



Osiemo v Robin and Robin Construction Company Limited (Cause 208 of 2018) [2024] KEELRC 199 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 199 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 208 OF 2018
K OCHARO, J
FEBRUARY 9, 2024**

BETWEEN

JEPHTER MOGUMO OSIEMO CLAIMANT

AND

ROBIN AND ROBIN CONSTRUCTION COMPANY LIMITED RESPONDENT

JUDGMENT

Introduction

1. Contending that at all material times, he was a permanent employee of the Respondent whose employment it unlawfully and unfairly terminated, the Claimant initiated this suit through a Memorandum of Claim dated 21st February 2018, seeking a raft of reliefs against the Respondent. Some of the reliefs sought were in character declaratory in nature, while others were compensatory.
2. The Respondent resisted through its memorandum of defence dated 10th May 2018. It denied the Claimant's claim and entitlement to the reliefs sought.

The Claimant's case

3. At the hearing, the Claimant adopted his witness statement as his evidence in chief. He stated that he first came into the employment of the Respondent in February 2016. He served the Respondent with diligence until 31st May 2017, when the Respondent terminated his services illegally, unprocedurally and unfairly.
4. He asserted that he was discharged from employment on the ground that he had reported on duty late. Further, on the material date, he was sent to work at a site in the Donholm area, but since he did not know the exact place he arrived late. The Respondent terminated his employment immediately without adherence to fair procedure. He was not heard or issued with a show cause letter.



5. He further alleged that at the termination, he was only paid Kshs 5,745/- for the days worked. He was never paid salary in lieu of notice, leave allowance, and unremitted NSSF and NHIF funds and compensation for public holidays worked.
6. The Claimant stated further that he reported the matter to the Ministry of Labour. As a result, the Respondent was summoned to appear for a meeting, but it disregarded the invitation.
7. Cross-examined by Counsel for the Respondent, the Claimant testified that his employment with the Respondent lasted between February to March 2016 to May 2017. Further, the contract of employment between him and the Respondent was not at any time reduced into writing. His salary could be paid through his bank account.
8. He testified further that at the termination of his employment, he signed a clearance certificate. However, he signed the same following harassment by the Respondent.
9. The Claimant further testified that he used to work daily and his major task was to lay underground plastic cables.
10. When he last went to the Labour offices, the Respondent's representative was present. The representative entered the Labour officer's office alone and when she came out, she urged them to take what the Respondent was offering.
11. In his evidence under re-examination, the Claimant stated that the clearance certificate was not explained to him. He was only told to sign the same.
12. The Labour Officer did not at any point tell them that the matter was duly settled. He was not a casual worker as he worked daily.

The Respondent's case

13. The Respondent presented one witness, Winnie Salano to testify on its behalf. The witness testified that at the material time, she was in the employment of the Respondent as the Manager in charge of personnel and operations.
14. The witness stated that the Respondent is a private liability company engaged in small construction projects. It does electrical line construction and masonry work. During her tenure, the company could be assigned contracts by Kenya Power and Lighting Company Limited to repair power lines in cases of power outages. The works were temporary. The Respondent could then engage artisans to do the job at an agreed piece rate. The artisans could be paid after the completion of the work.
15. The witness stated that at all material times, the Claimant was made aware that he was being engaged as a piece rate worker. Further, it was the Respondent's practice to give priority to workers who had served it in previous assignments, whenever, a new assignment came up. At times the Respondent would go for several months without securing a new assignment.
16. For the last engagement, the Respondent duly paid the Claimant all his dues amounting to Kshs 5,745. He was not dismissed as he alleges. Before the payment, the Respondent explained to the Claimant that it did not have another assignment, to enable it to retain him further.
17. The witness stated further that at all material times, it remitted duly remitted NSSF and NHIF contributions for its workers who were members of the Funds. It didn't owe any dues on the Claimant's account as alleged.



18. In her evidence under cross-examination, the witness stated that the Claimant had worked for the Respondent in a couple of assignments. The clearance Certificate was for the last payment. The payment and execution of the certificate were done after the matter was referred to the Labour Officer and an agreement was struck.
19. The Claimant was not being paid monthly but at the time of completion of the piecework.
20. It was only the Claimant and one Hillary who were cleared on 6th June 2018. They are the only workers who had laid a complaint with the Labour officer.
21. The Respondent's last assignment was within the Donholm area. The assignment was terminated by the Kenya Power & Lighting Company Limited. The Claimant could not be retained any longer.
22. The workers could be paid in cash through petty cash vouchers.

