



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1516 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

KENNEDY OCHIENG OWALA.....1ST CLAIMANT

JOHNSON ODHIAMBO OPANDE.....2ND CLAIMANT

VERSUS

BOOTH EXTRUSSIONS LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

- (a) The Claimants filed a claim via memorandum of claim dated 3rd August, 2017. There was a response filed by the Respondent and dated 19th March, 2018.
- (b) The Claimants claims they were employed by the Respondent on 15th January, 2009 and 1st July, 2008 respectively as a turn man at a starting salary of Kshs.643/= per day but was later increased to Kshs.20,280/= per month. The Claimants states that during that period they were not paid house allowance.
- (c) They also say their NSSF and NHIF dues were not remitted during that period.
- (d) They say on 26th August, 2014 the Respondent's factory manager Mr. Okoth terminated the Claimants employment via a telephone call without giving them a valid reason.
- (e) The Claimants says they tried to find out why they were terminated by calling and by visiting the Respondent's premises but they did not succeed.
- (f) A demand letter sent to the Respondent by the Claimant's advocate dated 1st July, 2015 was not responded to.
- (g) Claimants says they did not go on leave for the seven and 8 years respectively when they worked for the Respondents. They say they were also not paid for days worked in August inclusive 25th August, 2015 amounting to Kshs.16,900/=.
- (h) Claimants claim they worked throughout the year including public holidays and were never paid overtime and would only be paid single days wages instead of double pay which they claim is the legal way.
- (i) Claimants further claim they were never given one month notice or payment in lieu of notice.
- (j) The Claimants state their records were clean and were never served with warning letters or notice to show cause. They say their effort to know the reasons for their termination has been futile. The 1st Claimant Kennedy Ochieng Owala is claiming a total compensation of Kshs.1,209,452/= and the 2nd Claimant **JOHNSON ODHIAMBO OPANDE** is demanding Kshs,2,447,286.40/=. Both are also praying for costs and interest and a certificate of service.
- (k) Alternatively, they are praying of reinstatement without loss of benefits.

RESPONDENT'S EVIDENCE

(i) The Respondent avers that the Claimants being casual workers were being paid wages at Kshs.628/= inclusive 15% housing allowance according to the wages (General) amendment order (2013 - 2014). He says the Claimants last day of employment was 26th August, 2014 when an issue of integrity was raised verbally by one of the Respondent's customers trading by the name of **MODERN CASEMENT LIMITED**. Being casual workers, the Respondent chose not to engage them the next working day.

(m) He says that the decision not to re-engage the Claimants was lawful because they were casual workers. They say therefore that action to summarily dismiss the Claimants was lawful and justifiable under the Employment Act and Kenya Constitution.

ISSUE FOR DETERMINATION

- (n) (a) were the Claimants casual workers or were permanent employees?
- (b) If they were permanent employees was their employment unlawfully terminated?
- (c) Are the Claimants therefore entitled to the remedies they are praying.

DETERMINATION

(o) The main issue is the legal status of the Claimants at termination. Section 2 of the Employment Act defines casual employee

“as a person the terms of whose engagement provide for his payment at the end of each day and is not engaged for a longer period than 24 hours at a time.”

Section 37 of the same Employment Act provide that where a:-

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

(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 the contract of service.

(p) The Claimants aver they were employed by the Respondent from January, 2009 and July, 2008 respectively until 26th August, 2014.

The Respondent in his pleadings and in the Respondent's witness statement did not provide information to show when the Claimants were employed. The evidence only stated that their last day of employment was 26th August, 2014.

Clearly the Respondents did not give any evidence to controvert the Claimants' evidence both during their evidence in court and in the pleadings to the effect that they worked for the Respondents from January, 2009 and July, 2008 respectively. The Claimants and Respondents are in agreement the last working day of the Claimants was 26th August, 2014.

(q) The law referred herein above is from Section 2 and Section 37 of the Employment Act. In the case of **FRANCIS NDIRANGU VS BETTY WAIRIMU MAINA CASE 252 OF 2017** the court held that having worked continuously for longer than one month the Claimants terms converted by operation of law as provided in Section 37 of the Employment Act to service employment.

Also in the Case of **SILAS VS CARGO HANDLING SERVICES LIMITED (2013) eKLR** the Judge stated that “this kind of the employment where a casual employee is not terminated at the end of day and continues to work continuously for over a month up to and until over three months then the law converts the same into a contract of employment.

(r) The Claimants having worked for the Respondents for over 6 years each cannot be regarded as casuals anymore. By law their status convert to regular employment.

(s) As to whether their termination was unlawful and unfair the 1st Claimant who testified on his behalf and on behalf of the 2nd Claimant with his duly written authority told the court that on the 26th day of August, 2014 they were terminated via telephone by the Respondents' factory Manager.

