



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 25 of 2012

STEPHEN WAWERU MAINACLAIMANT

VERSUS

NICEY NICEY MILLERS LTD.RESPONDENT

J U D G M E N T

The claimant in this suit seeks the Courts order that the respondent pays him terminal benefits in the sum of Kshs.25,468, damages for wrongful dismissal, costs of the suit and interest thereon.

The claimant avers that he was employed by the respondent as a casual labourer at a monthly salary of Kshs.8000. He served the respondent for 6 months when his services were terminated summarily when he sustained serious injury to his finger while he was in the course of his duty. Upon dismissal, the respondent refused to pay him his terminal dues which he identified as unpaid salary for June, 2010, one month's salary in lieu of notice, pro-rate leave for five months and leave travelling allowance for the year 2010.

At the hearing the claimant testified that he had a labour card which he filled every day as he reported to work. He further stated that he injured his finger on 16th June, 2010 while sweeping the floor at his place of work. He reported the matter to his supervisor who gave him Kshs.500 for first aid at a nearby clinic.

On 26th October, 2012 he returned to the same hospital but was told more money was needed for treatment so he applied for a salary advance in the sum of Kshs.3,000.

He testified that his finger took 3 months to heal and when he returned to work in July, 2010 the manager refused to assign him light duties but instead referred him to the Insurance for him to claim compensation for the injury to his finger.

He further stated he was not a regular worker and that he could be out of work for one or two weeks.

He stated that his salary was Kshs.3000 per week paid through his account at Equity Bank. It was his evidence that he was never given any notice of termination of employment, never went on leave and was never paid any leave travelling allowance.

In cross examination he confirmed that he was a casual worker and used to work weekly and was paid at similar interval.

He stated that by the time of his alleged termination he had worked for the respondent for 5 months and by the time he got injured he had worked for 2 weeks in that month. He admitted that he had nothing to show his services were terminated. He also said he did not have a letter from a doctor recommending he

should be assigned light duties. He denied deserting work since he went to the Company 3 times to look for work but was not assigned any.

The respondent disputed the claimant's claim and at the trial called one witness a Mr. Peter Mwangi Njuguna who stated he was the proprietor of the respondent. He admitted that the claimant got injured and it was the respondent who took him to hospital and paid his hospital bills. It was his testimony that the claimant reported back to work after some time and was issued with insurance claim forms to file and take to the Insurance Brokers and never returned thereafter.

According to Mr. Njuguna, he was the one who recruits and terminates workers and not the manager. According to him the claimant should have come to look for him for work since he as the one who employed him.

It was his evidence that the claimant asked for a salary advance to be paid when he resumed work once healed but never came back. According to him, though he had no proof of payment in court, every worker was paid weekly and there was no way the claimant could have stayed since March, 2010 without being paid.

According to him the claimant had worked for only five months could not be paid leave or travelling allowance.

It is not in dispute between the parties that the claimant was a casual worker since he himself throughout his testimony was clear in his mind that he was a casual worker and was paid weekly. It is further not in dispute that as at the time of cessation of employment relationship the claimant had worked for approximately 6 months. What is unclear and the basis upon which this dispute will be determined is the circumstances under which the claimant left the respondent's employ. Was he terminated or did he abscond.

According to the claimant, he responded to duty but was not assigned any work instead he was asked to see the insurance since they were the ones who could compensate him after his injury. The respondent for its part contends that the respondent absconded duty after he was given insurance claim forms to fill and take to the brokers but never returned.

On the part of the claim, it is curious to note that whereas the issue of his injury in the course of employment was taken up by his counsel vide a demand letter dated 11th April, 2011 (SWM 3), no mention is made of the issue of wrongful termination of the claimant's employment by the respondent. On the other hand, on the part of the respondent, nothing was shown or produced to show any effort was made to look for the claimant in order to justify the claim of absconding duty. Neither party has therefore been of any useful assistance to the Court on this critical point.

As stated earlier, both the claimant and the respondent are clear in their minds that the claimant was a casual employee. Under Section 2 of the Employment Act, a casual employee means a person the terms of whose engagement provide for 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 testified and was confirmed by the respondent that he was a casual employee but was paid weekly. Further it is in evidence that prior to the cessation of employer – employee relationship, the claimant had worked for the respondent approximately 6 months in the circumstances, although the parties were clear in their minds that the claimant was a casual employer, the Court relying on the definition contained in Section 2 of the Employment Act above, finds that the claimant was not a casual employee. He have been a casual employee at the onset but not subsequently.

Section 37 (1) of the Employment Act provides that where a casual employee works for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35 (1) (c) provides that where a contract is to pay wages or salary Periodically at intervals of or exceeding one month, such contract is terminable by either party at the end of the period of 28 days next following the giving of the notice in writing.

From the foregoing, the claimant having been deemed to be a month to month employee by operation of law, it was incumbent on the respondent to terminate his services for absconding duty after giving him the requisite notice. The claimant having been attuned to his casual status for close to six months and where his pay was posted weekly was in a more disadvantaged position to pursue conversation of his status to a month to month employee.

In the circumstances the court finds that the respondent ought to have given the claimant month's notice to termination of employment should he default to return to work. The Court therefore awards him one month's salary in lieu of notice. The claim for leave, leave allowance are disallowed as the claimant had by the time of cessation of the employment relationship, had not served for a year as required by law. It is so ordered.

Dated at Nyeri this 4th day of June 2013.

**Abuodha J. N.
Judge**

**Delivered in open Court in the presence of for the Claimant and
.....for the Respondent.**

**Abuodha J. N.
Judge**