



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**

**CAUSE NO. 88 OF 2013**

**NDAO MAHUPA DALUH**

**CLAIMANT**

**v**

**CROWN PETROLEUM (K) LTD**

**RESPONDENT**

**JUDGMENT**

1. Ndao Mahupa Daluh (the Claimant) was employed by Crown Petroleum (K) Ltd (Respondent) on 25 April 2004 as a turn boy. The Respondent allegedly terminated his services on 15 October 2009. The Claimant filed a Memorandum of Claim on 23 April 2013 and pleaded that his salary was Kshs 333.33 per day translating into Kshs 10,000/- per month and that he worked Monday through to Sunday. He further pleaded that for the six years he served the Respondent, he did not go on leave. He seeks a declaration that his termination was unlawful and twelve months' compensation, salary in lieu of notice, severance pay, house allowance and leave pay.
2. The Respondent was served and it filed a Response on 17 June 2013 admitting employing the Claimant but on a casual basis on a daily wage of Kshs 333.33 during the entire duration of employment relationship. The Respondent denied that the Claimant worked Monday through to Sunday or never proceeded on leave or that the Claimant is entitled to terminal dues. It further pleaded it was not in breach of applicable law.
3. On 23 May 2013 the Claimant acting in person and Mr. Asewe holding brief for Mr. Balala appeared before me and I ordered the Respondent to file its Response and employment records of the Claimant within 14 days. These documents should have been filed by 6 June 2013 but were not.
4. On 17 June 2013 the Cause was mentioned before me and I directed the parties to exchange written statements and any other documents to be relied on within 21 days. I also fixed the hearing for 8 July 2013. The directions and fixing of the hearing date was done in the presence of the Claimant who was acting in person and Mr. Mohamed for the Respondent. Mr. Mohamed informed me had filed a Response but he never sought leave to have it admitted out of time. The Response had been filed that morning.
5. When the Cause was called up for hearing on 8 July 2013 there was no representation on behalf of the Respondent and having satisfied myself that the date was taken in the presence of both parties, I allowed the Claimant to proceed.

**The Claimant's evidence**

6. The Claimant gave sworn testimony.
7. The Claimant mainly reiterated what he had pleaded and testified, that in 2008 he was involved in an accident and the Respondent's Manager Mr. Shanti wanted him to have its Advocates handle the case but he declined. After two weeks the said Mr. Shanti called him and accused him of colluding with other turn boys to siphon off the Respondent's fuel and terminated his services.
8. The Claimant testified that the termination was without notice. He further testified that he was earning Kshs 2,500/- per week.
9. The Claimant therefore seeks pay in lieu of notice, severance pay, house allowance, compensation and leave.

### **Issues for determination**

10. The Respondent did not attend the hearing but I will consider its Response filed on 17 June 2013 and the written submissions filed outside time and without any leave from the Court on the same day.
11. The issues which arise for determination are
  - i. whether the Claimant was a casual employee
  - ii. (ii) whether the termination was unfair/unlawful
  - iii. (iii) whether the Claimant was underpaid
  - iv. (iv) appropriate remedies.

### **Whether the Claimant was a casual employee**

12. Section 2 of the Employment Act defines a casual employee to mean 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.
13. The Respondent admitted that the Claimant was employed in 2004. It did not plead in response to the plea by the Claimant that he was terminated on 15 October 2009.
14. I therefore do find as a matter of fact that the Claimant was in the employ of the Respondent for some five years and six months.
15. Section 37 of the Employment Act deems as converted, a casual employment to term employment any contract where an employee has worked for a period of continuous working days which amount in the aggregate to the equivalent of not less than one month or where the work cannot reasonably be expected to be completed within a period or number of working days amounting in the aggregate to the equivalent of three months or more.
16. The Claimant worked for over three months and by dint of section 37 of the Employment Act was not a casual employee.
17. And because the Claimant had served the Respondent for more than three months, the Respondent was under a statutory duty pursuant to section 9 to reduce the contract into writing and state the employment particulars prescribed by section 10 and 11 of the Employment Act. The Employment Act, 2007 has declared and defined the fundamental rights of employees and basic conditions of employment.
18. The Respondent was in flagrant breach of the statute. Article 41 of the Constitution has now assured the right of workers to fair labour practices. For an employer to keep an employee for more than three months as a casual employee is an unfair labour practice. To fail to draw up a written contract where the statute requires one is an unfair labour practice. The Claimant was essentially serving out an employment contract whose terms and conditions he did not know.

