



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO.1045 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

JUSTUS ORINA MARIITA.....CLAIMANT

VERSUS

ACCURATE STEEL MILLS LIMITED.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant filed a memorandum of claim dated 27th May, 2016. The Respondent filed a response via his response dated 22nd August, 2016.

CLAIMANT'S FACTS

2. The Claimant states he was employed by the Respondent as a general worker from June, 2011 until 2014 7th November when his services were terminated.

3. He says he used to work on public holidays and that he never took leave. He also claims his NSSF dues were never remitted during his working life and neither were his NHIF dues.

4. He says the Respondent claimed he terminated his dues because of shortage of work. He says nevertheless another worker was employed in his place.

5. He says he worked for the Respondent for 3 years and during that period he had no blemish. He says that he was not paid his terminal dues.

He is now claiming compensation for unlawful termination;-

- a. Salary in lieu of notice Kshs.21,600/=
- b. Payment in lieu of unpaid leave for entire period Kshs.45,360/=
- c. Pro-rate leave for 5 months worked Kshs.6,300/=
- d. Service gratuity Kshs.32,400/=.
- e. Compensation for unlawful termination

@ 12 months Kshs.259,200/=

Interest from date of filing suit till full payment.

Costs of the suit.

RESPONDENT'S CASE

6. The Respondent denies Claimant was their employee but avers he was a casual labourer on a nine week contract at a weekly pay of KShs.2820/= between November, 2012 to June, 2014.

The Respondent says the Claimant did not serve the alleged period in paragraph 8.

7. The Respondent states Claimant was not terminated but would have been recalled if need arose. He says he terminated the Claimant's employment for reasons beyond his control and he explained to the Claimant. He says the reasons were fair and genuine.

He says furthermore he paid the Claimant all his dues and so he denies that the Claimant is entitled to the remedies he is claiming.

The Respondent states the claims by the Claimant are a sham and aimed at unjust enrichment and so he prays this claim be dismissed with costs to the Respondent.

ISSUES FOR DETERMINATION

(a) The issues for determination are whether the

9. Claimant was a permanent or a casual employee.

(b) whether he was unlawfully terminated from his employment.

(c) whether he is entitled to the remedies prayed for?

DETERMINATION

10. As to the first issue on whether the Claimant was a permanent or a casual employee, I will easily resolve that issue by referring to the law.

Section 2 of the Employment Act defines a casual employee as "a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time."

11. Section 37 of the said act also provide that a casual employee who:-

a. Works for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month such a contract can be converted to a service contract or where the aggregate days amount equivalent to 3 months.

12. The Claimant states he was employed from June, 2012 to November, 2014 for a total of 3 years and 5 months.

13. The law is clear that if you work as a casual for more than one month your employment term converts to service term. In this case the Claimant would work for about 2 – 3 months renewable going by the appointment letters produced in this court by the Respondent.

The same are as follows:-

23/22/2012 to 24/1/2013

6/6/2013 to 7/6/2014

30/1/2014 to 2/4/2014

12/6/2014 to 3/8/2014

2/10/2014 to 3/12/2014

14. Each contract exceeded one month provided in law and so the employment was obviously meant to be permanent and no wonder the contract provided were entitled to annual leave according to Employment Act and termination was also in accordance to the Employment Act 2007.

15. In this case the casual contract converted to a contract of service for payment of monthly salary within the meaning of Section 37 (1) (a) of the Employment Act and therefore became protected from unfair and unlawful termination under Section 45 of the Employment Act 2007.

16. In the case of **SILAS MUTWIRI VS HAGGAI MWITI CARGO HANDLING SERVICES LIMITED (2013) eKLR** the court noted “this kind of employment where the casual employee is not terminated at the end of day and continues to work continuously for over a month up to and until three months then the law converts into a contract terms.”

17. Similarly and going by the contract produced and the pleadings and testimony of the Claimant he worked for the Respondent for over 3 years.

The Respondent only produced some records of casuals for 30th October, 2014 to 3rd November, 2014 and 6th November to 12th November, 2014 and also 13th November to 19th November. Yet the Claimant worked for Respondent from 2012 to 2014. The only other record produced by the Respondent shows Claimant worked for them from November, 2012 to June, 2014 and shows days he purported to work but the Claimant did not sign for the same.

18. The court has painstakingly considered all the evidence adduced and comes to the considered opinion that the Claimant’s employment was converted to contract of service. So under Section 35 (1)(c) of the Employment Act he deserved to be given at least 28 days’ notice to terminate his employment.

19. As to whether the Claimant’s termination was unlawful or unfair the Claimant testimony is that he was unexpectedly terminated without notice. He was informed there was shortage of work. The Claimant evidence is uncontroverted. The Respondent says the Claimant was not terminated but would have been recalled when other job opportunities arose. But there is no evidence of such communication.

The Claimant says another person had already replaced him.

20. Section 40 of the Act provides that if an employee is to be declared redundant there are clear mandatory provisions to be followed.

The employer should inform the employee one month before the redundancy or the union if the employee is a member of the union that he intends to declare him redundant.

There must also be meaningful consultation on the criteria used to declare the employee redundant and the terminal dues must be paid.

21. In other words, the criteria to declare a person redundant is clear and is mandatory as set out in Section 40(1) (a–g). If the process is not adhered to then the court must find the termination is unlawful and so enter judgement in favour of the Claimant.

22. In the present case the court having found that the Claimant had a term contract and further that he was terminated for shortage of work and yet the rightful process was not adhered to declare a person redundant therefore finds Claimant was unfairly terminated and so enters judgement in favour of the Claimant.

Judgement is entered in favour of the Claimant.

REMEDIES

23. (a) one month salary in lieu of notice from the contracts on record Kshs.11,280/=.

(b) Payment of unpaid leave for the whole period – Being a special damage claim it needs to be specifically pleaded and proved which is not proved and so prayer is declined.

(c) Prorata leave 5 months worked – (not evidence which are the five months – once again no prove – prayer is declined.

(d) Service gratuity at 15 days for 3 years Kshs.16,920/=.

(e) Compensation for unfair termination and having worked for about 3 years and not having contributed to his termination. I award him 3 months equivalent as full compensation Kshs.33,840/=.

DISPOSITION

24. The total award totals Kshs.62,040/= together with interest at court rates from the date of judgement till full payment.

25. Costs follow the event. Claimant is awarded costs.

It is so ordered.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 17TH DAY OF FEBRUARY, 2022

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE