



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.C/224/2017

CITATION: JULIUS KIMUTAI LAGAT VS SIRIKWA QUARRY LTD

JUDGMENT

1. The Claimant averred that he was employed by the respondent on 28th February, 2014 as a general Labourer at a monthly salary of Kshs. 8,400/= which he considered as underpayment. He worked for the respondent diligently without any warning in his record until 14th May, 2017 when the respondent terminated his service without any lawful reason.
2. According to the Claimant on 14th May, 2017 he was summoned by his superior who told him he needed to see the director. On arrival the director verbally told him to surrender the respondent's property including overall, shoes and gloves and once he did so, he was told to vacate the respondent's premises immediately.
3. The Claimant contended the termination was unfair and unlawful hence sought compensation for unfair termination and terminal dues including payment for leave not taken, underpayment, Overtime and service pay.
4. The respondent on the other hand pleaded that the Claimant had never been its employee as envisaged in the Employment Act and has never paid the Claimant a monthly salary as alleged. According to the respondent the Claimant was engaged as an on and off casual employee in the year 2014 and 2016 and worked for a cumulative period of less than two months. The Claimant was paid on daily basis for work done without any provision for a regular payment.
5. The respondent further stated that the Claimant would be engaged depending on availability of work hence there was no binding requirement/obligation either for him to come to work or for the respondent to give him work to do.
6. The respondent further pleaded that the badge presented to the Claimant was to enable him access the respondent's premises whenever he was engaged as a Casual labourer and protect him from arrest by police on suspicion of being an idler.
7. At the oral hearing the Claimant informed the Court that he was relying on his witness statement as his evidence in chief. According to him he was employed on 28th February, 2014 as a general worker and was paid Kshs. 350/= per day which was released to them weekly.
8. It was his evidence that he was never issued with a letter of employment. He used to work from 7am to 5pm and worked from Monday to Saturday. He worked continuously for three years. They were never stopped from working and were at the time of determination told work had stopped. He was neither issued with termination letter nor paid his terminal dues.
9. In cross-examination he maintained that he was employed on 28th February, 2014 and that he used to work on the machine side. He used to clean it. It was his evidence that he worked until 14th May, 2017. He was not issued with a letter of appointment but had a job card.
10. The Claimant further stated he signed the daily casual sheet and it showed he was paid Kshs. 300/= per day. In re-examination he stated that he worked continuously for six months as a casual worker.
11. The respondent's witness Mr. John Kioko Mulwa stated that he worked for the respondent as a supervisor. He adopted his witness statement written on 4th September, 2017 as his evidence in chief. He also sought reliance on the Supporting documents filed with the response. It was his evidence that the Claimant was introduced to the site by the initial person who was given the tender. The Claimant used to come to the gate to look for work. This was around 2014. His work was to make blocks. It was Mr. Mulwa's evidence that the Claimant was paid Kshs. 300 per day and only worked when there were orders for blocks. The Claimant and other Labourers were picked from the gate. They were given job cards for identification.
12. In cross-examination he stated that the Claimant worked for the subcontractor. He however had nothing to show the Claimant worked for the sub-contractor.

13. The Claimant alleges that he was employed by the respondent as a general worker at a monthly salary of Kshs. 8,400/= which he claimed was below the gazetted minimum wage. The Claimant further pleaded that he was entitled to housing allowance, overtime and service pay.

14. During the trial however, the Claimant never made reference to the claim for underpayment. He never produced any gazetted minimum wage order for his skills set for the Court to compare with what he claimed the respondent paid him and see if indeed there was underpayment. Concerning overtime, the Claimant never had any evidence to support his allegation of working overtime. These heads of claim, to a large extent remained unproven. It was common ground that the Claimant was paid daily but the money released to them weekly.

15. Whereas the respondent maintained that the Claimant was a casual worker whose services were hired on need basis, their interaction was for an aggregate period of more than one month.

16. Section 37 of the Employment Act provides that where a casual works for a period or number of continuous working days which amount to the aggregate to equivalent of not less than a month or performs work which cannot be reasonably be expected to be completed within a period or number of working days amounting in aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service. Section 35(1)(c) is concerned with notice to termination.

17. Section 37(3) further provides that an employee whose contract has been converted under subsection (a) and who works for two months or more from the date of employment as a casual shall be entitled to such terms and condition of service as he would have been entitled to under the Act had he not initially been employed as a casual employer.

18. The Claimant in his evidence in re-examination stated that he worked for the respondent as a casual for 6 months. The respondent's witness Mr. Mulwa on the other hand stated that the Claimant worked from 2014 but never worked continuously. The respondent however did not come out clearly over the period the Claimant worked. The Court however regrets that the evidence on the relationship between the two parties was unclear on both sides however what was clear was that an employer-employee relationship for a period more than a month existed.

19. To that extent by operation of law the Court will apply the deeming provisions of section 37 of the Employment Act and declare that the separation from the relationship ought to have been in accordance with the provisions of the Act. That is to say the Claimant was entitled to notice and reason for termination of employment. This did not seem to happen in this case.

20. The Court will therefore award the Claimant as follows: - KSH

(a) One month's salary in lieu of notice	8,400	
(b) Two months' salary as compensation		
For unfair termination of employment	16,800	
		25,200
(c) Costs of the suit		

Dated at Eldoret this 15th day of March, 2021

Delivered at Eldoret this 15th day of March, 2021

SIGNED BY: HON JUSTICE J.N. ABUDHA

EMPLOYMENT AND LABOUR RELATIONS COURT