



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 1498 OF 2015

MUTIE IRVI KYONGO.....CLAIMANT

-VERSUS-

VEE VEE ENTERPRISES.....RESPONDENT

JUDGEMENT

1. The claim herein arises from alleged unfair termination of the Claimant's employment contract by the Respondent on 14.3.2015 and it seeks the following reliefs:

- (a) An Order that the Respondent issues Certificate of Employment to the Claimant.
- (b) An Order that the Respondent pays the Claimant a sum of Kshs. 74,750/-
- (c) Costs of action
- (d) Any other relief the Court may deem fit to grant.

2. The Respondents denied all the allegations by the Claimant and prayed for the suit to be dismissed with costs.

3. The suit was heard on 24.7.2019 when the Claimant testified but the Respondent called no witnesses. After the hearing, only the Claimant filed written submissions.

EVIDENCE

4. The Claimant testified that he was employed by the Respondent as a mason from 3.6.2014 to 14.3.2015 when his services were terminated by the Respondent's Director Mr. Shah. He contended that the termination was unfair because it was without any lawful cause and without any 30 days prior notice or payment of salary in lieu of notice or fair hearing.

5. He further testified that he was never given any written contract but his contract was governed by the Regulation of Wages (Building and Constructions Industry) Order 2004 and the Employment Act 2007. He started with a daily wage of Kshs. 800 per day but later it was increased to Kshs. 900 per day payable on weekly intervals.

6. He further told the court that he never went for any annual leave and he worked 7 days a week including Sundays and Public Holidays. He also used his own tools and the employer did not pay him any tools allowance.

7. He therefore prayed for Kshs. 55985.20 as salary underpayment, Kshs. 18225 for 20.25 leave days earned in 9 months, Kshs. 32400 for 36 rest days, Kshs. 6300 for 7 public holidays and Kshs. 27000 being 30 days pay in lieu of notice totaling to Kshs. 85,050. He acknowledged receipt of Ksh. 10300 paid on 25.4.2015 leaving a net of Kshs. 74750.00.

8. He contended that he worked continuously and had he failed to attend work on Sundays, he would not be allowed to report back on Monday. He prayed for judgment for the sum prayed in his claim.

9. On cross-examination, he stated that he was stationed at Makongeni where they were constructing 625 two storey buildings. He admitted that he was a casual earning a daily wage but it was paid on weekly basis. He contended that his dismissal came before the construction project was complete. He explained that whenever they did foundation on unit they moved to another unit to allow the foundation to heal.

SUBMISSIONS

10. The Claimant submitted that although he started off as a casual employee, his continuous service for over 9 months converted to permanent employee by dint of section 37 of the Employment Act.

11. He further submitted that the termination of his employment was unfair because his right to Fair Labour Practices and Fair Administrative Action under Article 41 and 47 of the Constitution were violated because he was dismissed without being given an opportunity to be heard in the company of a fellow employee. He further contended that termination without notification to the nearest labour office violated section 78 of the Employment Act.

12. In view of the forgoing matters, he submitted that he is entitled to the remedies sought pursuant to the said Regulations and the Employment Act.

13. In conclusion, he submitted that except for the general denial in the statement of defence, the Respondent did not tender any evidence to rebut his claim and supporting evidence. He therefore urged that his claim is uncontested and should be allowed as prayed. He relied on **Trust Bank Limited v. Universal Bank Ltd & 2 Others**[2009]eKLR for emphasis.

ISSUES FOR DETERMINATION

14. The issues for determination are:

- (a) Whether Claimant's casual employment converted to a regular contract of service under section 37 of the Employment Act.
- (b) Whether the termination of his service was unfair
- (c) Whether he is entitled to the reliefs sought.

Conversion from casual to contract of service

15. The un rebutted evidence by the Claimant is that he worked continuously as a casual employee for over 9 months from 3.6.2014 to 14.3.2015 under section 37 of the Employment Act, a casual employee who works continuously for an aggregate period of not less than one month converts into an employee under a contract of service which requires a prior notice of not less than 28 days before termination. It follows that a formerly casual employee becomes protected from unfair termination of his contract of service.

Whether the Claimant's employment was unfairly terminated.

16. Under section 45(2) of the Act, termination is unfair if the employer failed to prove that it was grounded on valid and fair reason(s) and that it was done in accordance with fair procedure. In this case, the Respondent did not tender any evidence to prove that the reason for the termination was valid and the procedure followed was fair. Consequently, I find that the evidence by the Claimant that the termination was for no valid reason and that no prior notice or hearing was un rebutted and goes to prove that his employment contract was unfairly terminated by the Respondent's Director, Mr. Shah contrary to section 45 of the Act.

Reliefs Sought

17. Under section 49 of the Act, I award the Claimant one month salary in lieu of notice as prayed being Kshs. 27,000. I further award to him leave for 9 months on pro rate basis. Regulation 8(1) of the Regulation of wages (Building & Construction Industry) Order 2004 entitled the Claimant to 26 leave days per year while Regulation 8(2) entitled him to 2.25 leave days per month if termination occurs before completing 12 months of service. Consequently, I award him Kshs. 18,225 equaling to 20.25 days as prayed.

18. The claim for tools allowance for Kshs. 125 per month for 9 months is awarded by dint of Regulation 21 of the said Regulation equaling to Kshs. 1,125. However, the claim for rest days and public holidays worked is declined for want of particulars and evidence. Even if the Claimant had no documentary evidence, he should have called an eye witness who saw him work for 9 months without any rest day, public holiday or leave.

19. In conclusion I enter judgment for the Claimant in the sums of Kshs. 46,350.00 plus costs and interest at court rates from date of filing suit. The award is subject to statutory declarations.

Dated, signed and delivered in Nairobi this 25th day of January, 2021.

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the

parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE