



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 332 OF 2017

SYLVESTER MUSANGI MUTUA.....CLAIMANT

VERSUS

WIRE PRODUCTS LIMITED.....RESPONDENT

JUDGEMENT

1. The matter herein was commenced by way of a Memorandum of Claim filed on 20th February, 2017 through which the claimant alleged unlawful termination by the respondent. The claimant avers in his claim that he was an employee of the respondent for a period of 13 years and was earning a monthly salary of Kshs 13,440/=. He sought the following orders;

- a. A declaration that the respondent's dismissal of the claimant from employment was unlawful, unfair and inhumane;
- b. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded;
- c. An order for the respondent to pay the claimant his due terminal benefits totaling to Kshs 1,040,256/=
- d. Interest on (c) above from the date of judgment until full payment.
- e. Costs of the suit plus interest thereon.

2. The Respondent filed its defense vide a Response to the Claim dated 10th May, 2017 wherein it stated that the claimant was employed on a casual basis hence would be occasionally engaged depending on the availability of work.

3. The matter proceeded for hearing on 26th July, 2021 where each party called two witnesses. The claimant testified in support of his claim and called one witness by the name Richard Kitoo. On its part, the respondent called two witnesses by the names Ashtone Ronde and Kelvin Namuye.

Claimant's case

4. The claimant testified that he was employed by the Respondent sometimes in September, 2002 as a loader and that he was later transferred to the machine operations section. He told court that he stopped working for the respondent with effect from 20th May, 2015 when the Respondent's General Manager turned him away and asked him to wait for the machine maintenance when he would then be recalled. He stated that he went back to work thereafter but was denied access by the security of the respondent. It was his testimony that the foregoing amounted to summary dismissal.

5. He further testified that he worked during public holidays, was never given any off day and neither did he proceed for leave for the entire duration he worked for the respondent. He thus prayed for damages for summary dismissal and compensation as pleaded in his memorandum of claim.

6. During cross examination, the claimant admitted that he was never issued with any employment contract by the respondent and that he did not have any pay slip as he was being paid in cash. He also admitted that his name was indicated under "Casual Payments" in the respondent's bundle of documents at pages 2, 6, 14, 29, 34, 54, 59,64, 69, 89, 94 and 99. He further stated that he did not have any documents to evidence his leave entitlement.

7. The second claimant's witness Mr. Richard Kitoo informed court that he worked for the respondent with effect from 2002 to 2013 hence

knew the claimant as a colleague. It was his testimony that at the time he left employment, the claimant was still working for the respondent. In cross examination, he admitted that he did not have any document to prove that he worked for the respondent.

Respondent's case

8. The 1st respondent's witness (RW1) Mr. Ashton Ronde informed Court that he is in charge of Productions at the respondent company. He confirmed that he knew the claimant as he used to be given work at the production department. He further stated that the claimant would be given work depending on availability of raw materials and when there was work to be done.

9. It was his testimony that on the morning of 12th May, 2015, the claimant reported to the respondent company in search of work together with other casuals. However, there was a delay in acquisition of raw materials, hence they were informed that there was no work for them on that particular day. He stated that the claimant never reported to the respondent's premises thereafter.

10. He further stated that the claimant was never issued with a pay slip by the respondent. It was also his testimony that the claimant did not work continuously since 2002. He further informed Court that the casuals would be selected randomly. He testified that the claimant signed for the days he reported to work which could be evidenced by an attendance record. During cross examination, RW1 maintained that the claimant was a casual employee who worked occasionally for the respondent. He further denied that the claimant was a machine operator as machine operators worked on permanent basis.

11. The second respondent's witness (RW2) Kelvin Namuye told Court that he is the Administration Manager of the Respondent. He stated that the respondent employs 3 categories of employees namely, permanent, contract and casual employees. It was his testimony that the claimant was a casual employee and was engaged by the respondent between 2-10 times a month. That the claimant never at any particular time worked for 30 days continuously. It was his testimony that the claimant was not a machine operator as it was not practicable to employ machine operators on casual basis given the nature of their work.

