



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 671 of 2012**

**WILFRED BUKACHI OPWAKA .....CLAIMANT**

**VERSUS**

**READY CONSULTANCY COMPANY LIMITED.....RESPONDENT**

**JUDGEMENT**

1. By a Memorandum of Claim dated 20<sup>th</sup> April 2012 and filed in Court on the same day through Namada & Co. Advocates the claimant **WILFRED BUKACHI OPWAKA** claims the following from the Respondent **READY CONSULTANCY COMPANY LIMITED:-**

[a] A declaration that the Respondent's dismissal of the claimant from employment was unlawful and that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.

[b] An order for payment of terminal dues and damages totaling to Shs.194,910/=.

[c] An order for the respondent to pay costs of the suit plus interest thereon.

2. The Respondent filed its reply to the Memorandum of Claim on 21<sup>st</sup> June 2012 through Joshua Bunyori Mumia Advocates. The respondent admitted in the Reply to the Memorandum of Claim that the claimant was employed in January 2009 and dismissed on 6<sup>th</sup> January 2012. The respondent denies that the claimant was a machine operator. The respondent avers that the claimant was dismissed after several verbal warnings for underperforming his work and failing to follow instructions of his employer.

3. At the hearing the claimant testified in support of his case while the Respondent called two witnesses, **Mr. HUSSEIN SALAH**, a supervisor employed by the Respondent and **Mr. RASHID ABDULLAHI**, Administrative Assistant with Mombasa Maize Millers who had contracted the Respondent for supply of labour.

4. The claimant testified that he was employed in January 2009 as a machine operator in waste paper department. He worked for 6 days and rested on Sunday. He worked from 8.00 a.m. to 5.00 p.m. He was paid Shs.365 per day. His last day of work was 6<sup>th</sup> January 2012 when the Production Manager of Mombasa Maize Millers stopped him and 3 of his colleagues from working. He did not know why he was terminated. When he asked his supervisor why he was stopped from working, the supervisor said he did not know the reason for the termination. The Claimant also asked the Secretary and the Human Resource Manager who likewise did not know the reason for the termination. He was asked to collect his terminal dues after 12 days. He was never informed that his work was not satisfactory. He was not a member of

NSSF and had never gone on annual leave. He prayed that the Court grant him notice, Service pay, annual leave and other prayers in the Memorandum of Claim.

5. In cross examination the claimant stated that he worked for 6 days, was a machine operator, and was paid daily. He was supposed to pack six bales of 120 kg each per day. He was never informed that bales weighed less and was never warned. He denied selling groundnuts at work and also denied having been suspended for 3 days.

6. For the Respondent, **RW1 HUSSEIN MOHAMED SALAH** testified that he was a supervisor for Ready Constancy. He knew the claimant who worked in waste paper department and was paid Shs.365 daily; that all the Respondents employees are casuals. He testified that on 6<sup>th</sup> January 2012 the claimant and his 3 colleagues went to report to him that they had been stopped from working because their bundles were underweight. The claimant and his colleagues had been warned verbally for the same issue several times. He stated that the employees worked from Monday to Saturday for 5 days and were given one day off every week. The claimant's off day was on Wednesdays. He stated that the casuals were not given annual leave.

7. In cross examination **RW1** said he was employed on 27<sup>th</sup> December 2011 and had never witnessed the claimant being warned; the claimant and his colleagues worked for 5 days every week and achieved their targets before 5 p.m.

8. **RW2 RASHID ABDULLAHI** testified that he worked for Mombasa Maize Millers as an Administrative Assistant. He supervised casual and permanent workers. He had authority to terminate casuals but not permanent employees. He knew the claimant who worked for **READY CONSULTANTS** who are contracted by Mombasa Maize Millers to supply labour. The claimant worked in Waste Paper Department which collects waste paper and compacts in a machine.

9. On 6<sup>th</sup> January 2012 he was doing inspection when he found the claimant had packed 5 bales. When he checked the weight it was light and he could lift a bale with one hand. He decided to weigh the bales and found that they weighted 40kg, 30kg, and 45kg respectively instead of 120 kg. He decided to terminate the workers. He had warned them before and even suspended them for 3 days for underperformance prior to the termination. The warnings were verbal since, according to him, only permanent employees are warned in writing. The dismissals were also verbal. He did not have to explain to them the reasons for termination as the claimant and his colleagues knew why they were being terminated.

10. On cross examination **RW2** stated that the claimant was employed by Ready Consultants while he was an employee of Mombasa Maize Millers, and the claimant's supervisor was Mr. Hussein. He said the employees went to the Manager regarding their termination but his decision to dismiss them was sustained.

