KANATA, a cutting machine, cutting packets. He prayed for orders as claimed in his Memorandum of Claim. He further testified that he was not issued any documents to show that he was working for the Respondent.

Under cross examination the Claimant stated that he went to school up-to class 8, that he did not go for any training and that he learnt on the job. He stated he was sent home by a Mr. Mohan, the owner of the Company on 12<sup>th</sup> July 2010. He stated that he worked on 2 or 3 machines, attending to the machines and was paid weekly at a daily rate of Shs.250/= the rate for a General Labourer. He stated there is no month that he worked more than 24 days. He was given 1 day off every week on either Wednesday or Saturday and was off 4 days a month. He said he did not ask for Certificate of Service as he was never allowed back into the factory.

The Respondent called **TECLA ADEKA ADIKA**, RW1 the Human Resources Officer. RW1 testified that the Claimant was a General Worker and not a Machine Attendant or Machine Operator, that the Claimant did not know how to read English and Machine Operators must know how to read as they have to read orders from clients, that the machine operator must be a form 4 level and must produce certificate or diploma and must also have experience in operating the machine. The Claimant did not have any certificate. RW1 further testified that the Respondent does not employ machine attendants. The Claimant worked in polythene division which operates 24 hours in 2 shifts, a morning shift and a night shift and works on public holidays. Employees are paid overtime at double rate for work done on public holidays. Claimant did not work for more than 20 days in any month except July. Claimant was paid as general labourer at Shs.250/= in 2008 and 294.90 in 2009. In 2010 the rate was increased to 325/=. RW1 referred to Respondents exhibit 1 which are forms showing dates worked by the Claimant. She stated the forms were printed in advance and signed at the time of receiving payment. The forms are for casual employment. RW1 stated the Claimant worked up-to 12<sup>th</sup> July 2010 and did not report to work thereafter. He was declared a deserter on 16<sup>th</sup> July 2010 after failing to report to work on 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> July 2010. She stated Mr. Mohan Kumar is the General Manager, that he does not have direct contact with employees and would not be able to identify the Claimant. RW1 stated the Respondent has never gone to collect his Certificate of Service.

Cross examined by the Claimant RW1 responded that she joined the Company in 2009 and was not telling a lie. She denied telling the Claimant to do what he likes.

Examined by the Court, RW1 stated that Claimant was counting and packing packs that had been produced by the machine, that he worked with a machine operator and that the Company does not hire attendants. She stated that Claimant did not take annual leave and that the department worked for 6 days.

I have considered the pleadings, the testimony of the witnesses, the written submissions and the law. The issues for determination are the following:-

1. Whether the Claimant was a casual employee or not.
2. Whether the Claimant was a general labourer or a machine attendant.
3. Whether the Claimant was unfairly terminated or absconded duty.
4. Whether the Claimant is entitled to the prayers sought.

## 1. Whether Claimant was a casual employee or not

A casual employee is defined in Section 2 of the Employment Act 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.”***

Section 37 of the Act provides for conversion of casual employment to term contract as follows:-

(1)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. performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,

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) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(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 been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 88 of this Act shall apply.

Both the claimant and the Respondent are in agreement that the Claimant was engaged by the Respondent in December 2008 and worked for the Respondent until 12<sup>th</sup> July 2010. From the provisions of Section 37, the Claimant had worked for more than 3 months' intermittently and therefore his terms of engagement had converted from casual to term contract by operation of the law.

I thus find that the Claimant was not a casual employee but a term contract employee engaged on monthly basis as provided in Section 37(1) of the Act.

## 2. Whether the Claimant was a General Labourer or a Machine Operator

The Respondent's position is that the Claimant was a general labourer. RW1 testified that the Respondent does not employ any machine attendants, that it employs machine operators who must be form 4 level and must in addition have undertaken training and achieved either a certificate or diploma, and in addition, must have experience in running the machine, that the Claimant who is a

Class 8 level did not qualify to be a machine operator. RW1 upon being questioned by the Court stated that the Claimant's job was counting and packing packs that had been produced by a machine and that he was working with a machine operator. The Claimant on his part said he was a machine attendant and worked on a machine called KANATA which is a cutting machine. That he used the machine for cutting packets.

