



Republic OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1109 OF 2010

Mercy Wangari kibara 1st claimant
Anne Marende 2nd claimant
Hellen Muranguri 3rd claimant
Irene Njeri Marubu..... 4th claimant
Edwin Otieno 5th claimant
Lucy Wanjiru Mburu 6th claimant
Caleb Muchina 7th claimant
Eunice Gathoni Ngari 8th claimant
Catherine Wambua 9th claimant
Joyce V. Kitungulu 10th claimant
Mary Naomi Njeri 11th claimant
Joseph Mutuku Mbuti 12th claimant

versus

Beiersdorf (BDF) Each Africa Limited Respondent

JUDGMENT

The Claimants herein filed their Claim against the Respondent by way of Memorandum of Claim dated 16th September 2010 and filed in court on 23rd September 2010. They have each signed a Verifying Affidavit in support of the Claim.

The Claimants allege that they were employees of the Respondent from 2002 to the end of May 2010, that they were casual labourers and were each earning a basic pay of Kshs.8,900 at the time of termination of

employment.

They allege that they were not granted annual leave during all the period they worked for the Respondent. That they were terminated after the Respondent received a letter from their advocate seeking confirmation of their employment and payment of severance pay following reports that the company was changing hands. They were terminated without notice and without payment for days worked. They each claim the following;

- i. Salary for May 2010 Kshs.8,900.00
- ii. One months salary in lieu of notice Kshs.8,900.00
- iii. Accrued leave for 8 years Kshs.49,840.00
- iv. Gratuity at 25% of basic salary for 96 months Kshs.213,600.00

- v. Damages for unlawful termination Kshs.100,000.00
- v. **Total Kshs.381,240.00**

They also prayed for costs and interest, and any other relief the Honourable court deems fit to grant.

The Respondent filed a Memorandum of Defence dated 11th October 2010 and filed in court on 12th October 2010.

The Respondent avers that the Claimants were employed on temporary terms of 2 months and the contracts were renewed whenever the Claimants were subsequently engaged, that the Claimants were never entitled to annual leave as their employment was temporary. The Respondent further avers that it sought to introduce the Claimants to an outsourcing company for temporary/casual employees who would offer them permanent employment and recommend them to different organizations including the Respondent for casual/temporary jobs.

The Respondent denies terminating the Claimants jobs and alleges it is the Claimants who declined the invitation to join the outsourcing company. The Respondent also denies that it refused, failed or ignored to pay the Claimants their wages for May 2010 and further denies owing each of the Claimants the sum of Kshs.381,240 as alleged at paragraph 8 of the Memorandum of Claim. The Respondent prays that the Claim be dismissed with costs.

The Respondent filed a Supplementary Memorandum of Claim on 29th April 2010 in which it attached copies of identity cards, contracts and certificates of fitness for each of the Claimants.

The case was first mentioned in court before Justice Mukunya (now retired) on 2nd December 2010 when the case was fixed for hearing on 7th April 2011. On 7th April 2011 the hearing of the case was rescheduled to 11th October 2011 to enable the Respondents file their documents by way of a Supplementary Memorandum of Defence.

On 11th October 2011 Justice Mukunya was sitting in Mombasa and the case was mentioned before Justice Kosgei who rescheduled hearing date to 8th May 2012 when the court heard the testimony of HELEN WANGARI MURAGURI, the 3rd Claimant and EDWIN OTIENO ALOO, the 5th Claimant.

The case was then adjourned and fixed for further hearing on 18th September 2012 by which time the court had been reconstituted and the file was allocated to me for hearing and determination.

Mr. Kimani held brief for Mr. Gathii for the Claimants while Mr. Omulama appeared for the Respondent. They both to proceed with the case from where it had reached.

On that day I heard the testimony of Naomi Mary Njeri, the 11th Claimant, Mercy Wangari Kibara, the 1st Claimant, Joyce Vugutsa Kitungulu the 10th Claimant and Caleb Muchina, the 7th Claimant.

Parties then agreed that Mr. Kimani files witness statements for the remaining six Claimants following which he would close the Claimants' case. The case was adjourned to 26th October 2012 for hearing Respondents case.

