



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 1687 OF 2012**

**MUSEMBI KITHOE.....CLAIMANT**

**VS**

**TWIN RIVER TWO ESTATE LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim which is brought by way of Memorandum of Claim dated 29th August and filed in Court on 19th September 2012 is for unlawful termination of employment. The Respondent filed a Memorandum of Response on 18th October 2012 and the Claimant filed a Reply on 29th October 2012. The matter was heard on 31st January and 2nd July 2013 with Mr. Gachoka Mwangi appearing for the Claimant and Mr. Jesse Kariuki for the Respondent. The Claimant testified on his own behalf and the Respondent called Peter Karugu Mwangi and David Kisove. Both parties filed written submissions.

**The Claimant's Case**

2. According to the Claimant, he was employed by the Respondent in the year 1994 initially as a farmhand and later as a security guard. He worked until October 2008 when his employment was terminated without notice and without lawful cause. By the time of termination, the Claimant earned a daily rate of Kshs. 230 payable fortnightly. On 3rd March 2008, the Claimant was told not to report for duty the following day. The Claimant was housed by the Respondent and after the termination of his employment, he was evicted.

3. The Claimant referred the matter to the Kenya Plantation and Agricultural Workers Union and a meeting was held in the presence of a Labour Officer whereat it was recommended that the Claimant be paid notice, service pay and leave. The Respondent did not honour this recommendation.

4. In cross examination, the Claimant denied having deserted duty or reporting for duty while drunk as alleged by the Respondent. He also denied that he had declined to accept redeployment to the farm.

5. The Claimant claims the following:

- a) 3 months' salary in lieu of notice.....Kshs. 16,800
- b) Severance pay (gratuity) at 1 month's salary for each year worked.....78,400

- c) Costs and interest

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

6. In its Memorandum of Response, the Respondent denied that the Claimant was its employee effective 1994 to 2008 and averred that on various dates during the said period, the Claimant had been engaged as a casual general worker on a day to day basis.

7. According to the Respondent, the Claimant did not work on a full time basis. Peter Karugu Mwangi testified that the Claimant deserted duty after he was redeployed to work in the farm.

### **Findings and Determination**

8. The first issue for determination has to do with the status of the Claimant's employment with the Respondent. The Claimant told the Court that he worked full time from 1994 to 2008. The Respondent on the other hand maintained that the Claimant was a casual employee engaged from day to day but paid fortnightly.

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. In the case of ***Wilfred Bukachi Opwaka Vs Ready Consultancy Company Limited (Industrial Court Cause No 471 of 2012)*** Onyango J restated this law 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. In support of its contention on the status of the Claimant's employment, the Respondent produced a casual employment contract dated 26th November 2005 as well as copies of Muster Roll for the months of April and May 2001 and payment vouchers for diverse dates ranging between the 3rd week of January 2008 and the 1st week of October 2008.

12. The Court was however unable to reconcile the Respondent's contention with the testimony of its witness number 1; Peter Karugu Mwangi who testified that between 1994 and 1997, the Claimant worked continuously and the testimony of the Respondent's witness number 2; Musau Kisove who testified that he and the Claimant worked every day. Moreover, the records produced by the Respondent did not cover a substantial period of the Claimant's employment. In the circumstances, I invoke Section 37(1) of the Employment Act, 2007 and convert the Claimant's employment to term contract.

13. The next issue for determination is the applicable salary attaching to the Claimant. The Claimant testified that by the time he left the Respondent's employment, he earned a daily rate of Kshs. 230. The payment vouchers produced by the Respondent however showed a daily rate of Kshs. 160 as at the 1st week of October 2008. Since there was no claim for underpayment, the Court found no basis to depart from the daily rate paid to the Claimant as at the time he left the Respondent's employment. The Court therefore used this factor to determine the Claimant's monthly pay at Kshs. 4,800.

14. I will now address the claims for notice pay and severance pay (gratuity). The mode of termination of the Claimant's employment was in contention. The Claimant testified that he was terminated verbally without notice and without lawful cause. On its part, the Respondent stated that the Claimant absconded duty after being redeployed from security department to work in the farm.

15. According to letter dated 7th October 2008 from the Branch Secretary, Kenya Plantation & Agricultural Workers Union to the Respondent's Farm Manager, the Claimant's grievance was his relocation from security work to farm work. This was confirmed by the testimony of Musau Kisove, who himself was redeployed to the farm.

16. There was however no evidence that the Claimant was given an opportunity to controvert the reason for the redeployment, being reporting to work while under the influence of alcohol. For this reason, I find the circumstances leading to the separation of the Claimant's employment irregular and convert the termination of his employment to a normal termination with benefits.

17. In the submissions filed on behalf of the Claimant, reference was made to a Collective Bargaining Agreement (CBA) which was however not submitted to the Court. The Court was therefore unable to establish the terms contained in the said CBA and consequently resorted to the law to determine the reliefs due to the Claimant. Having converted the termination of the Claimant's employment to a normal termination, I award him one month's pay in lieu of notice. There was no evidence that the Respondent made National Social Security Fund (NSSF) contributions on behalf of the Claimant. I therefore award the Claimant service pay at the rate of 15 days pay for each completed year of service.

18. In the final analysis, I make an award in favour of the Claimant as follows:

- a) One month's salary in lieu of notice.....Kshs. 4,800
- b) Service pay for 14 years.....33,600
- Total.....Kshs.38,400**

The Respondent will pay the costs of this case.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF DECEMBER 2013**

**LINNET NDOLO**

**JUDGE**

**In the Presence of:**

.....*Claimant*

.....*Respondent*