Joel v Emmanuel Munga t/a Rabco Agencies (Cause 60 of 2018) [2022] KEELRC 1688 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1688 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 60 OF 2018

B ONGAYA, J

MAY 27, 2022

BETWEEN

DAVID MAKWAPA JOEL ..... CLAIMANT

AND

EMMANUEL MUNGA T/A RABCO AGENCIES ..... RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim on February 7, 2018 through Nyange Sharia Advocate of Kituo Cha Sheria. The claimant's case is that the respondent who was in clearing and forwarding business employed him as a supervisor from April 2014 until June 11, 2017 - when he was unlawfully and unfairly terminated. Further, his last monthly salary was Kshs. 24, 000.00. Further, he was not paid in lieu of notice, house allowance, leave pay for 4 years, and service pay. He made the claims accordingly. He alleged the termination was without reason or valid cause, the procedure in the *Employment Act* 2007 was not followed, and terminal dues were not paid. He claimed compensation for unfair termination. He prayed for judgment against the respondent for:

    a. A declaration the termination of the claimant's employment was unfair.

    b. One-month notice payment Kshs. 24,000.00.

    c. Leave pay for 4 years from 2014 to 2017 Kshs. 96,000.00.

    d. Service pay at half monthly salary for each of 4 years served Kshs. 48,000.00.

    e. House allowance at 15% of basic pay Kshs. 115, 200.00.

    f. Compensation for unfair termination Kshs. 288, 000.00.

    g. Total claim of Kshs. 571, 200.00.

    h. Issuance of certificate of service.

i. Any other relief deemed fit and just to grant to meet ends of justice.

2. The respondent filed on 04.07.2018 the memorandum of response through Mwarandu & Company Advocates. The respondent pleaded as follows:

   a. The respondent denied that it employed the claimant. Further, claimant was employed as a casual labourer and his contract of service lasted the assigned job.

   b. The respondent denied employing the claimant on April 28, 2014 as a supervisor at Kshs. 24,000.00 and denied that on June 11, 2017 the respondent terminated the claimant's employment.

   c. The claimant was engaged for 3 days or a week depending on the duration of ship docking at the port of Mombasa.

   d. Being a casual labourer he was not terminated at all.

   e. The respondent denied all claims made for the claimant and prayed the suit be dismissed with costs.

3. The claimant testified to support his case and the respondent as well testified to support his case. Final submissions were filed for the parties. The court has considered all the material on record and finds as follows.

4. The 1st issue for determination is whether the respondent employed the claimant on monthly basis or if he was a casual employee. The claimant's evidence is inconsistent with his pleading that he was employed at Kshs.24, 000.00 per month as a supervisor. He testified thus, "Initially I worked at MCT at PortReitz. Later I received phone to go to APM Terminal. I found RABCO. They wanted staff on verification. Respondent employed me to do it. I told them I would bring 2 colleagues. Each was paid Kshs.600.00 and I was paid Kshs.1, 000.00 per day. Respondent paid me. I was paid weekly salary on Saturday. I worked six days per week. I signed a book at payment. I worked 3 years...." In cross-examination he stated, "...I worked 6 days in a week. If Cargo arrived on Sunday, I went to work. I do not state that in my statement. My work was not to do verification as cargo arrived on ships. We did not work when cargo arrived. I worked at dry port... I worked for respondent for 3 years. I worked April 2014 till 2017..." In re-examination he further testified, "...There was no letter of appointment. I worked up to June 2017. At that time, I had been demoted from supervisor. Albert had taken over as supervisor. My pay had reduced from Kshs.1, 000.00 per day to Kshs. 800.00 per day." The Court finds that the claimant has failed, by his own evidence, to show that he worked for a monthly salary as alleged in his memorandum of claim. The inconsistency between his pleading and testimony makes his case incoherent and he cannot be trusted. The court finds that as pleaded and testified by the respondent, he was a casual employee on a daily wage and engaged on need basis to do verification job when ships arrived and docked at the port. There is also no reason to doubt the respondent's case that there was no agreed daily wage rate but that the claimant was paid on piece work basis per verification work assigned and then actually performed. The respondent's evidence was that he was engaged by a company known as APM as a gang leader to lead workers and he then engaged the claimant as his sub-gang leader to assist in recruiting staff. On a balance of probability, there is no reason to doubt the respondent's testimony because the claimant equally testified that the respondent asked him to bring other employees and he brought two other workers. The respondent's pleading and testimony is upheld that parties were in casual relationship with daily payment arrangement that was based on piece work.

5. To answer the 2nd issue for determination, in view of the casual employment with piece work arrangements, the claimant's claims and prayers will collapse. The court has considered the

respondent's failure to maintain records as per provisions of the *Employment Act*, 2007 and which failure appears to have been an impetus to the present suit. Accordingly, each party to bear own costs of the suit.

6. In conclusion, the claimant's suit is hereby dismissed with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 27TH MAY, 2022.

BYRAM ONGAYA

JUDGE