On 26th October 2012 Mr. Kimani appeared for the Claimants and Mr. Omulama appeared for the Respondent. Mr. Kimani had not filed the witness statements and sought an extension of 2 weeks which was granted and parties directed to take a hearing date at the registry.

CW1 Helen Wangari Muraguri testified that she joined the Respondent 14th November 2003 as a casual employee and was paid a daily wage of shs.300, that they were paid on Fridays. Later the payment was made through Mpesa. She referred to the Mpesa statements attached as Claimant's appendix 1. She signed temporary employment forms. She left employment in 2010. That the employees were handed over to Manpower as Respondent company was facing bankruptcy. She asked for payment of her dues instead of being handed over to the new company. She was then terminated on 2nd June 2010. She asked to be employed on permanent terms without success. She was not paid terminal dues. She prayed for payment of benefits such as leave from 2003, costs of suit, compensation and salary for May 2010. Under cross examination she stated she worked on temporary terms and signed temporary employment forms, that her payment was on daily rate, but paid weekly, that she was not paid her May salary, that some employees agreed to go and work for Manpower, that she had no letter of termination, that she demanded damages for unfair termination.

CW2 EDWIN OTIENO OLOO the 5th Claimant testified that he was employed on 25th April 2004 on temporary basis. He was paid Shs.350/= per day every Friday. He was paid by mpesa. He referred to his statement annexed to Claimants Appendix 1. He never went on leave. He signed temporary employment forms. The Respondent always promised to employ them on permanent terms. The Respondent wanted to hand them over to Manpower. They instructed their lawyer to write demand letter to the employer. On receipt of the demand letter the employer terminated their service on 2nd June 2010. The termination was unfair. They were not given notice. He was not paid terminal dues and payment for days worked. He claims terminal dues and costs.

Under cross examination he stated as follows; He worked between 2004 and 2010, he was paid on weekly basis but on daily rates, they worked even on Sundays, he never asked to be employed on permanent terms, he signed contract for 2 and a half months at a time but the employment was renewed from time to time. He decided to come to court instead of being handed over to Manpower. He worked continuously from 2004 to 2010. He was not paid May 2010 salary.

CW3 Naomi Mary Njeri, the 11th Claimant testified that she currently works with Kenyatta University but before that she worked for the Respondent at Industrial Area. She was labeling nivea, solea and limara. She started working in 2001. She was earning Shs.350 per day. At first she was paid cash but after about 2 years payment was made by Mpesa. She worked from Monday to Saturday. Whenever there was a lot of work she worked on Sunday. They reported to work at 7am and left at 5pm. Sometimes they left at 6 pm. They did not get annual leave. They were not paid overtime. She worked until June although she does not recall the date. They were transferred to Manpower. She demanded payment of terminal benefits for the period worked before going to Manpower but the Respondent declined. They approached a lawyer. After that the Respondent said they cannot continue employing the Claimants because they had taken the Respondent to court. She asked for payment for years worked and 3 days which were not paid. She also prayed for notice and leave, gratuity at 25% and damages for unfair termination. She also prayed for costs and interest.

Under cross examination CW3 stated that she was employed from 2001 to 2008 and was being paid shs.350. That she was a casual employee, that she did not accept employment by Manpower because the Respondent did not pay their terminal benefits for the period worked, that no explanation was given to them on why they should be employed by Manpower. She denied withdrawing money from Mpesa on 3rd May. She was informed verbally of her termination. She signed many different temporary employment forms between 2001 and 2008. What is attached is only one of them. Each contract was for

75 days.

CW4 Mercy Wangari Kibara, the 1st Claimant testified that she started working for the Respondent in November 1999. She was labeling nivea and solea. Her starting wage was Kshs.175 per day. At the time she left she was earning shs.350 per day. She worked from Monday to Saturday from 7am to 5 pm. Once in a while she worked up to 6 pm. They were paid every Friday. She worked until 2nd June 2008. They were never paid overtime or leave. She did not resign. She was told orally to leave as the company could not continue employing her as she had filed a case against the company. Manpower had been hired to recruit the employees and they had to sign forms with Manpower. She was not paid for the last week worked. She claims notice, leave, gratuity, damages and last working week's wages. She also prayed for costs and interest.

