



Anduka v Rosolo Building Co. Limited (Employment and Labour Relations Cause 1106 of 2018) [2023] KEELRC 2944 (KLR) (17 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2944 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1106 OF 2018**

**B ONGAYA, J
NOVEMBER 17, 2023**

BETWEEN

PITALIS MUSITIKHO ANDUKA CLAIMANT

AND

ROSOLO BUILDING CO. LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the Statement of claim on 02.07.2018 through Wanyonyi & Muhia Advocates. The claimant prayed for judgment against the respondent for:
 - a. The sum of Kshs.2,769,237.44.
 - b. Cost of this suit.
 - c. Interests on (a) and (b) above at Court rates.
 - d. Any other relief that this Honourable Court may deem just.
2. The Statement of response was filed on 23.08.2018 through Oyatta & Associates Advocates. The respondent prayed that the suit be dismissed with costs.
3. The claimant's case was that he was employed by the respondent on or about January 2000, as a carpenter, and that he served the respondent with loyalty and diligence until 06.05.2017, when, without any lawful cause, the respondent terminated his services.
4. The claimant states that the respondent breached the terms of employment by failing to confirm him as an employee having served it for 17 years as a casual labourer.
5. It is the claimant's case that the respondent failed to pay him just wages in accordance with the minimum wages' regulations by paying him Kshs.700/= per day instead of the stipulated wages of Kshs.1,062.65 per day.



6. The claimant pleaded that the respondent unlawfully denied him annual leave and forced him to work seven days a week without overtime allowances.
7. That he was on 03.05.2016 injured in the course of his employment and was subsequently compensated by the insurance company for the injuries at the sum of Kshs.859,200/= which was paid through the respondent. The claimant states that the respondent unlawfully withheld the compensation from him and his attempts to recover the said sum from the respondent led to his services being unlawfully terminated.
8. On the part of the respondents it is stated that the claimant was never its employee, but was instead a casual labourer who would be occasionally called upon to work for it whenever need arose.
9. The respondent asserts that it was non-existent and had not been incorporated in the year 2000, and, that it only came into existence when it was registered in 2005. Therefore, the claimant could not have been its employee as claimed.
10. The respondent states that it only required the services of the claimant in 2013 and in 2015, for a period of 3 weeks on both occasions, with the claimant being injured during the latter period while undertaking carpentry services for it.
11. That during the said two periods, the claimant was fully remunerated upon completion of the carpentry tasks given.
12. That on 04.06.2015 while the claimant was engaged by the respondent, he got injured and incurred medical expenses amounting to Kshs.62,319/= which expenses were subsequently compensated by the respondent through its insurance company for a sum of Kshs.81,915/=. That the work injury benefits claim is an entirely different cause of action and cannot therefore be brought under this suit.
13. The Claimant testified by adopting his witness statement and final submissions were filed for him. The respondent, despite service, failed to avail the witness and no final submissions were filed in that regard. The court has considered the parties' respective cases and makes finding as follows.
14. The claimant has pleaded and testified that he served as a casual employee over a period of 17 years. The Court finds that by his own pleading and testimony per paragraph 2 of the witness statement, he was a casual employee, on and off.
15. He enumerated his claims as follows:
 - a. Unpaid salary difference from 01.08.2013 – 30.05.2017 being 44 months thus 362.65 salary difference x1338.30.
 - b. One-month salary in lieu of notice Kshs.31, 879.50.
 - c. Salary from 01.05.2017 to 06.05.2017 Kshs.5, 313.25.
 - d. Unpaid leave for 17 years Kshs.541,951.50.
 - e. A year's salary compensation for unlawful termination Kshs.382, 554.00.
 - f. Gratuity for 16 years 5 months Kshs.210, 404.70.
 - g. Injury compensation paid by Monarch Insurance Kshs.859,200.00.
 - h. Unpaid NSSF for 17-years Kshs.400 x 198 months = Kshs.79, 200.00.
 - i. Unpaid NHIF for 17 years Kshs.173, 400.00.



- j. Total claim Kshs.2, 769,237.44.
16. The Court has considered the material on record. The Court returns that the claimant has asserted that he was a casual employee. How then could the Court award him claims as prayed based on monthly rates of payment? The Court finds the reliefs as claimed for are speculative and not established at all. It cannot be that the underpayment was for all 17 years and that the same rate of payment applied and which is not shown to have been the case.
17. As relates to compensation for injuries suffered, counsel for the claimant surrendered the same on 26.07.2023 per orders on record.
18. If the relationship was casual, then how would the Court return that it was an unfair termination whereas the witness statement states that the termination was without notice on unspecified date. The date, in the statement of claim and in the witness' statement was 03.05.2016 when the claimant suffered the injury. The date of the alleged termination is at large. The Court is unable to return a finding of unfair termination for want of due circumstances and particulars duly establishing the alleged unfair termination.

In conclusion judgment is hereby entered for dismissal of the suit with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 17TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

