



**NELSON ONYANGO OTHOO..... CLAIMANT**

**VERSUS**

**WILHAM KENYA LIMITED.....RESPONDENT**

**AWARD**

The Claimant has brought a claim against the respondent claiming terminal benefits as follows:-

- (a) Redundancy pay
- (b) Salary arrears for 15 days
- (c) Unprocessed claims for 13 days
- (d) Accrued overtime from 4/11/07 to 3/4/2008
- (e) Full compensation for wrongful loss of employment
- (f) Interest on Nos.(1) and (2) at court rates
- (g) 10% for intimidation
- (h) Costs of the suit.

On the other hand, the Respondent has filed his response denying

liability in all the above relieves sought by the claimant. The respondent avers that the claimant was only a casual employee within the meaning of the Employment Act and whose contract was terminable by a one-day notice. The claim was heard on 24/11/09 by my predecessor, Justice S.M. Madzayo who is no longer in this station. The parties have, however consented to have the matter proceed from where the former judge reached which is just to write this award.

During the hearing, the claimant testified alone and closed his case without calling any witnesses. He basically repeated on what was in his memorandum of claim. His evidence was that he was

employed by the respondent on 4-5-2005 and was terminated on 5-8-2008. That his job was basically changed severally. That on 27-7-2007, the respondent gave him a Certificate of Service. That his employment was terminated by declaration of redundancy and without following the right procedures. That in June, 2008 he had worked for 6 days and the salary for that period was never paid to him because his Supervisor took it on his behalf and never surrendered to the claimant. That the Respondent paid the claimant Kshs.11,025/= through the Ministry of Labour.

He concluded his case by saying that the redundancy was illegal and asked this court to make an award in his favour in terms of the prayers in his claim.

Mr. Masese appearing for the Respondent made his submissions in reply to the submissions by the claimant. His submissions in my view were a highlight of the averments in the memorandum of Response to the claim. The gist of his submissions is that the claimant was a casual employee of the respondent and no redundancy could be declared on him.

He then called one witness, Damaris Kimosop who testified as RW1. She confirmed to the Court that she was the Respondent's Human Resource Manager and that she had worked for the respondent for 7 years. That the respondent had employed permanent employees, seasonal contract employees and casual employees. That casual employees were paid wages per day as per government Wage Order. That payment was done through Diamond Trust Bank. That the casual employment was terminated on a daily basis and could not declare them redundant. She confirmed that she knew the claimant as a casual employee who was paid daily at the rate of Kshs.300/= per day.

On cross-examination by the claimant, she was not able to confirm the date when the claimant's employment ended. She could, however, confirm on the Daily Labour Processing Sheet that the claimant attended work on 5-8-08.

On being asked on the mode of payment, she told the court that employees were paid using ATM Card. She believed that the Claimant used to withdraw his money through ATM Card.

After the close of their case each party was allowed to file written submissions which I have considered in making this award.

The issues which arise from the case before me can be summarized as follows:-

- (a) whether the claimant was a casual employee?
- (b) whether redundancy can be declared in respect of casual employees?
- (c) whether the claimant is entitled to the terminal benefits prayed in his claim?

In answering the first issue, I have referred to the definition of a

*"casual employee"* under Section 2 of the Employment Act 2007 which is:-

*"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."*

The evidence before me from both the parties to this dispute fits the claimant as a casual employee as defined above. The claimant has annexed to his claim Annexure 1C, a summary of work attendance showing that he did not attend work continuously. This corroborates the Respondent's Annexures which is *"Casual Employees' Paysheet"* and on which sheet, the claimant's name appears. He has not challenged its authenticity and he is therefore, deemed to have admitted it.

I am therefore, on a balance of probability convinced that the respondent has discharged his obligations under Sec. 10(7) of the Employment Act by providing records to disprove verbal allegations

by the claimant on the terms of their contract of employment.

Having satisfied myself that the claimant was a casual employee, the next question I ask myself is whether the respondent could declare redundancy on the claimant.

Section 2 of the Employment Act, 2007 defines “*redundancy*” thus:

*“loss of employment, occupation, job or career by involuntary means through no fault on the employee, involving termination of employment or the initiative at the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”*

The procedure of declaring redundancy is provided for under Section 40 of the Employment Act, 2007 which I will not reproduce. This Court dealt with the issue of whether redundancy can be declared on casual employee or not in the “*Industrial Court Cause No.222(N) of 2008, Consolata Wanjiku Ndirangu –Vs- Wilham (K) Ltd*”.

In the said case, the Court found that because a casual employee is engaged for not more than twenty four hours at a time, such an employee is only entitled to a termination notice of one-day under Section 35(1) of the Employment Act. This means that in case of termination without notice, the employee is only entitled to one day’s pay and not the bigger amount contemplated for redundancy under Section 40(1)( f).

I am, therefore, persuaded to agree with the respondent’s case that the claimant could not have been declared redundant as claimed. Indeed, the parliament could not have intended that a casual employee and permanent employees be dealt with similarly during termination of employment. If that was the intention, the legislators would not have taken the trouble of classifying the employees and defining them separately in the Act.

Lastly, I proceed to deal with the question of whether the claimant is entitled to any benefits as prayed in this claim.

I have considered the evidence before me and the submissions by the parties, and I have been persuaded that the claimant is not entitled to redundancy benefits due to my finding above that the termination of employment was not through redundancy. I am, however, going to award a one day pay for termination without notice which the respondent is admitting. This amounts to Kshs.300/=.

I will also award the salary arrears for fifteen (15) days and the unprocessed claims for thirteen (13) days which the claimant has prayed. I will place the burden of proving that the salary was paid on the respondent who was the custodian of payment records. I have noted that RW1 did not conclude her evidence. Instead, she sought adjournment to avail more documents when the claimant challenged her evidence during cross-examination. She never testified again towards this and I award 28 days x Kshs.300/= totaling to Kshs.8,400/=

I will not award anything for overtime, loss of employment and intimidation due to lack of evidence.

I will however, award compensation for leave pay calculated on a prorata basis for the period of service. The Respondent has admitted this prayer and there is evidence that the figure has been calculated at Kshs.11,025.00 and has already been deposited with the District Labour Office as per Appendix 1(b) to the Claimant’s claim.

In view of the above findings, I **ORDER** and **AWARD** to the Claimant as against the Respondent:-

- (a) Notice pay - Kshs. 300.00
- (b) Salary Arrears - Kshs. 8,400.00

(c) Leave Pay - Kshs.11,025.00

**TOTAL = Kshs.19,725.00**

I also order the respondent to pay the Claimant's costs plus interest. The dues already deposited with the District Labour Office may be used to pay part of the sum herein awarded.

**Orders accordingly.**

**DATED and DELIVERED** at Nairobi this 17<sup>th</sup> day of September, 2012.

**Onesmus N. Makau**  
**JUDGE**