Under cross examination CW4 stated her contract provided for termination without reason. Her last working day was 2nd June 2010, that she did not go to Manpower as she wanted her benefits before going to Manpower. She worked continuously without leave, off days or overtime.

CW5 Joyce Vugutsa Kitungulu, the 10th Claimant testified that she worked for the Respondent from 2002 to 20th June 2008. She was labeling nivea, solea and other items. She worked from Monday to Saturday or Sunday from 7am to 5 pm, and sometimes upto to 6 pm. She was not paid overtime only permanent employees were paid overtime. Her last pay was shs.350 per day and was paid weekly through Mpesa. She did not resign. She was transferred to Manpower but demanded payment of terminal dues. She was required to sign manpower forms without being given any details. She was not allowed to work after her lawyer sent a demand letter to the Respondent. She was not paid for the last week worked. She prayed for payment of service, pay for last week worked, notice, leave, gratuity, damages for unlawful termination, costs and interest.

Under cross examination CW5 stated that they were offered lunch and the cost deducted from their pay, that she worked for 8 years, that they were not paid for days not worked, that there were no breaks, that they signed temporary engagement forms but this was rare, she did not refuse to be transferred to Manpower, she only asked for her benefits for years worked, that they were given manpower forms which did not indicate the rate of pay. She stated she was not paid shs.2,000/= for the last week worked.

CW6 Caleb Muchina, the 7th Claimant testified that he worked for the Respondent from 2004 to 2010. He worked in production producing gel, lotion and body stray products and nivea gel, lotions and Limara sprays, they worked from Monday to Friday. On other weeks they worked up to Sunday from 7am to 5pm. They were paid weekly. His first pay was shs.270 per pay and payment was in cash and later by Mpesa. He was never paid overtime. He did not take leave, he was never given notice for termination. He prayed for service for years worked, leave, notice over time, damages for unlawful termination, costs and interest.

Under cross examination CW6 stated that he worked for 6 years from 2004 to 2010, he signed the temporary contract form, he worked in production, plant hygiene, store and packaging,. There were days they did not work when there was no power or water. They were only paid for days worked. He left employment on 2nd May, 2010 when he was told by the supervisor to go home. He was informed in April that he would be transferred to Manpower at a meeting with directors of the Respondent and Manpower. That work with Manpower was to be fresh employment. He seeks payment for the last week worked which is Kshs.2,000.

The Claimant filed witness statements for the other 6 Claimants. In the witness statements the 6 Claimants, apart from deponing on the circumstances under which they were dismissed, which is similar to those of the 6 Claimants who testified, state that they were terminated on the same date and earned same wages as the 6 Claimants who testified. They further state that;

- i. Joseph Mutuku Mbuti, 12th Claimant was employed by the Respondent in 2000.
- ii. Catherine Mutanu Wambura the 9th Claimant was employed by the Respondent in 2003.

- iii. Irene Njeri Marubu, 4th Claimant was employed by the Respondent in 2000.
- iv. Eunice Gathoni Ngari, 8th Claimant was employed by the Respondent in 2006.
- v. Lucy Wanjiru Mburu the 6th Claimant was employed by the Respondent in 2006.
- vi. Anne Marende the 2nd Claimant was employed by the Respondent in 2002.

The parties appeared before me on 12th February 2013 when the case was fixed for hearing of defence case on 26th March 2013.

RW1 Mr. Brighton Ochieng Ogola, the supplies and Chain Manager for the Respondent testified on behalf of the Respondent.

Mr. Ogola testified that he had worked for Respondent for 14 years and knew all the Claimants. The Claimants used to work for the Respondent on temporary basis. They signed temporary engagement forms. They worked when there was need. The maximum period for the temporary contracts was 75 days with weekend breaks.

He testified that the Respondent did not terminate the services of the Claimants. All temporary employees were transferred to a 3rd party but the Claimants refused to take the jobs. He denied that the Claimants were not paid their dues.

He prayed that the case be put to rest and the Respondent be discharged.

Under cross examination RW1 stated that some of the Claimants have worked for the Respondent from 2004, others 2007, that initially they were paid in cash and later by mpesa. That the temporary employees were not transferred to the 3rd party, they were to apply directly for employment with the 3rd party. That and out of the 130 temporary employees only 11 did not execute the contracts with the 3rd party. He stated that all the Claimants were paid their dues during the last week of May.

