



REPUBLIC OF KENYA

High Court at Mombasa

Cause 133 of 2013

URBANUS MBEVA MONGO

CLAIMANT

v

SOLITON TELMEC LIMITED

RESPONDENT

JUDGMENT

1. Urbanus Mbeva Mongo (the Claimant) filed a suit against Soliton Telmec Limited (the Respondent) on 20 April 2012 and the issue in dispute was stated as *non-payment of notice, leave, unlawful termination of employment and compensation*. The Respondent filed a Reply to the Memorandum of Claim on 18 May 2012.

2. I heard the parties on 23 April 2013 on which day the Claimant gave sworn testimony on his behalf while the Respondent called one Ahmed Abdihamid Ahmed.

Claimant's case

3. The Claimant testified that he was employed by the Respondent as a casual worker in 2006 in the position of Manual Technician and that on 10 October 2010 his services were terminated allegedly because a contract the Respondent had with Kenya Data Network had come to an end. At the time of termination he was earning Kshs 8400/- per month but paid on a weekly basis.

4. The Claimant testified that his main responsibility was the laying of cables.

5. The Claimant further stated that he did not go on leave from 2008 up to the time of termination and that the Respondent had orally promised to pay him what he referred to as operation and maintenance standby.

6. On cross examination the Claimant admitted that in the course of his employment by the Respondent he got injured in the workplace and consequently sued the Respondent before the Chief Magistrate's Court and that in the suit before the Magistrates' Court he pleaded that he worked with the Respondent until September 2010.

7. He further admitted the Respondent employed his son as he could not continue with work due to the injuries he had suffered and which position the doctor who treated him confirmed by certifying in writing that he could not continue working.

8. The Claimant insisted he was terminated and therefore seeks a declaration that his termination was unlawful, he was a contract worker, terminal benefits, leave allowance, operation maintenance night outs, 6 public holidays worked at double pay and one month salary in lieu of notice.

Respondent's case

9. The Respondent's witness testified that the Claimant had been working with the Respondent as a helper in the field, depending on availability of work and that he was being paid weekly on Saturdays. The Respondent's salary records/labour lists' from 30 October 2008 to September 2010 were produced.

10.Regarding the separation between the Claimant and the Respondent, the witness confirmed and testified that the Claimant got injured in the course of work but never continued with work after the injury.

11.The witness also stated in re-examination that when the contract the Respondent had in Mombasa ended, those employees who were willing were relocated to Kilifi, Malindi and Voi.

Issues for determination

12.The issues which arise for determination according to my understanding of the parties pleadings, testimony and evidence are

- (i) Whether the Claimant was a casual labourer or contract employee
- (ii) Whether the Claimant was dismissed unfairly/wrongly
- (iii) Appropriate remedies

(i) *Whether the Claimant was a casual labourer or contract employee*

13.In determining the nature of the Claimant's engagement with the Respondent it is necessary to look up the legal position. And the first relevant provision is section 37 of the Employment Act. It should not be forgotten that the Employment Act, 2007 commenced on 2 June 2008.

14.The section makes provision of conversion of casual employment to term contract where a casual employee has either worked continuously for more than a month or performed work which could not be expected to be completed in a period shorter than three months.

15.The Respondent's salary record/labour lists' show that the Claimant worked for 7 days between 30 October 2008 to 5 November 2008; 5 days between 20 November 2008 to 26 November 2008;3 days between 11 December 2008 to 17 December 2008;2 days between 12 February 2009 to 18 February 2009; 6 days between 30 July 2009 to 5 August 2009; 7 days between 6 August 2009 to 12 August 2009, 30 December 2009 to 6 January 2010,4 March 2010 to 10 March 2010,24 June 2010 to 30 June 2010,2 September 2010 to 8 September 2010 and that the Claimant was off duty for 8 weeks between 15 November 2010 to 11 January 2011 and for which he was paid Kshs 16,800/-.

16.From the records produced in Court, the Claimant cannot seek refuge under section 37(1)(a) of the Employment Act. There is no evidence that the Claimant worked for a number of continuous working days amounting in the aggregate to more than one month.

17. Section 37(1)(b) of the Act on the other hand deals with cases where the employee performs work which cannot be expected to be finished within three months.

18.The records produced by the Respondent show at the bottom pages thereof that the Claimant and others were assigned to carry out tasks at different sites such as Mbaraki,state house, kizingo,lighthouse,Mwakilingo,makande Kobil,Shmanzi,Kongowea,Changamwe,Mikindani among other sites.

19.These records, coupled by the admission in evidence that the Claimant had been variously employed by the Respondent from 2008 and that some employees who were willing were relocated to other towns,

lead me to only one factual conclusion, that the tasks which the Claimant had been assigned could not be completed in any time earlier than three months.

20.I therefore do answer the first issue by declaring that the Claimant was not a casual labourer but a contract employee to whom section 35 of the Employment Act is applicable.

(ii) Whether the Claimant was dismissed unfairly/wrongfully

21.It is not in dispute that the Claimant was injured on 8 September 2010 while in the course of employment. In his witness statement filed together with the Plaint in RMCC No. 62 of 2011, *Urbanus Mbeva Mongo v Soliton Telmec Ltd*, the Claimant stated that he continued working until 24 September 2010, was taken to hospital by the Respondent's supervisors on 6 October 2010 and that on 15 November 2010 he was referred to a specialist.

22.As regards the separation between the Claimant and the Respondent there are lots of contradictory facts to establish what exactly happened. In the present Cause it was the case of the Claimant that he was dismissed on or around 10 October 2010. Hospital receipts produced by the Respondent appear to suggest that the Respondent was paying hospital bills as late as December 2010 and January 2011.This conduct does not appear consistent with an employer who has dismissed an employee.

23.On the other hand, on 17 December 2010, the Claimant made a complaint of unlawful termination to the District Labour Officer who wrote to the Respondent.

24.Again records produced by the Respondent show that the Respondent paid the Claimant some Kshs 16,800/- for 8 weeks off duty from 15 November 2010 to 11 January 2011.

25.Overall, the Claimant did not impeach or even attempt to impeach the records produced by the Respondent.

26.In my view the Claimant has failed to discharge the legal burden placed upon him to show that he was terminated unfairly, if at all, by the Respondent to enable me discuss whether the Respondent complied with either section 35, 41, 43 or 45 of the Employment Act. In the circumstances I need not address the issue of appropriate remedies.

27.The upshot of the foregoing is that I dismiss the Claim with no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 17th day of May 2013.

**Justice Radido Stephen
Judge**

Appearances

Urbanus Mbeva Mongo Claimant in person

Mr. Mogaka instructed by

Mogaka Omwenga & Mabeya Advocates for Respondent