The Regulation of Wages and Conditions of Employment (General) Order defines machine attendant as follows:-

**Machine Attendant** sets up and operates automatic or semi-automatic machines used for cutting, punching, pressing or moulding materials (such as wood, textiles, rubber or plastic), or spinning, weaving and blending textile fibres; he feeds machines with material to be processed, starts machines and observes proper flow of material, examines products and stops machines when products do not meet certain standards and adjusts and cleans machines to ensure that products meet the standards set for mass production.

A General Labourer on the other hand includes a cleaner, sweeper, gardener, children's ayah, house servant, day watchmen an messenger.

From the description by the Claimant and RW1 of the work done by the Claimant, it is clear that the Claimant did not perform any of the work described under the definition of general labourer. I find that he performed the tasks defined under the job description of machine attendant.

For these reasons I find that the Claimant was a machine attendant.

### **3. Was the Claimant unfairly terminated or did he abscond duty?**

The Claimant in his testimony stated that he was dismissed by a Mr. Mohan who according to him is the owner of the factory. RW1 admitted that Mr. Mohan Kumar is the General Manager, to whom RW1 reported. According to RW1 Mr. Mohan has no direct contact with employees and would not be able to identify the Claimant.

I find the testimony of RW1 to be presumptuous. She cannot speak about what the General Manager knows or does not know. There was no reason given why Mr. Kumar was unable to attend Court to deny or confirm the allegations of the Claimant. The averments of RW1 relating to knowledge of Mr. Kumar cannot be authenticated and cannot therefore qualify to contest the evidence given by the Claimant.

In the Answer to Memorandum of Claim at Paragraph 9, the Respondent alleged that its investigations revealed that the Claimant had gone to work for another Company after absconding duty on 12<sup>th</sup> July 2010. No evidence was adduced by the Respondent to prove this allegation. The Claimant was not even asked in cross examination if he went to work for another Company after absconding duty at the Respondent Company.

There is also no evidence that the Claimant was terminated in the manner prescribed in Section 41 of the Employment Act.

I find that the Respondent has not controverted the allegations of the Claimant that he was dismissed by Mr. Mohan.

For these reasons I find that the termination of employment of the Claimant by the Respondent was unfair.

### **4. Is the Claimant entitled to the prayers sought?**

The Claimant has claimed the following:-

- a. 30 days salary pay in line of notice at 367/35 per day = Kshs. 11,020.50
- b. Underpayments of wages as per legal notices = Kshs. 23,048.65
- c. One day worked on 12<sup>th</sup> July 2010 = Kshs. 367.35
- d. Annual leave for 1 year 6 months (31.5) days = Kshs. 11,571.00
- e. Weekly resting days (80) days at 367/35 per day = Kshs. 29,388.00
- f. Severance pay for 1 year (15) days at 367/35 per day = Kshs. 5,510.25
- g. 19 Public Holidays at 367/35 per day = Kshs. 6,979.65
- h. 12 Months' salary compensation at 367.35 = Kshs.132,246.00
- i. An order that the Respondent do issue a Certificate of Employment to the Claimant.
- j. Cost of action.
- k. Interest from 12<sup>th</sup> July, 2010 when the Claimant was terminated until the amount is paid in full.

I will consider each head separately.

**a. 30 days salary in lieu of notice**

Having found that the Claimant was on term contract by virtue of operation of the law vide Section 37(1) of the Employment Act and having further found that he was unfairly terminated, the Claimant is entitled to payment of 1 months' salary in lieu of notice as provided in Section 49 (1) (a) of the Act.

I therefore award the Claimant Kshs.10,285.80 being the daily rate of Shs.367.35 times 28 as provided in Section 35(1) (c).

