



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1027 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

JOSEPHAT MWANZA MUTUA

CLAIMANT

VERSUS

M/S KERBBOOKE (K) LIMITED

RESPONDENT

JUDGMENT

1. The Claimant initiated the claim by way of a statement of claim dated and filed on 5th June 2017. He alleges that he was an employee of the Respondent from 23rd January 2014 to 28th March 2017 when he was unfairly terminated without terminal benefits. He claims Kshs.1,015,753.03 comprising of –

(a) Underpayments of salaries caused Kshs.316,226.40

(b) 30 days' salary pay in lieu of notice Kshs.29,535.00

(c) 88.54 days annual accrued leave for 38 months Kshs.87,167.63

(d) 152 days weekly resting days at per day Kshs.149,644.00

(e) 12 months' salary compensation or 365 days at per day Kshs.359,342.50

(f) 45 days severance pay for 3 years served at per day Kshs.44,302.50

(g) 30 days public holidays at per day Kshs.29,535.00

Kshs.1,015,753.03

(h) Certificate of service

(i) Costs of the suit.

(j) Interest at Court rates

2. The Respondent denied the claim alleging that the Claimant had been paid all his dues, that due process was followed in the termination and the summary dismissal was lawful. Although the Respondent denied the date of engagement records show that the Claimant started earning a salary from January 2014. Neither party provided a written contract of employment. Whereas the Claimant claimed to have been employed as a Tailor, the Respondent asserted that he was engaged as a Production Machinist and denied there had been any underpayment of the Claimant. The Respondent prayed that the claim be dismissed with costs.

Evidence

3. The Claimant (CW1) testified that he was a trained Tailor and was engaged as such and had worked for the Respondent since 2014 and

was dismissed on 28th March 2017 by word of mouth and no payment was made. He told the Court that he had not received any warning letters previously. He admitted that he was terminated for having spoken to a fellow workers in the factory during working hours. He was emphatic that many employees came to him for advice. He admitted that he was talking to employees behind him. He testified that each worker had a specific task in the production of clothes. He told the Court that he was paid per day but after two weeks based on the hours worked. He stated that he would be paid for the days worked and that the factory was closed during public holidays. He told the Court that he would make certain parts of specific garments such as trousers.

4. He confirmed that he used to work from 8 am to 4 pm or 6.30 or 7.00 pm depending on the quantity of work and extra hours were paid as over time. Finally he testified that he was terminated for no reason.

5. RW1, Mr. Alfred Eddo testified that the Respondent engaged the Claimant in 2014 as a Machinist since the Respondent did not employ tailors. He explained that each worker was stationed behind a machine to perform a specific role in the mass production of garments.

6. He told the Court that the Claimant was dismissed for misconduct. He was talking to other employees during working hours thereby interfering with production and when questioned about it, his repose was that he was only answerable to the owner of the factory not the supervisor. He informed the Court that casual employees were paid per hour per day (9.00 am – 4.30 pm) weekdays and Saturdays up to 1.00 pm. He further testified that the Claimant was paid as per the guidelines and as agreed upon with Workers' union. He confirmed to the Court that speed was of the essence in mass production and that he was not aware that the Claimant was a trained Tailor. He stated that the Claimant had served the Respondent as a casual for 3 years and was given an opportunity to make representation before termination. Finally he testified that the Claimant was paid for the days worked but availed no documentary evidence. He also confirmed that the Respondent was yet to give the Claimant a certificate of service.

7. Neither party provided documentary proof of the contract of service between them.

SUBMISSIONS

Underpayments

8. The Claimant's Counsel submitted that the Claimant was

employed as Grade II Tailor on 23rd January 2014 at a daily rate of Kshs.532.60 against Kshs.862.40. The Claimant was thus underpaid by Kshs.265.90 per day for 6 days a week equivalent to Kshs.1,595.40 per week for four weeks a month at Kshs.6,381.60 until 30th April 2015 (16 months), a total of Kshs.102,105.60.

9. That as of 1st May 2015, the Respondent increased the Claimant's salary to Kshs.596.60 per day paid after two weeks against Kshs.984.50 as contained in Legal Notice No. 117 of 1st May 2015. The Claimant was thus underpaid by Kshs.387.90 per day for 6 days a week equivalent to Kshs.2,327.40 per week for 4 weeks in a month amounting to Kshs.9,309.60 up to 28th March 2017 (23) months a total of Kshs.214,120.80

Agreement

10. Counsel further submitted that despite the parties having an agreement that all conditions contained in the Regulations of Wages (Tailoring Garment Making and Associated Trade) Order agreement of Tailors and Textiles Manufacturers registered by the Industrial Court and the Employment Act, 2007 would be adhered to, the Respondent ignored the Order and the Employment Act.