The parties opted not to file written submissions or make oral submissions and asked that the court determines the case based on the evidence on record.

I have considered the pleadings and the testimonies of all the witnesses as well as the witness statements filed on behalf of the 6 Claimants who did not testify.

The issues for determination are the following;

- i. Whether the Claimants were temporary employees or not.
- ii. If not, then what was the nature of their employment.
- iii. Whether the Claimants are entitled to the prayers sought.

I will consider the issue No. 1 and 2 together, that is whether the Claimants were temporary employees and if not, what was the nature of their employment.

In the Memorandum of Claim the Claimants allege that they were all employed in 2002 and worked as casual employees until May 2010 when they were terminated. However in the testimonies of the Claimants who testified in court and in the witness statements of the 6 Claimants who did not testify, the Claimants stated that they were employed as follows;

1st Claimant – November 1999

2nd Claimant 4th November 2003

4th Claimant - 2000

5th Claimant – 25th April 2004

6th Claimant - 2006

7th Claimant - 2004

8th Claimant - 2006

9th Claimant - 2003

10th Claimant – 2002

11th Claimant – 2001

12th Claimant – 2000

RW1 in his testimony stated all the Claimants worked for the Respondent on temporary engagement of between 2 to 3 weeks with the maximum engagement being 75 days. He did not confirm or deny that the Claimants started working on the dates alleged by the Claimants. He testified that the Claimants had breaks in service but did not specify when and how long the breaks were apart from stating that the Claimants had weekend breaks. No records were produced by the Respondents to confirm the period worked by each of the Claimants or the length of any breaks.

Since the only breaks mentioned by RW1 was weekends, the only conclusion that I can draw is that the Claimants worked continuously and the only days they did not work were on weekend breaks. Section 10(6) and (7) of the Employment Act provides that an employer must keep records of all employees including dates of engagement and termination and that if in any proceedings an employer fails to produce the written particulars the burden of proving or disproving an alleged term of the contracts shall be on the employer.

In the present case the Respondent, who is the employer has failed to disprove the allegation that the Claimants were employed on the dates they have alleged and that they worked continuously up to May 2010 when their employment terminated.

On the second issue of the nature of employment, Section 37(1) (2) and (3) of the Employment Act provides as follows;

37. Conversion of causal employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(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.

From the foregoing, I find that the Claimant's contracts were by operation of the Law vide section 35(1) of the Act converted into monthly contracts of employment.

The next issue is whether the Claimants are entitled to their prayers.

I will consider each prayer separately.

1. Salary for the Month of May 2010.

The Claimants who were paid by mpesa submitted printed copies of their Mpesa accounts from Safaricom Ltd which shows the last remittance from the Claimants as follows;

i. 1 st Claimant	27-5-2010
ii. 2 nd Claimant	30-4-2010
iii. 3 rd Claimant	27-5-2010
iv. 4 th Claimant	27-5-2010
v. 5 th Claimant	N/A
vi. 6 th Claimant	N/A
vii. 7 th Claimant	23/4/2010
viii. 8 th Claimant	30/4/2010
ix. 9 th Claimant	27/5/2010
x. 10 th Claimant	27/5/2010
xi. 11 th Claimant	25/3/2010
xii. 12 th Claimant	27/5/2010

The Respondent alleges that it paid all the Claimants for all days worked. It did not produce any records to prove such payment or contest the Mpesa statements produced by the Claimants.

From the Mpesa statements and the evidence of the Claimants, they were paid daily and they were not paid for the last week worked. They are claiming only 1 week's payment.

For the foregoing reasons, I award all the Claimants with the exception of the 5th and 6th Claimants who did not produce Mpesa accounts, the sum of Kshs.2,450 being 7 days pay in line with Section 37(2) of the Employment Act. The payment is based on a daily rate of Kshs.350.

ii. 1 month's salary in lieu of notice.

Section 37 (1) of the Employment Act provides that Section 35(1) (c) shall apply to the terms of service of a casual employee whose employment has been converted to monthly contracts of services. Section 35(1) (c) provided for payment of notice upon termination of contract at the rate of 28 days salary. Section 36 provides for payment in lieu of notice.