11. The facts of the case are not contested. The claimant was employed by the Respondent in January 2009 and worked until 6<sup>th</sup> January 2012 when he was summarily dismissed. He was paid daily at Shs.365/= per day, was given one day off every week, was never given annual leave. He was not a member of NSSF or NHIF. He was dismissed by RW2 Mr. Rashid Abdulahi, an employee of Mombasa Maize Millers to whom the Respondent was contracted for supply of labour.

12. 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 terms of contract terms at the expiry of one month. Having worked for more than 1 month continuously the claimant was no longer a casual employee but employed on monthly contract. He was therefore entitled to annual leave and termination notice as provided in Section 37 of the Act.

13. The procedure for termination of employment on disciplinary grounds is covered under Section 41, 43, 44 and 45 of the Employment Act.

14. The issues for determination in this case are whether the termination of employment of the claimant was justifiable, whether fair procedure was used, and if he is entitled to the prayers sought in the Memorandum of Claim.

15. The Respondent has admitted both in the reply Memorandum and through the witnesses that the claimant was never informed of the reasons for his termination, allegedly on the basis that he knew why he was being terminated. He was never given an opportunity to defend himself and the dismissal was verbal and instant. There were no grounds given nor was any procedure used. I find that the termination was unfair and unjustified.

16. The next issue to determine is whether the claimant is entitled to the terminal benefits of leave, service pay and compensation of 12 months' salary as prayed.

17. Section 49 provides that where the summary dismissal or termination of a contract of an employee is unjustified, the employee is entitled to payment of the wages which he would have been entitled to had he been given notice. In this case the conversion from casual to monthly contract entitles the claimant to one months pay in lieu of notice. At the salary of Shs. 365/= per day, he is entitled to 30 days pay of Shs.10,950/= as prayed. The amount has not been contested. I therefore award him Shs. 10.950/= being the equivalent on one months' salary in lieu of notice.

18. The other prayer of the Claimant is for payment of service pay. Section 35[5] as read together with Section 35[6] of the Employment Act provides for payment of service pay to an employee who has been terminated and who is not subject to subsection 35[6]. The claimant was not a member of NSSF or any other pension, provident fund or gratuity scheme and is therefore entitled to service pay. The claimant has prayed for service pay at the rate of 18 days salary for each year worked based on the Award of Hon. Justice James Rika in Cause No.746 of 2011 between **RUTH KEMUNTO OMWOYO** and **EAST AFRICAN GROWERS**.

19. Section 37(5) of the Employment Act does not provide for the rate of service pay. There are several general orders under the Labour Institutions Act (formerly the Regulation of Wages and Conditions of Employment Act, now repealed) which provide for gratuity (which is the same as service pay). The General Order (Protective Security Industry) provides for gratuity at the rate of 18 days per completed year of service for employees with a minimum of 5 years service. In the absence of specific provision for a particular industry the practice has been to use the redundancy rate of 15 days per completed year of service. The decision of Hon. Justice Rika quoted above does not mention which industry the Claimant worked in or the reason for departure from the practice.

I grant the claimant service pay at the rate of 15 days per completed year of service. Having worked for 3 years at a salary of Shs.365/= per day, the claimant is entitled to Shs.365x3x15, a total of Shs.16,425. I award him the said sum of shs.16,425/= as service pay.

20. The claimant prayed for payment in lieu of annual leave for the 3 years that he worked for the Respondent. The law provides for a minimum of 21 days annual leave per year for every employee. The respondent admitted that the claimant, like all casuals, was not granted leave. The claimant is therefore entitled to 21 days leave for each of the 3 years that he worked which works out to 365x21x3 giving a total of Shs.22,995/=. I grant him the sum of Shs.22,995/= as payment in lieu of leave for the 3 years worked.

21. The claimant also prayed for compensation equivalent to 12 months salary. The Respondent has not contested this amount. Indeed the Respondents submissions do not make any reference to compensation at all. The amount claimed is the maximum provided by law. The claimant was subjected to casualisation of his employment for 3 years against the law. He was never paid for any days he did not work and never benefitted from any of the other benefits of regular employment due to the casualisation. He was terminated verbally, by a person who was not even his employer. In the circumstances I consider it reasonable to award him the maximum compensation as prayed. The claimant is therefore awarded Shs.131,400/= being 12 months' salary as compensation for unfair dismissal.

The claimant therefore gets judgment against the Respondent in the total sum of Shs.181,770/= to be paid within 30 days from the date of judgment. The claimant shall also get costs against the respondent to be agreed by the parties. If no agreement is reached the costs will be taxed by the Registrar.

**Orders accordingly.**

**DATED AND DELIVERED IN NAIROBI THIS 29<sup>TH</sup> DAY OF OCTOBER 2012.**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

For claimant \_\_\_\_\_

For Respondent \_\_\_\_\_