Termination

11. Counsel contended that the Claimant was unfairly terminated on 28th March 2017 without terminal of dues including payment in lieu of notice, accrued annual leave and rest days and compensation for the termination.

Remedies

12. Counsel submitted that the Claimant was entitled to Kshs.316,226.40 on account of underpayment from 2014 to 2017. Twelve months' compensation for unlawful termination for want of a valid and fair reason and procedure as prescribed by Sections 45 and 43 of the Employment Act. The argument was buttressed by the decisions in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014)** and **Caliph O. Ogego v National Social Security Fund, Cause No. 280 of 2013** which dealt with unlawful termination. That in addition, the Claimant was entitled to one month's salary in lieu of notice. 88.54 days of accrued annual leave for 38 months at Kshs.87,167.63 and 152 weekly rest days at 984.50 per day at Kshs.149,644. 12 months' salary compensation at Kshs.359,342.50, 45 days severance pay for 3 years at Kshs.44,302.50 and 30 days public holiday at Kshs.29,535.

RESPONDENT

Underpayment

13. The Respondent's Counsel submitted that the Claimant produced no documentary evidence to establish the alleged underpayment. Moreover, the Claimant was employed as a Production Machinist as opposed to a Tailor. That the Claimant provided no evidence to prove that he was employed as a Tailor. Counsel relied on the decision in **Daniel Otieno Migori v South Nyama Sugar Company Ltd, Civil Appeal No. 529 of 2017** for the proposition that parties are bound by their pleadings. The pleadings were based on a claim that the Claimant

was employed as a Tailor. Reliance was further made on **Tailor and Textiles Workers Union v Rosky Industries, Cause No. 812 of 2010** where the Court declined to award relief on underpayment where there was a dispute over the job description of the Claimant. Counsel also submitted that the Claimant was paid on a piecework rate basis and the Claimant received payment for work done which explains the variation of salary from month to month.

Remedies

14. On payment in lieu of notice, the Respondent submitted that the amount was not due because the termination was lawful and due process had been followed. The Claimant took leave as it fell due and the claim for leave days was baseless.

15. It was also submitted that since the parties had no agreement to pay for rest days, the claim for the same was baseless. Relatedly, since the termination was lawful compensation was unavailable.

16. On severance pay, the Respondent submitted that since the Claimant had not been declared redundant, the claim had no legal basis.

17. On public holidays, the Respondent submitted that the parties had no agreement to pay for the days and in any case the factory was closed during public holidays and any work done by employees was paid as overtime.

Determination

18. From the pleadings, evidence and submissions the following issues arise for determination: -

(i) Whether the Claimant was employed as a Tailor or Production Machinist;

(ii) Whether the Claimant was a casual or term employee;

(iii) Whether the Claimant's termination was unfair;

(iv) Whether the Claimant is entitled to the reliefs sought;

(v) Costs of the suit;

(vi) Interest.

19. In whether the Claimant was engaged as Tailor or Production Machinist, the Claimant argued that he was engaged as the Tailor while the Respondent contended that it engaged the Claimant as a Production Machinist. Since the contract of employment was oral, the Court is compelled to search for the true nature of Claimant's employment from the circumstances of the case principally the work place. The Claimant testified that he worked in a factory where each worker had a specific duty. He told the Court that in making of trousers for instance, he would perform a defined task as opposed to making the entire item. That the workers used tailoring machines in the factory. The Respondent's witness testified that the Claimant was engaged as Machinist and emphasised that the Respondent did not employ tailors. He confirmed that each employee had a distinct role to play in the mass production process. He further testified that each worker had a table (about one meter) and a machine. In cross examination he told the Court that tailoring and production are different processes. Whereas in tailoring a person prepares the entire garment, in mass production each person performs a specific task/role. He denied knowledge that the Claimant was a Grade II Tailor.

20. On preponderance of the evidence, the Claimant has not discharged the burden of proof that though he was Grade II Tailor, he was engaged as a Tailor by the Respondent. His own evidence and that of the Respondent's witness demonstrate that he was engaged as Production Machinist, in the Respondent's factory.

21. On regard to whether the Claimant was a casual or term employee the parties were in agreement that the Claimant was employed as a casual worker and was paid as such. The Respondent witness confirmed in cross examination that the Claimant worked as a casual for 3 years. The Respondent's payment records attest to this fact. It is essential to determine whether the Claimant was a casual employee. He testified that he was being paid per day but after two weeks. Section 2 of the Employment Act, 2007 defines a casual employee to mean a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a period longer than twenty four hours at time.

22. In **Krystalline Salt Limited v Kwekwe Mwakele & 67**

Others [2017] eKLR the Court of Appeal observed that –

“Casual employment entails engagement for a period not longer than 24 hours at a time and payment made at the end of the day.”

23. From the foregoing definition it is evident that the Claimant was not a casual employee of the Respondent. The nature of his employment is discernible from Section 37 of the Employment Act, 2007 which provide for the conversion of casual employment to term contract.

