



Kombo v Doshi & Company (Hardwares) Limited & another (Cause 419 of 2016) [2022] KEELRC 1171 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1171 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 419 OF 2016**

**B ONGAYA, J
MAY 27, 2022**

BETWEEN

BWIBWI SALIM KOMBO CLAIMANT

AND

DOSHI & COMPANY (HARDWARES) LIMITED 1ST RESPONDENT

DOSHI ENTERPRISES LIMITED 2ND RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim on May 31, 2016 through I R B Mbuya & Company Advocates. The claimant's case is that he was employed by the respondents (being unaware of the relationship between the respondents) from April 2012 to March 28, 2015 as a welder. It is the claimant's case he worked throughout the period of service without break. His last daily wage is pleaded as Kshs. 650.00. He pleads the termination was abrupt without notice in late March 2015 when the respondents' Mr. Hussein Chuka told him that there were no materials. He alleges unfair termination because the reason given was not good enough and he was not heard prior to the termination. Further, he was not registered under NSSF or other pension scheme. It is his case that the termination offended sections 18 (4) and (5), 40, 49, and 50 of the *Employment Act*, 2007. He prayed for judgment against the respondents for:
 - a) Notice pay one-month wages Kshs 650 x 26 days = Kshs 16, 900.00.
 - b) Pay for accrued 3 years' leave days Kshs 650 x 3 x 21 = Kshs 40, 950.00.
 - c) Service pay 15 days for each completed year of service (3 years) Kshs 650 x 3 x 15 = Kshs 29, 250.00.
 - d) Maximum compensation per sections 49 and 50 of the Act Kshs 16, 900 x 12 = Kshs 202, 800.00.



- e) Certificate of service.
 - f) Any further relief the Honourable Court may deem just to grant.
 - g) Costs of the cause.
 - h) Interest from the date of judgment until full payment.
2. The respondents filed the response to the memorandum of claim on July 12, 2016 through C.B Gor & Gor Advocates. The respondents pleaded that they employed the claimant as a casual labourer and he never worked throughout the period without a break as alleged – he only worked on days his services were needed. Further, he worked with breaks from 2011 to 2014 - and the aggregate number of days actually worked over the years was 302 days. He never worked continuously from April 2012 to 28.03.2015 as alleged for him. Further, on February 19, 2014 he deserted work when he collected his wage of Kshs.483.88 for that day and he left never to return at the respondent’s premises. He was a member of NSSF per section 13 of the [National Social Security Fund Act](#), Cap 258 as a casual labourer and special contributions were made per NSSF statement exhibited. The respondents’ case was that the claimant was paid full entitlements and his claims and prayers were denied. The claimant having voluntarily not reported back after the last day at work, the issue of unfair termination did not arise. The respondent prayed the claimant’s suit be dismissed with costs
3. The claimant testified to support his case. The respondent’s witness (RW) was the Elizabeth John Risambu, the respondents’ Human Resource and Administration Assistant. Final submissions were filed for parties. The Court has considered all the material on record and finds as follows:
- 1) The evidence is that the respondents employed the claimant as a casual general labourer in their enterprise. The claimant was employed at a daily wage of Kshs 483.88 as per last day’s petty cash payment for February 19, 2014. In absence of any other evidence, the Court finds that his last day at work was on 19.02.2014. He had been engaged on and off effective 2011 per the attendance summary dated June 14, 2016 and exhibited for the respondent. The Court finds that per that exhibit on attendance summary, the claimant had a break in the service and from 2011 to February 19, 2014 he served for an aggregate of 302 days. The Court finds that the claimant contradicted himself when he pleaded that he was employed as a welder then he testified that he was a machine operator working as scrap metal machine operator. The respondent has shown that the claimant had been employed in 2011 and not April 2012 as had been pleaded for him and per his testimony. He denied working for the respondent in 2011 yet by evidence on summary days the respondent has established the claimant worked and NSSF was remitted. Such contradictions in his case rendered it not trustworthy on a balance of probability. The Court finds the claimant was a casual worker with breaks in his service. The respondent’s case is upheld.
 - 2) There is no reason to doubt testimony by RW thus, “...He was a casual labourer. We have casual list for daily payment. Casuals were recruited every morning at the gate on need basis when materials are available. He was employed 2011 and left February 19, 2014. He did not work continuously. He was employed on daily basis” RW testified the respondents maintained a register of casual employees but which had not been filed. On a balance of probability, the Court has found that there is no reason to doubt RW’s testimony especially in view of the claimant’s contradictory evidence. The Court returns that taking into account the exhibits as referred to by RW, the claimant was a casual employee and he is bound by his pleading that he worked continuously but which he has failed to establish by way of evidence.



- 3) The claimant was not coherent in his testimony on the circumstances of the separation with the respondents. While pleading he worked up to March 28, 2015, he further pleaded that in late March 2015 Mr. Hussein Chuka claimed there was lack of materials and he was thereby wrongfully and unlawfully summarily dismissed. So if the materials were lacking, how did that amount to summary dismissal in absence of alleged gross misconduct or fundamental breach against him in terms of section 44 of the *Employment Act*, 2007. In his oral testimony he testified that he was told there was no more work by Mr. Chuka and again that he was locked out by a guard whose name he did not recall and who told him that there was no work - and the guard locked him out. He does not offer oral or other evidence about the date he was locked out or told there is no work. He contradicts himself on the person who told him there was no work – and he does not specifically state the date of the separation in his oral evidence or otherwise provide that date. There is no reason therefore to doubt RW’s evidence that the claimant was paid on February 19, 2014 and thereafter he did not resurface for further casual employment.
 - 4) The Court returns that the material evidence was that the claimant was a daily worker and he had breaks in the service per records exhibited for the respondent. The Court finds that the claimant being a daily casual employee, the contract of service ended at the close of each day he served. The service has not been established to have converted to one subject to minimum statutory terms and conditions of service as envisaged in section 37 of the Employment, Act. The claims for unfair termination will collapse.
 - 5) Except for a certificate of service, the claimant has failed to establish the basis for the claims as made. The claims and prayers are declined. In view of entitlement to certificate of service and which was not delivered, each party to bear own costs of the suit.
4. In conclusion judgment is entered for parties with orders the respondent to deliver the certificate of service in 30 days and 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

