



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

AT MOMBASA

CAUSE NO. 652 OF 2016

JUMA BATI CHUPHI.....CLAIMANT

VERSUS

LEISURE LODGE LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd July, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 07.09.2016 through Otieno Asewe & Company Advocates. The claimant's case is that the respondent employed him in September 2003 as a Carpenter and he worked for 12 years earning a daily wage of Kshs. 700.00 per day. Further, he was told work had gone down and to go away until he would be recalled and when he went back to check he found someone else had been employed in his place. The claimant's case is that it was not true that work had gone down and the termination was unfair in procedure and substance in view of sections 41, 43, and 45 of the Employment Act, 2007 which the respondent breached. Further, the respondent denied him rules of natural justice per section 45(5) of the Act and Articles 41 and 47(1) and ILO convention 158 on termination of employment were contravened. The claimant claimed for:

- a. One month pay in lieu of termination notice Kshs. 18, 200.00.
- b. Leave for 12 years Kshs. 176, 400.00.
- c. Years of work at 15 days per year Kshs. 126, 000.00.
- d. Severance pay 15 days per year Kshs. 126, 000.00.
- e. 12 months' compensation for unfair termination Kshs. 218, 400.00.
- f. Total claim Kshs.665, 000.00.

The claimant prayed for judgment against the respondent for:

- a. Payment of Kshs.665, 000.00.
- b. Costs of the claim and interest thereon at court rates.
- c. A declaration that the termination was unfair, unlawful, and unjust.
- d. Any other relief that the court may deem just and fit to grant.

The response to the memorandum of claim was filed on 14.12.2016 through Wanja & Kibe Advocates. The respondent's case was that the claimant was a casual employee from time to time depending on availability of work and he worked on piece work basis. He was paid all his dues for days worked and the sections of the Employment Act, 2007 and the Constitution 2010 pleaded for the claimant did not apply to the case. The respondent pleaded that the claimant was not entitled to the claims and prayers made and the suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was Jackson Nzioki Mutiso, respondent's Human Resource Administrator. Final submissions were filed for parties.

The **1st issue** for determination is whether parties were in a contract of service. RW testified that the claimant worked for the respondent from 2010 to September 2015 as a Carpenter. RW further testified that the claimant worked on call upon need especially in May, June and July when the respondent's hotel closed for renovation and the claimant was not a continuous employee. On the other hand, the claimant testified in cross-examination thus, **"I was employed by respondent 2003 by Mr. Wanderi. It was casual. I say it was casual service. I worked every day. I used to use check-in cards. Later machines were installed. I worked for respondent from 2003 to 2018. I was terminated in 2018. Case was filed in 2016. At time the case was filed, I had been terminated. I confirm I worked from 2003 to 2016.... I was terminated 2016 or so. I did not record. I do not recall. I have never been asked date of dismissal since I was born...."** In re-examination, the claimant testified thus, **"I filed documents in Court including witness statement. I wrote I was terminated September 2015. I say I was terminated September 2015."**

The respondent filed clock-in record for the claimant for the years 2010, 2011, 2012, 2013, 2014 and 2015. The summary was also computed and filed. It shows that over the years the claimant worked for an aggregate of 498 days being an aggregate of 1.36 years over the span of 5 years. The Court has considered the parties' evidence and finds that there is no reason to doubt the respondent's coherent evidence and which has not been rebutted by the claimant in any material respect. As confirmed by the claimant, he was a casual employee paid at daily rate. As per the respondent's evidence the employment was from 2010 to September 2015 as a Carpenter and on daily and need basis. The claimant did not specifically plead the date he was terminated and he was not coherent on the date he was terminated. In that regard his account cannot be trusted. The Court finds that he was a casual employee with breaks in service per the clock-in summary computed and exhibited for the respondent.

To answer the **2nd issue** for determination the Court finds that the claimant having been a casual employee, his contract of service ended at the close of the day. The respondent had no obligation to assure him employment on the next day. Even if he was told to go away as he pleaded and testified, the Court finds that there was no breach of the casual contract of service. The claimant's case appears to be that when he came back, he found other two carpenters who had been casual employees had been permanently employed. While that may have been the case, the Court has found that in the circumstances, the respondent had no obligation to emplace the claimant on permanent service. Further the Court has found that the claimant's evidence was incoherent on the date of termination and he could not be trusted. His case will collapse and all his claims are found unjustified because he has failed to establish that he was entitled to a contract of service with minimum statutory terms and conditions of service as provided for and envisaged in section 37 of the Employment Act, 2007.

To answer the **3rd issue** for determination, the Court returns that parties submitted on the issue of whether the claimant was a member of the trade union. While there was no evidence that the claimant was a member of the union, the parties made no pleadings in that regard and the Court finds the submissions to have been misconceived.

In conclusion, judgment is hereby entered for the respondent for dismissal of the claimant's suit with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 23RD JULY, 2021

BYRAM ONGAYA

JUDGE