37. Conversion of casual 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.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.

24. It is common ground that the Claimant worked for the Respondent from 23rd January 2014 to 28th March 2017 when he was dismissed. This was confirmed by the Respondent's witness, Mr. Alfred Edondo who did not contradict the fact that the Claimant was paid every two weeks. It is also clear that he used to work from 8.00 to 4.30 pm or up to 7.00 in overtime which was paid every two week and he never took leave. From the evidence on record, the Court is satisfied that the Claimant had worked for the Respondent for a period of or a number of continuous working days which amounted in the aggregate to the equivalent of not less than one month, in which case his contract of service transitioned from casual to term. He qualified to be a monthly employee and therefore subject to the provisions of Section 35(1) on termination notice. Similarly, since the Claimant worked continuously for two months or more from the date of employment as a casual employee, he was entitled to such terms and conditions of service as would have been the case if he had not initially been employed as a casual employee.

25. Put differently, the Claimant was entitled to leave termination and service pay in accordance with the provisions of the Employment Act, 2007. This is consistent with the decision in **Harrison Meshack Lusibo & Another v Mareba Enterprises Ltd (2013) eKLR**.

26. On termination, it was common ground that the Claimant was terminated for misconduct. The Claimant submitted that the termination was unfair while the Respondent's case was that the Claimant was terminated fairly and was afforded opportunity to respond to the allegations of misconduct. The Claimant admitted that he was found standing and talking to the workers stationed behind him during working hours. He even submitted a hand written note dated 28th May 2017 to the management on the issue. The Claimant did not deny the fact of standing and talking to another or other employees stationed behind him in the factory. He was terminated on the same day by word of mouth.

27. From the evidence on record, the Court is satisfied that the Respondent had a valid and fair reason to terminate the Claimant for misconduct. However, being a term employee, he was entitled to a termination notice of 28 days or payment in lieu of notice. The manner in which the Respondent terminated the Claimant violated Sections 35(1), 41 and 45 of the Employment Act, 2007. Consequently, I find that termination of the Claimant without notice and without giving him a hearing to be unfair.

28. I now consider the specific heads of claim: -

(i) Underpayment – Kshs.316,226.40

Having found that the Claimant was employed as a production machinist a opposed to a Tailor, as he alleged, this claim fails for want of proof.

(ii) 30 days' salary in lieu of notice

Having found that the Claimant's employment transitioned

to a term contract by operation of law and thus bound by Section 35(1) of the Employment Act, 2017, the Claimant is entitled to payment of one (1) month's salary in lieu of notice by virtue of Section 49(1)(a) of the Employment Act 2007. He was paid a daily wage of Kshs.596.60. The highest gross pay he received for the entire period was Kshs.15,210.50. I award the sum of **Kshs.15,210.50**.

(iii) 88.54 leave days' accrued Kshs.87,167.65

The Court is guided by Section 28 of the Employment Act, 2007 which provides for 21 days after every 12 consecutive months of service the Claimant is entitled to 21 days for the 3 years and 2 months he worked for the Respondent. This works out to $(596.60 \times 21 \times 3) + 3$ days for the additional 2 months worked amounting to $37,585.80 + 1,789.80 = 39,375.60$.

I award the Claimant **Kshs.39,375.60** on account of accrued annual leave.

(iv) 152 days weekly rest days Kshs.149,644.00

The evidence on record shows that the Respondent's factory was not open for business on Sunday which gave the Claimant one rest day in consonance with Section 27(2) of the Employment Act, 2007. This claim is rejected for want of proof.

(v) 12 months' salary compensation or 365 days at per day – Kshs.359,342.50

Having found that the Claimant was unfairly terminated, he is entitled to compensation. Because, the Claimant worked for the Respondent for 3 years and 2 months and contributed to his termination, the Court is of the view that 2 months' salary equivalent is sufficient compensation. I therefore award him **Kshs.30,421.00** being 2 months' salary.

(vi) 45 days severance pay for 3 years at per day – Kshs.44,302

Granted that the Claimant was terminated by the Respondent for misconduct and not on account of redundancy under Section 40 of the Employment Act where severance pay is payable at the rate of 15 days for each completed year of service, the claim under this head is rejected for want of proof.

(vii) 30 days' public holiday – Kshs.27,535.00

Evidence on record show that the Respondent's factory was closed during public holidays and any work done during such days would be paid as overtime. The Claimant testified as much. The claim under this head lacks the necessary particulars and is rejected for want of proof.

29. In sum judgment is entered in favour of the Claimant in the sum of Kshs.85,007.10 with costs and interest at Court rates from the date of this judgment.

30. The Respondent to issue Certificate of Service to the Claimant forthwith.

31. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2021

DR. JACOB GAKERI

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE