



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1121 OF 2017

FREDRICK OCHIENG.....CLAIMANT

VERSUS

SAMAR CONSTRUCTION CO. LIMITED.....RESPONDENT

JUDGEMENT

1. The matter herein was commenced by way of a Memorandum of Claim filed on 19th June, 2017, through which the claimant alleged unlawful termination by the respondent. The claimant avers in his claim that he was employed by the respondent sometimes in June, 2014 and served as such until until 27th June, 2016 when his services were unlawfully and without justifiable cause terminated. On this account, he sought various reliefs including salary in lieu of notice, service pay for 3 years, gratuity, compensatory damages and loss of future earnings.

2. The respondent filed its defense vide a response to the Claim dated 5th November, 2017 wherein it stated that the claimant was employed on a casual basis to do shuttering works after which his services were no longer required.

3. The matter proceeded for hearing on 9th November, 2021 with each side calling one witness.

Claimant's case

4. The claimant testified as CW1 and at the outset, he sought to rely on his witness statement which he asked the court to adopt as part of his evidence in chief. He also produced the documents filed together with his claim as exhibits before court.

5. The claimant testified that he was employed by the respondent sometimes in July, 2014 as a fore work subcontractor and was being paid Kshs 1,000.00 per day. That he was working at the respondent's construction site at Kileleshwa. He told court that he was being paid every Saturday hence his total weekly pay was Kshs 6,000.00. It was his testimony that his services were terminated on 27th June, 2016 on the basis that there was low volume of work. He added that it was not true that there was low volume of work as there was still a lot of work pending at the site at the time his services were terminated. He averred that he was not paid his dues outstanding as at that time.

Respondent's case

6. The respondent's witness (RW1) Mr. Fredrick Kibui Kawara informed Court that he is a foreman at the respondent company. He confirmed that he knew the claimant as he was working at the construction site at the material time. He averred that the claimant was a carpenter who was working on a day to day basis when the shuttering works were being done. He stated that the claimant was not an employee of the respondent and he was only engaged when his services were required. That indeed, the claimant was let go when the volume of work was low and his services were no longer required at the construction site.

Submissions

7. The claimant in his written submissions maintained that the respondent did not have any valid reasons to terminate his services. He further submitted that he worked for the respondent from July, 2014 to June, 2016 and between 7:00 am to 5:00 pm everyday hence it was a continuous employment. That therefore and by dint of section 37 of the Employment Act, he was a protected employee with full rights and benefits. He placed reliance on several authorities including **Fredrick Ouma Otieno vs Falcon Signs Limited (2020) eKLR**, **Kenya Planation & Agricultural Workers Union vs Del Monte Kenya Limited (2016) eKLR** and **Kenya Broadcasting Corporation vs Geoffrey Wakio (2019) eKLR**.

8. The respondent did not submit any submissions for consideration by court despite being granted an opportunity to do so.

Analysis and Determination

9. From the pleadings on record, the evidence submitted and the testimonies rendered before Court by both parties as well as the submissions on record, the issues calling for resolution by this court are;

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. It is not in contest that the claimant rendered services to the respondent. The issue in contention is on what terms were such services rendered.

11. The claimant has averred that he was in the employment of the respondent for a period of about 3 years that is from 2014-2016. This position has been discounted by the respondent who contends that the claimant was employed intermittently on a casual basis.

12. The Employment Act recognizes various types of employment, namely, contract of apprenticeship and learnership, probationary contract, fixed term contract and contract of casual employment. From the facts and circumstances relevant to this case, the type of employment that fits the context herein is employment on casual basis. 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.*

13. The claimant admitted that he was being paid wages either at the end of the day or at the end of the week. He also produced a Casual Labour Card which was issued in his name. It was his testimony that his employment was continuous and that he would return the Casual Labour Card at the end of each week upon receiving his dues.

14. 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.

15. The claimant has averred that he worked for the respondent continuously beyond 3 months. It was not in contention that he was working at the respondent's construction site. The claimant in his testimony before court averred that he worked on Block A and B at the construction site. He averred that each block had 9 floors and consisted of 2 and 3 bedroom units. That at the time he was let go, he had already completed the 8th floor of Block B. This was confirmed by RW1. His only point of divergence was that there was low volume of work at the time the claimant was let go.

16. It is therefore apparent that going by the sheer volume of work at the respondent's site, it was not reasonably expected that the same would be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more. This fact was not disputed by the respondent. It was also not disputed that the claimant worked continuously for a period of continuous days equivalent in aggregate to not less than a month at the site.