### **Whether the termination was unfair/unlawful**

19. I have made a finding that the Claimant was not a casual employee but a term employee by operation of section 37 of the Employment Act. The consequence of the finding is that the Claimant's contract ought to have been terminated pursuant to section 35(1)(c) of the Act following the giving of at least twenty eight days notice in writing. On this ground alone I would hold that the termination was against a statutory provision and therefore unfair.
20. But I need also to discuss the legal significance of section 45(1) of the Employment Act. The section provides that

**No employer shall terminate the employment of an employee unfairly.**

The section has now given the ordinary employee security of tenure. The common law/contractual concept of dismissal at will of employer without cause on notice or pay in lieu is no longer the correct legal position in Kenya. An employee is entitled as of right to procedural fairness as required by section 41 of the Act and to substantive fairness as expressed in sections 43,45 and 47 of the Employment Act.

21. The Respondent maintained in its Response that the Claimant was a casual employee and therefore it was not in breach of any law when it terminated him. Indeed, in its submissions reference was made to section 35(4)(b) of the Act which provide that

**Nothing in this section affects the right-**

**(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.**

22. The Respondent in its submissions only cited the provision up to the word 'notice'. This provision must be examined within the overall statutory framework and not only the contractual framework and my perusal of the Employment Act, Labour Institutions Act and Labour Relations Act has not found any single cause recognised by any of the three statutes which entitles an employer to terminate without notice. In fact, by virtue of section 41(2) of the Employment Act, an employer must hear and consider any representations an employee may wish to make in cases of summary dismissal.
23. I refuse to accede to the submission by the Respondent. The contract of the Claimant did not end at the close of day on 15 October 2009. By operation of law the Claimant was on a term contract.
24. However I look at it, the termination of the Claimant, who by law was on a term contract was unfair. The Respondent was expected to satisfy both the procedural and substantive fairness requirements of the Employment Act.

**Whether the Claimant was underpaid**

25. Because of the statutory provision of section 90 of the Employment Act, I will limit my discussion of this issue to the period from 15 October 2006. The Claimant was terminated on 15 October 2009.
26. The basic terms and conditions of employment have been outlined in the Regulation of Wages and Conditions of Employment, cap 229 which was repealed by the Labour Institutions Act.
27. No evidence was led as to what business the Respondent is involved in and therefore I will rely on the Regulation of Wages (General) Orders 2006 up to 2009. Column 1 thereof listed turn boys under row number 2.

**Rates 1 May 2006 to 30 April 2007**

28. The Minimum wages for this period was set out in Legal Notice No. 38 of 2006.
29. The minimum monthly wage during this period was Kshs 5,611/- exclusive of house allowance while the daily rate was Kshs 269/70. The Claimant was not underpaid during this period.

#### **Rates from 1 May 2007 to 30 April 2008**

30. The Minister for Labour did not gazette new rates for this period and therefore Legal Notice No. 38 of 2006 was still applicable

#### **Rates from 1 May 2008 to 30 April 2009.**

31. The Minister for Labour did not gazette new rates for this period and therefore Legal Notice No. 38 of 2006 was still applicable

#### **Rates from 1 May 2009 to 15 October 2009**

32. Through Legal Notice No. 70 of 2009 the Minister gazetted new minimum rates. The monthly rate excluding housing allowance was set at Kshs 6,621/-.With 15% house allowance of Kshs 993/- the total monthly wages was Kshs 7,614/-.The daily rate was fixed at Kshs 318/25.
33. By the admission of both parties pleadings, the Claimant was earning Kshs 333/- per day. He was not underpaid and therefore the Claim for underpayments must fail.

