



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1671 OF 2016

ALBERT MOGISI MOKAYA.....CLAIMANT

VERSUS

HAGGAI MULTI-CARGO HANDLING

SERVICES LIMITED.....RESPONDENT

JUDGEMENT

1. This suit was commenced by way of a claim filed on 22nd August, 2016 and through which the claimant seeks against the respondent various reliefs on account that he was wrongfully dismissed from employment.
2. The respondent neither entered appearance nor filed a response in answer to the memorandum of claim. The claim was therefore undefended. On record, is an Affidavit of Service deposed by one Mr. Geoffrey Anami on 19th September, 2016, through which he states that he effected service of the statement of claim and summons to enter appearance upon the respondent. Annexed to the Affidavit of Service is a copy of the copy of the Summons which bears the receiving stamp of the respondent.
3. The matter was slated to proceed for hearing on 8th November, 2021 and on the said date, the respondent was absent. The claimant through his Advocate, produced an Affidavit of Service deposed by one Mr. Kevin Balongo on 5th November, 2021, through which he states that he effected service of the day's hearing notice upon the respondent. Annexed to the Affidavit of Service is a copy of said hearing notice.
4. Being satisfied with the return of service, the court directed that the matter proceeds in absence of the respondent, pursuant to Rule 22 of this Court's Rules.

Claimant's case

5. At the commencement of the hearing, the claimant adopted his witness statement to constitute part of his evidence in chief. He also produced the bundle of documents filed together with his claim as exhibits before court.
6. A summary of facts as presented by the claimant is that, he was employed by the respondent through its contracted client Ken- Afric (EA) with effect from 8th October, 2012. That he worked as an assistant in the store department until 19th October, 2015 when he was directed to go home alongside other colleagues on account that there was no work.
7. It was his testimony that the respondent did not give him any notice nor contact the labour office as regards his termination. He further told court that he used to be paid after every two weeks by the respondent and that he used to work from 7:30 am till 5:30 pm and at night from 5:30 pm till 8:00 am. He asked the court to allow his claim as prayed.

Submissions

8. Upon close of the hearing, the claimant filed written submissions through which he urged the court to find that his termination was unfair in terms of Sections 40 and 45 of the Employment Act. He placed reliance on the case of the **Abigael Jepkosgei Yator & another vs China Hanan International Co. Ltd (2018) eKLR**.

Analysis and determination

9. From the pleadings on record, the evidence placed before court as well as the submissions, the issues for determination can be distilled as follows;

i. What was the nature of the employment relationship between the claimant and the respondent?

ii. Whether the claimant was unfairly and unlawfully terminated?

iii. What reliefs if any, are available to the Claimant?

Nature of the employment relationship

10. The claimant stated that he was engaged on a casual basis and was being paid after every two weeks. Indeed, the bank statements which the claimant produced contain the term “casuals” against the payment made by the respondent to his account.

11. The claimant submitted that though he was engaged as a casual employee initially, his terms of employment were eventually converted to term contract by dint of section 37(1) of the Employment Act (Act).

12. I must admit that the evidence presented before me is quite minimal and doesn't shed much light to the case. Nonetheless, the court is bound to arrive at a determination.

13. Section 2 of the Employment Act defines a casual employee to mean *a person whose terms of engagement provide for payment of wages at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.*

14. The claimant stated that though he was being paid after every two weeks and that he started off as a casual employee, he served in the employment of the respondent with effect from 8th October, 2012 until 19th October, 2015, which is approximately 3 years.

15. As per his bank statements, the claimant was paid by the respondent on weekly intervals namely; 27th July, 2015, 31st July, 2015, 17th August, 2015, 22nd August, 2015, 1st September, 2015, 11th September, 2015 and 5th October, 2015.

16. Section 37 (1) and (4) of the Act provides as follows;

(1) Notwithstanding any provisions of this Act, where a casual employee-

(a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month;

(b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

17. The claimant stated in his testimony that he worked for the respondent continuously beyond a period of 3 months. This assertion was confirmed through his bank statements which indicate that he was paid at weekly intervals for a period of 3 continuous months, that is July, August, September and October, 2015.

18. The evidence by the claimant that he worked continuously for the respondent for a period of continuous days equivalent in aggregate to not less than a month, was not controverted as the respondent did not tender a defence nor participate in the trial.

19. In view of the foregoing and in light of section 37 (1) of the Employment Act, the claimant's engagement was converted from casual employment to permanent and was deemed to be one where wages are paid monthly and section 35 (1) (c) effectively applied to that contract of service. Such was the finding by the Court of Appeal in the case of **Nanyuki Water & Sewage Company Limited v Benson Mwit Ntiritu & 4 others [2018] eKLR**, which I fully adopt and reiterate.

