



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1998 OF 2016

DANIEL MWANZIA MUTUA.....CLAIMANT

VERSUS

KENYA BUILDERS & CONCRETE CO. LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 15th July, 2011 as a general worker on a daily wage of Ksh.586 payable weekly.

The claimant worked for the respondent until 2nd February, 2016 when employment terminated.

The claim is that employment terminated unlawfully as no notice was issued or payment of terminal dues leading to unfair termination of employment. The claimant is seeking the following terminal dues;

- a) Notice pay ksh.16,983.20;
- b) House allowance for 91 months Ksh.203,798.40;
- c) NSSF contributions Ksh.4,800;
- d) Leave pay for 4 years Ksh.54,868.80;
- e) Compensation;
- f) Certificate of service; and
- g) Costs of the suit.

The claimant testified in support of his case that his employment by the respondent can be confirmed through the NSSF statement from 15th July, 2011 and would be paid a daily wage of Ksh.586. later such daily wages would accumulate and be paid weekly through his bank account. Employment terminated without notice and or payment of terminal dues.

Upon cross-examination, the claimant also testified that there was a clocking in system and his reporting time and departure would be captured by the respondent. That on 29th February, 2016 he was at work though he claims employment terminated on 2nd February, 2016. That he was not issued with a written contract of employment.

Defence

The defence is that the claims made by the claimant are not true and there was no unlawful termination of employment as alleged. The respondent sometimes deals with casual employees due to the nature of business. Casual employees provide services within a few hours or a single day earning a daily wage or upon completion of a particular task in accordance with section 35 of the Employment Act.

The claims made are without justification and should be dismissed with costs.

In evidence, the respondent called Jeremiah Nzioka the human recourse manager and who testified that the claimant was a general worker and sourced on a needs basis. The respondent is a construction company and contracts not limited and based on availability of work where the claimant would be employed when work was available. There was no continuous em0loyment. The claimant would clock-in and out and

these records are filed to confirm the payment schedules.

The claimant lastly worked under a contract for a month. He had been issued with warning letters. His daily wages graduated from Ksh.450 and lastly earning ksh.586. His last working day was on 29th February, 2016 and not 2nd February, 2016 as alleged.

The claimant voluntarily left his employment and being a general worker, he was free not to report to work.

At the close of the hearing, both parties filed written submissions.

Determination

Section 10 of the Employment Act, 2007 (the Act) allow parties to an employment contract to determine the nature of the employment relationship. Casual employment is allowed subject to the provisions of section 10 and 37 of the Act. where there is continuous work; where there is work for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; where the employee 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 Act defines such an employee to be protected and the rights and benefits under the Act are available pursuant to section 37 of the Act.

From the payment records filed by the respondent, the claimant was at work until the 29th February, 2016. In this regard, he worked continuously over the years and from January, 2015 to February, 2016;

7 days in February, 2016;

17 days in January, 2015; and

18 days in December, 2015.

And in that order the claimant remained under the service and control of the respondent.

The respondent has also attached a monthly contract for the claimant for August, 2012. Mr Nzioki also testified that the claimant would be issued with warning letters for poor work performance meaning he remained in the regular and continuous service and employment of the respondent. Such components of employment under a contract and issuance of warnings do not define a casual employee. He was covered under section 37 of the Act.

Termination of employment must be with notice pursuant to section 35 of the Act and for given reasons are required under section 43 read together with section 45 of the Act.

In this case, the claimant testified that his last working day was on 2nd February, 2016 but the respondent's case is that he worked until 29th February, 2016 and was paid for 7 days. That would be in tandem with an employee employed as a casual and whose employment is terminated at the end of the day but in this case, the payment for 7 days relates to a contract employee.

As no notice or reasons were given to the claimant for termination of his employment such is due save the payment for 7 days in February, 2016 well addressed the notice pay due. Compensation in this case is awarded at one (1) month gross pay at Ksh.586 per day all at Ksh.16,983.20.

On the work records filed, the claimant was paid for his time. He was paid a daily wage of Ksh.586 and under the Wage Orders such wage was inclusive of a house allowance and to claim outside of such amount would amount to unjust enrichment.

NSSF contributions are due to the statutory body and not payable to the employee.

On the claim for leave pay, on the records, the claimant was not at work daily. In any given month he had up to seven (7) days absence.

A certificate of service is due under section 51 of the Act for the duration of employment.

Accordingly, judgement is hereby entered for the claimant against the respondent for compensation at Ksh.16,983.20; a certificate of service shall be issued in accordance with section 51 of the Employment Act, 2007; and each party shall pay own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF JANUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistance: Okodoi

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