**b. Under payments**

Having found that the Claimant was paid as a general labourer when he was a machine attendant, I find that he is entitled to underpayments. In her testimony RW1 admitted that the underpayments claimed by the Claimant resulted from the fact that he was paid as a general labourer while he calculated his pay based on the wages of a machine attendant. The sum of Kshs.23,048.65 as tabulated by the Claimant was not contested by the Respondent. I have checked the figures against the wages orders appended to the Claimant's Memorandum as well as the Response and find them to be correct.

I therefore award the Claimant the sum of Shs.23,048.65/= as underpayment.

**c. 1 day worked on 12<sup>th</sup> July 2010**

The Respondent did not contest that the Claimant worked on 12<sup>th</sup> July 2010 or that he was not paid for that day. Since the claim is not contested, I award the Claimant the sum of Shs.367.35 being daily wages for 12<sup>th</sup> July 2010.

**d. Annual leave for 1 year 6 months**

Having found that the Claimant was on monthly term contract and having worked from 20<sup>th</sup> December 2008 to 12<sup>th</sup> July 2010, the Claimant was entitled to annual leave at the rate of 1.75 days per month worked. The Claimant worked for 18 complete months and is therefore entitled to (18x1.75) 31.5 leave days. At shs.367.35 per day, this amounts to Kshs.11,571.50. I award him the said sum in lieu of annual leave.

**e. Weekly Rest days**

Both the Respondent and the Claimant are in agreement that the Claimant was paid as a casual for days worked only. Both parties agree that the Claimant worked for 6 days a week and therefore he had one unpaid rest day per week. Section 37 (2) of the Employment Act provides that where a casual employee works for 6 days he is entitled to payment on the 7<sup>th</sup> day which is his rest day. Having failed to pay the Claimant on his rest days, the Claimant is entitled to the same. From the forms attached to the Respondent's answer to Memorandum of Claim at Pages 6 to 75, the Claimant worked for 69 weeks. He is therefore entitled to payment for 1 rest day for each of the 69 weeks at the daily rate of 367.35. This amounts to Kshs.25,347.15. I award the Claimant the said sum.

**f. Severance Pay**

According to Section 40 of the Employment Act the Claimant is not entitled to Severance Pay as he was not declared redundant. He is however entitled to Service Pay as the Respondent has not proved that the Claimant was a member of NSSF or any other retirements scheme. Having completed 1 year the Claimant is entitled to Service Pay at the rate of 15 days as is the agreed practice.

I therefore award the Claimant the sum of Shs.5,510.25 being 15 days salary.

**g. 19 Public Holidays**

RW1 testified that the Respondent paid all employees who worked on public holidays at the rate of double the daily rate. The Claimant has not demonstrated that he worked on any public holiday and was not paid at double the normal hourly rate.

I find that this claim has not been proved by the Claimant and dismiss the same.

**h. 12 months compensation**

The Claimant seeks maximum compensation of 12 months. Having found that he was unfairly terminated he is entitled to compensation.

I however find 12 months compensation for a person who worked for under 2 years excessive and unreasonable. I find that 2 months' salary is reasonable compensation taking into account the manner in which he was terminated and the fact that he was subjected to casual terms of employment for the whole of the period he worked for the Respondent.

I therefore award him compensation in the sum of Shs.22,041 being 60 days wages.

**i. Certificate of Service**

Having worked for more than 4 weeks, the Claimant is entitled to a Certificate of Service as provided in Section 51 of the Employment Act.

I therefore direct the Respondent to issue the Claimant a Certificate of Service within 30 days from the date of judgment.

**j. Costs**

Each party shall bear its costs.

In summary therefore I give judgement to the Claimant against the Respondent as follows:-

i. **Kshs.98,171.70/=**

ii. ***Certificate of Service***

Orders accordingly.

Read in open Court this 27<sup>th</sup> day of June 2013

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**Peter Kioko Mutiso** Claimant present in person

**Muchiri h/b for Gathu** for Respondent