20. Section 37 (3) of the Employment Act provides that;

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would be entitled to under this Act had he not initially been employed as a casual employee.

21. In light of the foregoing legal provision, the employment of the claimant assumed a different character upon conversion from casual, hence he is entitled to the terms and conditions stipulated under the Act. This position is reinforced by the decision of **Rashid Odhiambo Allogoh & 245 Others vs Haco Industries Limited [2015] eKLR** where the court opined as follows;

“With the enactment of the Employment Act 2007, considerable attention is paid to provisions of section 37 thereof which provides for conversion of casual service to permanent employment. In particular, subsection 37 (5) (sic) provides that an

employee whose contract of service has been converted (on account of a continuous service of three or more months like in the petitioners' case) and who has worked for two or more months from the date of employment as a casual employee, shall be entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee."

22. The net effect of the construction of section 37 (3) of the Act and the foregoing judicial pronouncements is that the claimant was entitled to the safeguards under the Act. Accordingly, his termination ought to have been undertaken in accordance with the provisions of the Act. This brings us to the next issue for determination and which is whether the termination of the claimant was fair and lawful within the meaning of the Act.

Whether the claimant was unfairly and unlawfully terminated?

23. **Section 43(1)** of the Employment Act, places the burden of proving reasons for termination on an employer and failure to do so, renders such termination as unfair. In addition, **section 45 (2)** of the Act, qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

24. The aforementioned legal provision is what constitutes substantive justification and is also the first limb towards proving whether or not a termination is fair.

25. The claimant has averred that the reason given for his termination was that there was no work. Evidently, the reason for termination falls within the ambit of section 45 (2) (b) (ii) of the Act and would constitute the "*operational requirements of the employer*". Essentially, the claimant's form of exit from employment is redundancy.

26. Section 2 of the Act defines redundancy to mean **the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.**

27. Substantive justification in instances of redundancy finds its basis under the above definition in section 2. To this end, the circumstances leading to an employee's redundancy ought to be within the context of the definition of redundancy.

28. To this end, the respondent had to prove that the services of the claimant were superfluous and that his termination was based on its operational requirements. It was also under an obligation to prove this fact before court. This would have been demonstrated through both oral and documentary evidence but it was not done. As this matter was not defended, such evidence was not adduced hence there can only be one determination and that is, the claimant's termination through redundancy was not substantively fair.

29. The procedure to be complied with in effecting a redundancy is stipulated under section 40 (1) of the Employment Act. Specifically, an employer is required to comply with the following preconditions;

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

30. There is no evidence at all that the respondent complied with the foregoing preconditions. As indicated herein, the respondent did not participate in the trial process hence there is no evidence from its end to suggest that it complied with any of the conditions under section 40(1).

31. Needless to say, the respondent has failed to discharge its burden under the law by proving that the claimant's termination was fair and lawful. Having found as such, what reliefs then avail the claimant.

Reliefs

- 32. Having found that the claimant’s termination was unfair and unlawful, I will award him five (5) months’ gross salary as compensatory damages.
- 33. The claimant is further awarded severance pay on account of his termination through redundancy.
- 34. I further award the claimant one (1) month’s salary in lieu of notice pursuant to the provisions of section 35 (1) (c) of the Act.
- 35. I decline to make any award as regards overtime, off days and public holidays as the same have not been substantiated.
- 36. The claimant has prayed for house allowance. This claim is inadmissible as it is presumed that the same was subsumed in his gross salary. In this regard, the Black’s law dictionary, 10th Edition defines gross income as the **“Total income from all sources before deductions, exemptions, or other tax reductions...Also termed as gross earnings”**. From this definition, it is presumable that the claimant’s gross salary had taken into account all income payable to him.

Orders

37. In the circumstances, I enter Judgment in favour of the claimant against the respondent as follows;

- a) **Compensatory damages in the sum of Kshs 85,000/= which sum is equivalent to 5 months gross salary.**
- b) **One month’s salary in lieu of notice being Kshs 17,000/=.**
- c) **Severance pay for 3 years being the sum of Kshs 25,500/=.**
- d) **The total award is Kshs 127,500/=.**
- e) **The claimant shall also have the costs of the suit.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JANUARY, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Muchiri

For the Respondent No appearance

Court Assistant Barille Sora

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 had 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 Civil 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.

STELLA RUTTO

JUDGE