#### **Appropriate remedies**

##### ***Salary in lieu of Notice***

34. Considering my findings above the Claimant is entitled to one month pay in lieu of notice pursuant to sections 35(1)(c) as read with section 36 of the Employment Act. By virtue of Legal Notice No. 70 of 2009 the monthly wage of the Claimant excluding house allowance was Kshs 6,621/-. I would award him Kshs 6,621/- as one month pay in lieu of notice.

##### ***Severance pay***

35. The Claimant was not declared redundant and therefore the severance pay which is provided for at section 40 of the Act is not applicable.
36. In lieu of severance pay, I would substitute payment of service pay as set out in section 35(5) of the Employment Act. The Respondent whose duty was to keep records did not file any despite my order of 23 May 2013.I would therefore not apply any exceptions set out on section 35(6) of the Act.
37. Having served for five years and six months, the Claimant would be entitled to service pay equivalent to 82 days (15 days for each year multiplied by 5 years and six months prorated to 7 days).
38. It is not disputed that the Claimant was earning a daily rate of Kshs 333/-.That sum multiplied by 82 days yields a sum of Kshs 27,306/-

##### ***House Allowance***

39. The daily rate the Claimant was earning was inclusive of house allowance as far the provisions of the general wages orders provided in the relevant schedules are concerned.

## Leave

40. The case for the Respondent was that the Claimant was a casual and thus not entitled to leave. This contention by the Respondent cannot stand because of the decision I have reached.
41. Because of the provisions of section 90 of the Employment Act, the Claimant would be entitled to leave he would have gone on three years prior to termination. That is from 15 October 2006.
42. Section 28 of the Employment Act entitles an employee to a minimum of 21 days leave with full pay after every completed twelve months consecutive service. The Claimant is entitled to at least three months salary in this respect.
43. The monthly minimum wage at termination of Claimant was Kshs 6,621/-. I would award him Kshs 19,863/- in lieu of accrued leave not taken.

## Compensation

44. Compensation equivalent to gross wages not exceeding twelve months is one of the primary remedies for unfair termination. The others are reinstatement and reengagement.
45. Section 49(4) of the Employment Act has set out some thirteen factors which the Court ought to consider. The Court can consider any, some or all of them. The Claimant did not contribute to the termination. He had served the Respondent for 5 years. According to his ID which was exhibited to the Memorandum of Claim, he was born in 1962. He was 47 years old at termination and had about 10 more years of service.
46. The Respondent was in flagrant breach of the law. It practiced unfair labour practices.
47. Considering these factors and the need to balance the rights of employees and economic interests of employers, it is my view that the maximum twelve months gross wages in compensation would be just. The minimum monthly wage was Kshs 6,621/-. 15% house allowance of Kshs 993/- means the Claimant's gross monthly wages was Kshs 7,614/-.
48. I would assess the compensation payable to the Claimant at Kshs 91,369/-, being equivalent to twelve months gross wages.

## Conclusion and Orders

49. In conclusion I do find, hold and declare that
  - i. The Claimant was on a term contract and not a casual employee
  - ii. The termination of the Claimant was unfair.
  - iii. The Claimant was entitled to 21 days annual leave with full pay.
50. I therefore award and order the Respondent to pay the Claimant
  - a. One month salary in lieu of Notice Kshs 6,621/-
  - b. Service pay equivalent to 82 days pay Kshs 27,306/-
  - c. Accrued leave (3 months pay) Kshs 19,863/-
  - d. Twelve months maximum compensation Kshs 91,369/-

**TOTAL Kshs 145,159/-**

51. The Claims for severance pay, house allowance and underpayments are dismissed.
52. There will be no order as to costs.

**Delivered, dated and signed in Mombasa on this 23rd day of August 2013.**

**Justice Radido Stephen**

**Judge**

**Appearances**

Claimant in person Balala & Abed Advocates filed Response and submissions but did not appear at the hearing



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