



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 413 OF 2017

ROLEX OCHIENG OWUOR.....CLAIMANT

VERSUS

EQUATOR BOTTLERS LIMITED....RESPONDENT

JUDGMENT

1. The questions for the adjudication by the Court in the Cause herein are:

- i. Whether the Claimant was a casual employee?
- ii. Whether the termination of the Claimant's employment was unfair?
- iii. Whether the Respondent was in breach of contract?
- iv. Appropriate remedies.

2. The Cause was heard on 10 May 2021 when Rolex Ochieng Owuor (the Claimant) testified and on 17 November 2021, when a Human Resources Manager with Equator Bottlers Ltd (the Respondent) testified.

3. The Claimant filed his submissions on 15 December 2021 and the Respondent filed its submissions on 11 February 2022 (should have been filed before 21 January 2022).

4. The Court has considered the pleadings, evidence and submissions.

Nature of employment contract

5. The Respondent denied that the Claimant was an employee serving as a loader from 2007 until separation in August 2017.

6. According to the Respondent, the Claimant was a loader (casual employee) who would be called upon to offer services whenever and only when there was work.

7. The Claimant however asserted that he served the Respondent continuously from July 2007 until August 2017, when he was allegedly dismissed and to show that he was such an employee, produced a copy of his Provisional Member Statement of Account from the National Social Security Fund.

8. None of the parties produced a primary document to indicate the nature of contractual relationship they had.

9. In such a case, it is open to the Court to rely on secondary evidence.

10. The Claimant produced a copy of a statement from the National Social Security Fund, and it shows that the Claimant was employed by the Respondent on 1 January 2010, and that he was paying *standard contributions*.

11. Casual employees do not make *standard contributions* to the Fund and on that account the Court discounts the contention by the Respondent that the Claimant was casual *employee*, at least from 1 January 2010.

12. On the nature of the relationship prior to 2010, the Court notes that it is the responsibility of an employer to keep employment records. The employer is also required to issue a written contract. The records would include those of casual employees.

13. The Respondent did not produce any records (such as pay records) to support its allegation that the Claimant was ever a casual employee. Its witness admitted that it started a contractual relationship with the Claimant in 2006. Casual employment cannot subsist for more than 3-months.

14. Without the records and considering section 10(7) of the Employment Act, 2007, the Court finds that the Claimant's contractual engagement with the Respondent started in 2006.

Unfair termination of employment Procedural fairness

15. Sections 35(1) and 41 of the Employment Act, 2007 set out the procedural fairness requirements an employer should comply with when terminating an employment contract.

16. The Claimant testified that his employment was terminated verbally on 1 August 2017 by the Human Resources Officer and that there was no notice or reasons given.

17. The Respondent pleaded in its Response that the Claimant declined to render services when called upon and that in any case, there was no work for the Claimant when business slowed down.

18. The copy of the Claimant's statement from National Social Security Fund indicates that the Respondent's made monthly and continuous payments on behalf of the Claimant.

19. The contention therefore that the Claimant only worked intermittently or during peak seasons cannot be true.

20. The Claimant testified that he used to sign an attendance register. A copy was not produced in Court.

21. The Claimant was on a monthly pay. He was entitled to a written notice of termination which was not given.

22. The Court is satisfied that the Respondent unfairly terminated the Claimant's employment.

Breach of contract

23. The Claimant sought Kshs 3,780/- being salary arrears. He did not provide any details of the arrears in the witness statement. He also did not advert to the head of the claim during oral testimony, and the Court finds that without an evidential foundation to this head of claim, relief should be declined.

Appropriate relief Compensation

24. The Claimant served the Respondent for about 10-years and on account of the length of service, the Court is of the view that the equivalent of 8-months gross wages as compensation would be appropriate (gross wage according to pay slip produced in Court was Kshs 7,127/-).

Pay in lieu of notice

25. The Claimant was paid by the month and the Court will award the equivalent of 1-month wage as pay in lieu of notice.

Certificate of Service

26. A Certificate of Service is a statutory entitlement of an employee, and the Respondent should issue one to the Claimant within 21-days.

Conclusion and Orders

29. The Court finds and declares that the Respondent terminated the Claimant's employment unfairly and awards him:

(i) Compensation Kshs 57,016/-

(ii) Pay in lieu of notice Kshs 7,127/-

TOTAL Kshs 64,143/-

28. The award to attract interest at court rates from the date of judgment.

29. Respondent to issue Certificate of Service within 21-days.

30. The Claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 16TH DAY OF FEBRUARY, 2022

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant P.D. Onyango & Co.Advocates

For Respondent Kiragu Wathuta & Co.

Court Assistant Chrispo Aura