



**REPUBLIC OF KENYA**  
**INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1890 OF 2011**

**SAMUEL LUKAYO AGUMI.....CLAIMANT**

**-VERSUS-**

**HACO INDUSTRIES LTD. ....RESPONDENT**

**Mrs. Kariuki for Claimant.**

**Mr. Njagi for Respondent.**

**JUDGMENT**

The suit was filed on 11<sup>th</sup> November, 2011 by way of a Memorandum of Claim dated 9<sup>th</sup> November, 2011.

The Claimant seeks payment of terminal dues to wit:

- i. *One month salary in lieu of notice.*
- ii. *Payment in lieu of leave days for seven years.*
- iii. *House allowance calculated at 15% of basic salary for seven years and;*
- iv. *Compensation for unlawful dismissal.*

The facts leading to the suit may be summarised as follows:

That the Claimant was employed by the respondent on 2<sup>nd</sup> November, 2000 as a store attendant at a monthly salary of Kshs.7,800/=. That he was not given a letter of appointment.

The he worked continuously until the 15<sup>th</sup> February, 2009 when the Respondent maliciously, wrongfully and unlawfully accused him of theft by servant and caused him to be charged with a criminal case being **RM Criminal Case No. 41 of 2008** at Makadara Court.

That the Claimant was acquitted of the charges under **Section 202** of the **Criminal Procedure Code** (CPC) on 16<sup>th</sup> February, 2009.

The Claimant was summarily dismissed and therefore was not given notice or paid in lieu thereof. He claims the sum of Kshs.7,800/= in lieu of notice. He was not given annual leave for the entire period of seven years and therefore claims payment of twenty-one days salary for each completed year of service in

lieu of leave, in the sum of Kshs.38,220/=.

That he was not housed by the Respondent and was not given house allowance in terms of the General Wage Order for the period at the rate of 15% of the basic wage. He claims the sum of Kshs.98,280/= in this respect.

The Claimant denies that he stole anything in the course of his employment and states that he was not given opportunity to explain himself before the dismissal. For this reason the dismissal was both substantively and procedurally unfair and the court should grant him maximum compensation in respect thereof.

The Claimant testified under oath in support of his case and relied on the various attachments to the Memorandum of Claim. He told the court that upon his acquittal he was refused to return to work by the security officers at the Respondents premises. That since he had not gotten a letter of dismissal he still believed he could return to work. It was only after he was refused entry when he decided to file this matter in court.

He denies that he was employed as a casual stating that the nature of his work was always available and therefore he worked six days a week from 8 a.m. to 5 p.m. and was paid overtime whenever he exceeded those hours.

He gave an example of Saturdays which he worked from 8 a.m. in the morning to 7 p.m. in the evening. He was not told whether the Kshs.7,800/= had any house allowance component and thus he believes he is entitled to payment of the house allowance at the rate of 15% of the said wage.

The Respondent filed a Memorandum of Response dated 28<sup>th</sup> November, 2011 on 18<sup>th</sup> November, 2011. The Respondent called one **Justine Nyaga**, the current Human Resource Manager in support of its case.

He told the court that he joined the Respondent on 1<sup>st</sup> October, 2010 when the Claimant had already left the Respondent. That he relied on the Respondent's Human Resource records in his testimony.

He testified that the claimant was a temporary employee from the documents in his custody. He told the court that the Claimant was not given annual leave because he was a casual. He added that if it is true that the Claimant worked continuously for seven years, it was on a willing employee and willing employer basis.

He agreed that the Respondent was a manufacturing company and though the volume of work done by casuals fluctuated, it did not end as such. That the Claimant carried components from the factory to the store and issued them the assemblers. That this is the core business of the Respondent and was continuous in nature.

He said under cross-examination that he had no record to show that the Claimant was a casual.

The witness stated that casual labourers at the factory were employed on a needs basis and were paid upon completion of piece work or on a weekly basis. That from 2007 the company started outsourcing temporary labour but earlier, the Respondent hired them directly.

Furthermore, the witness told the court that the daily rates paid to the casuals were inclusive of house allowance and therefore the Claimant was not entitled to any.

The witness was not able to testify with respect to the circumstances that led to the arrest and termination of the Claimant's job because he was not employed by the Respondent at the time.

He told the court further that in 2009 the company stopped outsourcing casual labour and offered them contracts of service.

The testimony by the Claimant that he worked continuously for the Respondent as a store attendant remains largely uncontroverted because Mr. Justine Nyaga who testified on behalf of the Respondent was not privy to the facts of the case having joined the Respondent after the Claimant had stopped working there.

Equally, the witness was unable to refute the testimony by the Claimant that he was not involved in any way with theft by servant as alleged or at all. The acquittal by the magistrate court serves to corroborate his testimony as he was found to have no case to answer and was not put on his own defence.

The Respondent readily admitted that the Claimant was not granted leave for the period he worked because he was a casual. The Respondent was however unable to produce any documentation confirming that indeed the Claimant was a daily paid casual.

Furthermore, no evidence was tendered by the Respondent to counter the Claimant's testimony that he was arrested at the instance of the Respondent and upon acquittal he was shut-out of the Respondent's premises and lost his job accordingly.

It is the court's considered view that the Claimant worked continuously for a period of seven years for the Respondent and was therefore not a casual within the meaning of either the **Employment Act Cap 226** now repealed or **the Employment Act No. 11 of 2007**.

That he was therefore entitled to twenty one days leave for the entire period of his service. The Respondent admits that the Claimant was not granted such leave and the court finds that he is entitled to payment in lieu of annual leave for seven years served.

The claim for housing allowance has not been sufficiently proven and the court dismisses the same.

With regard to the claim for compensation, the court observes that the Claimant had unblemished record of seven years in the services of the Respondent. That the Claimant lost his job on the basis of unfounded allegations which led to his arrest.

That the Claimant was not prosecuted for want of evidence and thus he was unnecessarily humiliated leading to loss of his source of income.

That his attempts to return to work upon acquittal was rudely rebuffed instead of the Respondent according him an opportunity to explain why his employment should not be terminated.

The court is satisfied that the summary dismissal of the Claimant was substantively unlawful and procedurally unfair within the meaning of **Section 45 (2) (a) and (c)** of the Employment Act.

The court therefore directs the Respondent to pay:

1. *Kshs.7,800/= being one month's salary in lieu of notice;*
2. *Kshs.38,230/= being payment in lieu of seven years leave;*
3. *Eight months salary as compensation for unlawful/unfair dismissal in the sum of Kshs.62,400/=.*

*Total award Kshs.108,430/=.*

4. *Costs of the suit.*

It is so ordered.

***Dated and delivered at Nairobi this 14th day of August, 2013.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**