The Claimant's submissions

23. The Claimant's Counsel identified three issues for determination; whether the Claimant was a casual or permanently employed by the Respondent; whether the Claimant was procedurally and lawfully terminated; and whether the Claimant is entitled to the prayers sought.
24. Counsel submitted that the Claimant was a regular and permanent employer. The Respondent issued him with a staff card that indicated his designation as Artisan. If he was a casual employee as alleged by the Respondent, he could not have been issued with a staff card.
25. Counsel submitted further that when the Claimant's employment was terminated, he was made to sign a clearance Certificate. According to him, it is only long-term employees who are normally subjected to clearance procedures, not casual employees.
26. The Claimant's salary was normally paid into his Co-operative Bank account at the end of each month, a further indication that he was a permanent employee of the Respondent.
27. Counsel further submitted that there is no dispute that the Claimant was regularly employed by the Respondent and therefore even if he was a casual employee, his employment status converted to a permanent one by dint of the provisions of section 37(4) of the *Employment Act*.
28. It was further submitted that the Claimant was dismissed from employment without any notice and due terminal dues. He was not issued with any notice to show cause. The dismissal was wrongful. To buttress these submissions, Counsel placed reliance on the case of the *Principal and B.O.G Machakos Teachers College v Wambua Muunga* (2016) eKLR.
29. As the termination of the Claimant's employment was both wrongful and unlawful, the Claimant is entitled to the reliefs sought in his statement of claim.

Respondent's submissions

30. The Respondent's Counsel identified four issues that he deems emerge for determination, thus;
 - a. Whether there is a prima facie case by the Claimant against the Respondent.
 - b. Whether the Claimant was contracted in February 2016 as an artisan on permanent employment.
 - c. Whether the Claimant discharged the Respondent over any claims vide the letter of clearance dated 6th June 2017.



- d. Who should bear the costs of the suit?
31. Counsel submitted that the Claimant's suit should be dismissed on account that he did not establish a *prima facie* case against the Respondent. Further, the evidence presented did not prove a case on a balance of probability against the Respondent.
 32. The court was urged to take note that the Claimant executed a letter of clearance. However, he did not disclose the existence of the letter to the Court until the same was brought forth by the Respondent. As a result, he is guilty of non-disclosure of material facts. Further, the letter exonerated the Respondent from any claims. The Claimant did not controvert this fact. The Claimant's claim should be dismissed as a consequence.
 33. The Claimant's evidence that he was forced to sign the letter should be disregarded. Nowhere in his pleadings did he allege coercion. The assertion regarding coercion was nothing but an afterthought.
 34. It was further submitted that having signed the letter of clearance, discharging the Respondent from any liability, the Claimant by his conduct is estopped from claiming that he was unfairly dismissed.
 35. The Claimant's counsel urged the court to note that the NSSF records tendered by the Claimant indicate his employer as Kings Kitchen. To counter his evidence that he was an employee for whom the Respondent was supposed to contribute security funds, the Respondent was able to demonstrate that at all material times, it remitted funds to NSSF for accounts of the employees that it was bound to.
 36. It was further submitted that there is ample evidence on record that indicates that the Claimant was a piece-rate worker.
 37. The Claimant totally failed to prove that he was unlawfully and unfairly dismissed. Consequently, he is not entitled to any of those reliefs sought in his pleadings.
 38. The decision in the case of *Principal & B.O.G. Machakos Teachers College v Wambua Muaga* (*supra*) or distinguishable from the matter at hand. Unlike this matter, the Claimant in the cited case had an appointment letter.

Analysis and determination

39. I have carefully considered the pleadings, evidence and submissions placed before me in this matter, and the following issues emerge for determination:
 - a. What was the nature of the Claimant's engagement with the Respondent?
 - b. Whether the Claimant's employment was unfairly and wrongfully terminated.
 - c. Whether the Claimant is entitled to the reliefs sought.

a. What was the nature of the Claimant's engagement with the Respondent?