He informed the court that they were not given any reason why their employment was terminated so unceremoniously. He said they tried to inquire both on telephone and verbally but they were not given any information.

(t) The Respondent in his pleadings said there were integrity issues raised by a Respondent's customer trading as Modern Casement Limited.

(u) The Respondent did not say what the issue was or to whom was the accusing finger. He just says that they decided not to re-engage the Claimants since they were casuals.

The Respondents opted not to call a witness in court.

(v) Section 45 of Employment Act provide that no employer shall terminate the employment of an employee unfairly. A termination of an employee is unfair if employer fails to prove the reason for termination is valid, that the reason for termination is a fair reason and that the employment was terminated in accordance to fair procedure.

(w) The Claimant witness says he was abruptly terminated together with the 2nd Claimant on telephone and no notice was giving to him and no reason was given as to why they were terminated.

(x) In the often cited case of **WALTER OGAL ANURO VS TEACHERS SERVICE COMMISSION 955 OF 2011** the court held that for "termination to pass the fairness test, it ought to be shown that there was not only substantial justification for termination but also procedural fairness. Further Section 43 of Employment Act obligated an employer to prove the reasons for termination of employment and where the employer failed to do so the termination was deemed to have been unfair.

(y) As for the procedure followed to terminate employment, it is well provided in Section 41 of the Employment Act that the employee must be given a chance to be heard in the presence of a fellow employee witness of his choice or a shop floor steward.

(z) In the present case the termination was thus unfair and unlawful. The contract of service of the Claimants having converted to a service contract under Section 37 of the Act, the Respondent was barred by Section 35 and 45 from terminating the Claimants without prior notice of not less than 28 days in writing and by giving a valid reason and fair reason as well as giving Claimants an opportunity to defend themselves.

(a) In view of the foregoing the court enters judgment in favour of the Claimants and awards the following remedies.

REMEDIES: KENNEDY OCHIENG OWALA

(b) (a) one month payment in lieu of notice Kshs.20,280/=

(b) Annual leave for 7 years Kshs.141,000/=

(c) Days worked only 25th August, 2014 Kshs.16,900/=.

(d) House allowance for 7 years declined as the Claimant has not demonstrated to the court how he worked out the same to reach that figure.

(e) Public holidays – also no records or how the same is arrived at and so is declined.

(f) Rest days is also declined for the above reasons.

(g) NSSF and service pay – no records from NSSF from Claimant to prove the same was not remitted and so is declined.

(h) Compensation for wrongful dismissal for 5 months equivalent Kshs.101,400/=.

(i) Baggage and luggage claim is not also proved and is not clear what it refers to and so is declined.

(j) since costs follow the event Claimant is awarded costs from the Respondent.

(k) Interest is awarded from the date of judgment till full payment.

(l) Certificate of service to issue.

CONCLUSION

The effect of the award is Kshs.278,180/= plus interest and costs.

(m) Having awarded the above, I decline the alternative prayers for reinstatement of the Claimant since 3 years have since passed as provided in Section 12 of Employment and Labour Relations Court Act.

Orders accordingly.

REMEDIES – 2ND CLAIMANT – JULIUS ODHIAMBO OPANDE

(a) Payment in lieu of notice for one month Kshs.20,280/=.

(b) Annual leave for seven years as Respondent never controverted the prayer Kshs.141,000/=.

(c) Days worked to 25/8/2014 Kshs.16,900/=

- (d) House allowance not granted as there are no workings or records to show how the figure was arrived at.
- (e) Public holidays – no records how the figure was arrived at so is declined.
- (f) Rest days – no records also as to how the figure was arrived at so same is declined.
- (g) NSSF and service pay. Claimant should have produced NSSF records or document to show the same was deducted from him but not remitted so the prayers as well is declined.
- (h) Compensation for wrongful dismissal equivalent of 5 months Kshs.101,400/=.
- (i) Full compensation for wrongful loss of employment – not proved and is declined and is well covered in 9 above.
- (j) Baggage and luggage allowance – claim is not proved and is not clarified what its reference hence id declined.
- (k) Since costs follow the event Claimant is awarded costs from the Respondent.
- (l) Interest at court rates from date of judgment until full payment.
- (m) Issuance of certificate of service to the Claimant.

CONCLUSION

The effect of this award is Kshs.279,580/= plus interest and costs.

(n) Having awarded the above, I decline the alternative prayers for reinstatement of the Claimant since 3 years have since passed (Section 12(viii) of Employment and Labour Relations Court Act.

Orders accordingly.

Delivered, dated and signed in Nairobi this 10th 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