The Claimants allege their employment were terminated by the Respondent while the Respondent states as follows in paragraph 6 of the memorandum of Defence.

“In further response to paragraphs 5 and 6 of the Memorandum of Claim the Respondent states that it sought to introduce the Claimants to an outsourcing outfit for casual/temporary employees who would

offer them permanent employment and who would then recommend them to different organizations to do casual/temporary jobs including the Respondent herein.”

The testimonies and witness statements of the Claimants as well as the testimony of RW1 confirm this position.

Transfer of service of an employee to another employer without the transfer of benefits accruing to the date of such transfer effectively means the service of employee with the first employer comes to an end. In normal circumstances this would be done through redundancy. In cross examination RW1 stated that the Claimants were to apply for employment with the 3rd party.

Having terminated the employment of the Claimants the Respondent was under obligation to give the Claimants 1 months salary in lieu of notice.

I therefore award each of the 12 Claimants 28 days salary as pay in lieu of notice in the sum of Kshs.9,800/=

(iii) Accrued Leave

The Claimants have each claimed accrued leave for 8 years. In the Memorandum of Defence at paragraph 4 the Respondent has alleged that the Claimants were never entitled to annual leave as they were employed only on temporary basis. This was repeated by RW1 in his testimony.

This is an admission that the Claimants never took and were never paid for annual leave.

Section 28 of the Employment Act provides that every employee who has worked for a minimum period of 2 months is entitled to annual leave of one and three quarter days for each month worked or 21 working days per year worked. The Section does not define employee to exclude a casual or temporary employee.

Each of the Claimants is therefore entitled to 21 days annual leave for each year worked.

I therefore award them the following.

1st Claimant – 80,850

2nd Claimant 58,800

3rd Claimant – 51,450

4th Claimant – 73,500

5th Claimant – 44,100

6th Claimant – 29,900

7th Claimant – 44,100

8th Claimant – 29,400

9th Claimant – 51,450

10th Claimant – 58,800

11th Claimant – 66,150

12th Claimant – 73,500

(iii) Gratuity Allowance

The Claimants have claimed gratuity allowance at 25% of salary for 96 months. None of the Claimants mentioned gratuity in their testimonies or witness statements.

The Memorandum of Claim does not explain the basis of the claim. Neither the Employment Act nor the Contracts signed by the Claimants, a sample of which is annexed to the Respondents memorandum of Defence as Exhibit DEXI, provide for gratuity.

I find that the Claimants have not proved the claim for gratuity and dismiss the same.

The Claimants were however entitled to Service pay by virtue of Section 35(5) of the Employment act. Since they did not claim the same, I make no order for the same.

(iv) Damages for unlawful termination

Section 12 (3) (v) and (vi) of the Industrial Court Act, 2011 grant this court jurisdiction to award compensation and damages in any circumstances contemplated under the Act or any written law.

Section 49(1)(c) provides that the court may order payment to an employee the equivalent of a number of months wages or salary not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal.

I have considered all the circumstances of this case and taken into account the factors enumerated in Section 49(4) of the Act, the fact that all Claimants were in fact declared redundant, that they were subjected to temporary terms of employment in breach of the provisions of the law and that they were unfairly denied continued employment for demanding payment of their terminal benefits. I consider that maximum compensation is reasonable and award each of them 12 months' salary in the sum of Kshs.117,600.

In conclusion therefore judgment is entered for the Claimants against the Respondent as follows;

1st Claimant – Kshs.210,650

2nd Claimant Kshs.188,650

3rd Claimant – Kshs.181,300

4th Claimant – Kshs.203,350

5th Claimant – Kshs.171,500

6th Claimant – Kshs.156,800

7th Claimant – Kshs.173,950

8th Claimant – Kshs.159,250

9th Claimant – Kshs.181,300

10th Claimant – Kshs.188,650

11th Claimant – Kshs.196,000

12th Claimant – Kshs.203,350

The Claimants shall also have costs of the Claim.

Orders accordingly

Read in open Court this **19th** day of **September** 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Kimani h/b for Gathii for Claimants

Momanyi h/b for Wairagu for Respondent