40. There is no dispute that at the material time, the Claimant was engaged by the Respondent to render services to it. However, there is a great controversy as regards the nature of engagement. The position by the Claimant was that he came into the employment of the Respondent on a permanent basis. The Respondent on the other hand contended that the Claimant was a piece rate worker for all those occasions he worked for it.
41. Before I delve further into these issues, it is imperative to state that this court notes that the Claimant both in his evidence and submissions, missed the Respondent's position on the nature of the engagement. While the latter maintained all through that the Claimant was a piece rate worker, the



- Claimant posited that the Respondent had taken the position that he was a casual worker. I find considerable difficulty in understanding what informed the blurring. I suspect a failure on the part of the Claimant to distinguish between a casual worker and a piece-rate worker.
42. A piece rate worker is paid based on the number of units they produce or tasks he or she completes, rather than receiving an hourly or fixed salary. Piece rate workers are compensated based on their productivity or output.
 43. The *Employment Act* 2007, defines piece work, thus, any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance.
 44. The Respondent's witness testified that the nature of the Claimant's employment was that he would be paid at the end of an assignment. His output was measured in the number of meters worked. His remuneration was computed at Kshs 150 per meter. The Claimant didn't put forth any evidence to controvert the Respondent's, on the stated mode of computation and payment. In my view, the description as given by the Respondent no doubt fits the definition of piece rate work.
 45. This court notes the elaboration given by the Respondent's witness concerning the nature of the contracts the Respondent would secure from time to time and the type of workers it would engage to enable it to undertake the contracts. I am persuaded by the Respondent's assertion that owing to the nature of the contracts, it could often require piece rate workers and not permanent workers.
 46. The Claimant asserted that he was a permanent employee who at all material times was paid a monthly salary through his account hosted at the Co-operative Bank of Kenya. To prove this assertion nothing would have been easier for him than to tender a bank statement as evidence.
 47. Further, to prove that he was a permanent employee, the Claimant needed to demonstrate that he was on a fixed salary payable at specific times. This, he totally failed to show.
 48. In sum, I am not convinced that the Claimant was in the employment of the Respondent as a permanent employee. He was at all material times a piece rate worker.

Whether the Claimant's employment was unfairly and unlawfully terminated

49. Having found as I have hereinabove, that the Claimant was a piece rate worker, the question that springs up is as to whether the expansive rights and protections for employees under the *Employment Act* are available to piece rate workers. Certainly, the answer is in the affirmative. However, it is important to note that how they set in, in case of a dispute, depends on the circumstances of each case. For instance, where the worker is discharged upon completion of the contractual task, there cannot be any place for him to claim that he deserved a termination notice or that he was dismissed without adherence to the procedure contemplated under section 41 of the *Employment Act*, 2007.
50. It was the Claimant's case that he worked for the Respondent up to 31st May 2017. This Court notes that on the 6th of June 2017, the Claimant executed a document captioned "Clearance letter" which read in part;

"I Jones Osiemo of Id No. xxxxxxxx confirm that I have cleared with Robin and Robins Construction Limited and therefore I have no any claims with the company. I have received my pay work pay in the full amount of 5,745 (five thousand seven hundred and forty five shillings only) and overtime of shillings 500 (five hundred shillings only)."
51. The Respondent's witness testified to the circumstances under which the document was executed. The Claimant and his colleague had after the completion of the contract tasks, and discharge by the



Respondent, complained to the Labour Officer alleging unfair dismissal. Following deliberations at the Labour office, the terms of the clearance letter culminated.

52. While admitting that he executed the document and got paid the sums set out therein, the Claimant asserted that he was harassed and forced to sign the document. Besides making this bald assertion of harassment and coercion, he did not in his evidence explain how, when and by whom this happened.
53. If indeed the Claimant was dismissed on the 31st May 2017, how then did he avail himself to execute the document on the 6th June 2017? The only reasonable explanation that this court sees is that he so did as a result of the events at the Labour Officer, as explained by the Respondent's witness.
54. Having stated as I have hereinabove, it is easy therefore to conclude that the document had a contractual effect on the parties. This court cannot shut its eyes and ignore the intention of the parties as expressed in the document.
55. The document signifies an acknowledgement that the relationship between the parties had come to an end. Further, the Claimant received all that he was entitled to under the contract of service. I am not inclined to see it any different way, as that could amount to rewriting a contract for the parties.

Whether the Claimant is entitled to the reliefs sought

56. In my considered view, the reliefs sought by the Claimant are deeply anchored on the fact that he was a permanent employee of the Respondent. Having concluded as I have that he was not, I see no basis on which any of the reliefs can be availed to him.

Conclusion

57. By reason of the premises, I find no merit in the Claimant's case. It is hereby dismissed.

READ, SIGNED, AND DELIVERED THIS 9TH DAY OF FEBRUARY, 2024.

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OCHARO KEBIRA

JUDGE

In the Presence of;

Mr. Ochako for the Claimant

Mr Mogire for the Respondent

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.



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OCHARO KEBIRA
JUDGE