17. The respondent despite contesting the claimant's nature of employment, did not adduce any evidence at all to prove that there was a break in the service of the claimant. As it was, no Muster roll or Casual Labour Register was produced before court to discount the claimant's evidence that he worked continuously for a period of not less than a month and that the work undertaken was to be completed within 3 months.

18. 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 contract term and was deemed to be one where wages are paid monthly and section 35 (1) (c) effectively applied to that contract of service. On this score, I am guided by the Court of Appeal's finding in the case of **Nanyuki Water & Sewage Company Limited vs. Benson Mwiti Ntiritu & 4 others [2018] eKLR**.

19. Further, 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.

20. Accordingly, the terms of the claimant having assumed permanency upon conversion from casual, he is entitled to benefit from the terms and conditions stipulated under the Act. In the case of **Rashid Odhiambo Allogoh & 245 Others vs Haco Industries Limited [2015] eKLR**, 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."

21. By virtue of the provisions of section 37 (3) of the Act and the foregoing judicial pronouncements, the claimant was entitled to the safeguards provided under the Act. As such his termination ought to have been undertaken in accordance with the provisions of the Act. This takes me to next question 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?

22. **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. **Section 45 (2)** of the Act, deems 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.

23. The aforementioned legal provision is what constitutes substantive justification and is also the first limb towards proving the fairness of a termination from employment.

24. As I have noted, the only contention by the respondent in this regard was that the claimant was engaged on a casual basis to undertake a specific task hence could not have been unlawfully terminated.

25. From the pleadings and evidence on record, the claimant was terminated on account of low volume of work. Essentially, this would fall under section 45 (2) (b) (ii) of the Act and would constitute the "*operational requirements of the employer*". Accordingly, the manner through which the claimant exited employment was through redundancy.

26. Pursuant to section 2 of the Act, redundancy arises when an employee loses **employment, by involuntary means and at the initiative of the employer, where the services of such an employee are declared superfluous.**

27. Substantive justification in the event of redundancy ought to be proved in the context of the above definition and in line with the provisions of section 45 (2) (b) (ii).

28. Therefore, the respondent was required to prove that there were justifiable reasons for the redundancy in that the claimant's services were superfluous and the termination was in respect of its operational requirements. This was not done at all as no evidence was tendered to that end. This would have been demonstrated through oral and documentary evidence but it was not done. It was not sufficient for the respondent to merely state that the claimant's services were no longer required, it had the legal burden to prove the same.

29. Further, upon the claimant being declared redundant, the respondent was under an obligation to comply with the conditions stipulated under section 40 (1) of the Employment Act. These conditions are;

(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. The respondent did not table any evidence to demonstrate that it complied with any of the aforesaid conditions. As a matter of fact, it never made any indication or suggestion, that it complied with the same.

31. The upshot of the foregoing is that the respondent has failed to discharge its burden under the law by proving that the claimant's termination was fair and procedural. 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 three (3) month's gross salary as compensatory damages. This award is informed by the length of the employment relationship and the fact the respondent did not advance any reasons whatsoever, for the claimant's termination and did not comply with the laid down requirements in so doing.

33. I further award the claimant one (1) month's salary in lieu of notice.

34. I will also award the claimant service pay pursuant to section 35 (5) of the Employment Act.

35. The court also awards the claimant prorated leave in respect of 2016 which was the last year he served the respondent. I will not award leave for the previous years as it cannot be presumed that the same was carried forward.

36. The claimant has also sought the sum of Kshs 21,573.00 being an outstanding amount from his dues. This sum was not disputed by the respondent and in any event, no evidence to the contrary, was produced. As such, the same is awarded.

37. The employment relationship having been admitted, the claimant is entitled to a certificate of service pursuant to section 51(1) of the Employment Act.

Orders

38. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;

a) Compensatory damages in the sum of Kshs 72,000/= which sum is equivalent to 3 months gross salary.

b) One month's salary in lieu of notice being Kshs 24,000/=.

c) Service pay for 3 years being the sum of Kshs 72,000/=.

d) Outstanding dues in the sum of Kshs 21,573/=.

e) Untaken leave days (10.5 days x Kshs 800) hence Kshs 8,400/=.

f) The total award is Kshs 199,973/=.

g) The claimant shall also have the costs of the suit.

h) Interest on the amount in (f) at court rates from the date of Judgement till payment in full.

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

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Moraa

For the Respondent Mr. Mwangi

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