



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

CAUSE NO.1867 OF 2016

SAKEI KIDENGA.....CLAIMANT

VERSUS

MATTAN CONSTRUCTION LIMITED.....RESPONDENT

JUDGEMENT

The hearing proceeded in the absence of the respondent. The hearing date was allocated on 11th November, 2020 and served upon the respondent. On 13th January, 2021 the respondent filed Notice of Change of Advocates. On the hearing date there was no attendance despite service and the respondent being aware of the hearing date.

Claim

The issue in dispute is the alleged unlawful termination of employment on grounds of redundancy.

The claimant was employed by the respondent on 15th March, 2013 as a driver at a wage of Ksh.30, 000 per month and worked until 4th May, 2016 when one director, Najib Rashid terminated his employment on the grounds that there was no work and without payment of any terminal dues. There was no notice or due process.

The claimant is seeking payment of the following dues

- a. Notice pay Ksh.30,000;
- b. Salary for 15 days worked in January, 2016 Ksh.15,000;
- c. Leave pay for 3 years ksh.90,000;
- d. House allowances since March, 2013 Ksh.171,000;
- e. Service pay for 3 years Ksh.45,000;
- f. Unlawful termination Ksh.360,000;
- g. Damages for unlawful termination ksh.360, 000.

The claimant testified in support of his claims that upon employment by the respondent he worked diligently at a construction site in Upper Hill, more work was allocated at Mwala for another road construction, then Nanyuki and Migori when they returned back to Upper Hill site but upon reporting on duty he was not allowed to clock in. He was told there was no work since it was raining. Mr Najib made the communication but refused to pay terminal dues.

The claimant also testified that He was paid his wages in cash at Ksh.30, 000, while working at night he would earn night duty allowance and mileage allowances at ksh.15, 000 and 20,000 respectively all in cash.

The claimant made a report at the Labour Office and the respondent responded that other employees had been laid off but the claimant was aware that there was construction work at Nandi Hills road. The claims made should be awarded with costs.

Defence

The defence filed is that the claimant was an employee earning ksh.30, 000 per month save he worked from the year 2015 and 2016 and for less than 6 1/2 months. The respondent occasionally hired the claimant as a tipper driver whenever it landed a road construction tender which work would be for short durations and the alleged employment for 3 continuous years does not apply. The claimant is that he would only be hired on a needs basis.

There was no unfair termination of employment and the claims made are not due having worked for only 6 months;

September, 2015 wage was paid through the claimant's bank account at Ksh.30, 000;

October, 2015 wage of Ksh.30, 000 paid through the bank account;

November, 2015 wage of Ksh.11, 291 paid for 11 days worked through Mpesa;

January, 2016 there was no engagement;

February, 2016 wage of ksh.30, 000 paid;

March, 2016 wage of ksh.30, 000 paid;

April, 2016 wage of ksh.30, 000 paid;

May, 2015 wage of ksh.24, 667 paid for 24 days worked through the bank.

The claimant would be paid through his bank account at Equity bank, Mfangano Street branch; account No.[...] and the claims made should be dismissed with costs.

The respondent also filed two witness statements and list of documents with regard to the wage payments made to the claimant.

The claimant filed written submissions that the respondent has admitted employment save that the claimant was employed when work was available. Section 2 of the Employment Act has defined an employee and under section 37 an employee who remains at work for over 28 days is protected and has rights secured. For the period of employment, the claimant ceased being a casual employee and the claimed dues should be paid. Where there is no work section 40 and 43 of the Employment Act apply and the redundancy dues paid and where these are not followed under section 43 employment is terminated unfairly.

The claimant relied on the cases of **Loice Otieno v Kenya Commercial bank limited [2013] eKLR; Alphonse Maghanga Mwachaya v Operations 680 Limited; Kiema Mwangangi v Rajani Engineering Limited [2019] eKLR.**

Determination

The respondent filed defence and a list of documents with regard to the claimant's employment which records are not challenged. These records relate to the nature of employment and period of employment from September, 2015 to May, 2016 with a breach of no work in January, 2016.

What is apparent is that the second part of employment was from February to May, 2016 for 3 full months and 24 days.

As correctly submitted by the claimant, section 37 of the Employment Act, 2007 (the Act) converts causal employment to employment with benefits under the Act and in the following terms;

37. Conversion of causal employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) 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 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.

such an employee is protected in law. the claimant having worked for over a period of one months and remained in the service of the respondent for over 3 months and 24 days, enjoyed rights under the law. the respondent as the employer opted to remain under causal terms of employment instead of issuing an appropriate written contract spelling out the terms of engagement are required under section 10(6) and (7) of the Act.

in this case, on the records filed and particularly the nature of wage payments, the claimant was last in the continuous employment of the

respondent for 3 months and 24 days only. He cannot claim outside of such period.

there is no dispute that employment terminated due to no work availability. The claimant testified to the fact that upon return from Migori, it was raining and Najib told him to go away because there was no work. He demanded for his terminal dues.

termination of employment due to non-availability of work is allowed under the provisions of section 40 of the Act, on condition that the employee is issued with notice and terminal dues paid.

There is no evidence of notice being issued. Such is due at the last monthly wage paid all at Ksh.30, 000.

On the claim for salary pay for work in January for 15 days, there is no evidence of work in January, 2016. Such is not due.

Leave pay is only due for the 3 ½ months last worked pursuant to section 37(2) and (3) read together with section 28(2) of the Act at 1.75 days wage for each full month worked. at the wage of ksh.30, 000 per month, the claimant is entitled to Ksh.5, 250 in leave pay.

House allowance claimed on the wage earned at Ksh.30, 000 is over and above the due minimum wage and to add a house allowance would be unjust enrichment.

Service pay for 3 years is not due as well as damages for alleged unlawful termination of employment.

On the claim for compensation for unfair termination of employment, without notice and payment of the due terminal dues at the end of employment and the claimant being secured under section 37 of the Act, pursuant to section 43 of the Act such employment terminated without the due process even where there existed a redundancy. The due process of the law required the claimant be issued with notice and paid his dues. Compensation is due and one month pay is found appropriate at Ksh.30, 000.

Accordingly, judgement is hereby entered for the claimant in the following terms;

- a. Compensation ksh.30,000;**
- b. Notice pay Ksh.30,000;**
- c. Leave pay Ksh.5,250; and**
- d. Each party shall pay own costs.**

DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MAY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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