



Mwagwaru v Doshi & Company (Hardwares) Limited & another (Cause 421 of 2016) [2022] KEELRC 1649 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1649 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 421 OF 2016
B ONGAYA, J
MAY 27, 2022**

BETWEEN

ABDALA MWANYONGO MWAGWARU 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 sister companies) from September 2014 to September 25, 2015 as a general labourer. The 2nd respondent was the initial employer but changed the branding at the premises to 1st respondent's name. It is the claimant's case he worked throughout the period of service without a break. He pleads the termination was abrupt, without notice, and with no valid fair reason. It is his case that the termination offended sections 40, 49, and 50 of the *Employment Act*, 2007. He prayed for judgment against the respondents for:
 - a. Notice pay one-month wages Kshs. 13, 650.00.
 - b. Pay for accrued leave days Kshs. 11, 025.00.
 - c. Service pay Kshs. 7, 875.00.
 - d. Non-payment of house allowance Kshs. 24, 570.00.
 - e. Maximum compensation per sections 49 and 50 of the Act Kshs. 163, 800.00.
 - f. Certificate of service.
 - g. Any further relief the Honourable Court may deem just to grant.



- h. Costs of the cause.
 - i. 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 worker and he never worked throughout the period without a break as alleged. Further he was a member of NSSF and for the days worked NSSF was deducted and remitted. He never worked continuously from September 2014 to September 25, 2015. Further his last day at work was on September 24, 2015 after collecting the day's wage of Kshs. 546.00 and thereafter he never worked for the respondent. The respondent denied the claims and prayers made for the claimant and prayed his 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 hardware enterprise. The claimant was employed at a daily gross wage of Kshs. 546.00 and net of Kshs. 525.00 after statutory deductions including NSSF. His last day at work was on September 24, 2015. He had been engaged on and off effective September 2014.
 2. There is no reason to doubt testimony by RW thus, "I confirm I have known the claimant from September 15, 2014 to September 24, 2015. See exhibit R.1. October, November, December 2014 he never worked. Daily attendance register and daily payment register is in place. His last day at work was September 24, 2015. He did not collect pay every day showing he did not work continuously. NSSF and NHIF was remitted." 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 testified that on September 25, 2015 he reported at work but he was locked out. RW testified that after the payment of September 24, 2015, the claimant went away and never availed himself for the daily engagement. 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.
 4. 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