12. He further testified that like other casual workers, the claimant would work for the neighboring companies around the area the respondent is located. He stated that around 20th May, 2015, the respondent experienced shortages in raw materials hence there was no work for the casuals in the production department. This affected the claimant hence he was not engaged on the material day and in the subsequent days when the shortage of the raw materials persisted.

13. RW2 further testified that the claimant did not show up at the respondent company thereafter. He further produced an attendance register which is signed by the casual employees when checking in and checking out of work. He stated that the register captures all casual employees who reported for work on any particular day in the various departments of the respondent. He testified that for instance, in the month of March, 2013, the claimant worked for only 3 days. He referred the Court to pages 2, 6 and 14 of the attendance record. He also referred the court to pages 25, 29, 34, 54, 59, 64, 69, 89, 94 and 99 which shows that the claimant worked for 10 days in the month of November, 2014.

Submissions

14. The claimant in his written submissions maintained that he was not a casual employee having worked for the Respondent for a period of 13 years and that his dues were paid either weekly or monthly. He submitted that he was unfairly dismissed when he was chased away from the Respondent's premises on 20th May, 2015. The claimant further submitted that due process was not followed when his services were terminated.

15. The claimant relied on the case of **Donald Odeke vs Fidelity Security Limited** and **Christopher Baraza Wasike vs Pemco Agencies limited**.

16. The respondent reiterated in its submissions that the claimant was occasionally engaged as a casual worker in its weld mesh and cutting section. The respondent further submitted that the claimant was paid on cash basis and was not on monthly salary of Kshs 13,440/= as alleged. The Respondent further submitted that the claimant's employment was never converted from casual to term contract as claimed. The Respondent sought to rely on the case of **Rashid Odhiambo Allogoh & 245 others vs Haco Industries Limited (2015 and Krystalline Salt Limited vs Kwekwe Mwakele & 67 others (2017))**.

Analysis and Determination

17. From the pleadings on record, the testimonies rendered before Court by both parties and the submissions on record, the issues falling for the Court's determination are;

- i. What was the nature of the employment relationship between the claimant and the Respondent?
- ii. What reliefs if any, are available to the Claimant?

Nature of the employment relationship

18. It is not contested that the claimant rendered services to the respondent. The main question for determination is on what terms were such services rendered.

19. The claimant has averred that he had an employment relationship with the respondent. This position has been discounted by the

respondent who contends that the claimant was employed on a casual basis.

20. The Employment Act recognizes various types of employment, namely, contract of apprenticeship and learnership, probationary contract, fixed term contract and contract of casual employment. The type of employment that fits the context herein is employment on casual basis. Section 2 of the Employment Act defines a casual employee to mean *a person whose terms of engagement provide for payment of wages at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.*

21. The respondent through its two witnesses, produced an attendance record which bears the name of the claimant. The attendance record which is titled “*Casual payments*” contains the following key columns, *name of the employee, time in, sign in, time out, sign out, the total hours worked, 8 hours earn, over time earn and total earn.*

22. It is notable that the attendance record bears the claimant’s name on particular days under the weld mesh and cutting section, for instance at page 2 in respect of 23rd March, 2013, page 6 in respect of 25th March, 2013, page 14 in respect of 22nd March, 2014, page 25 in respect of 13th November, 2014, page 29 in respect of 14th November, 2014, page 34 in respect of 15th November, 2014. On the other hand, the claimant’s name is missing on certain days under the weld mesh and cutting section for instance at page 10 in respect of 30th March, 2013, page 19 in respect of 11th March, 2014, page 39 in respect of 19th November, 2014 and page 44 in respect of 18th November, 2014.

23. It is therefore apparent from the record produced by the respondent, that the claimant worked on certain days but was not present on other days within the weld mesh and cutting section where he would ordinarily render his services. The record further indicates the number of hours worked by the claimant on the dates he was engaged. On his part, the claimant did not produce any documentation to discount the evidence by the respondent and to prove that he worked for the respondent continuously for a period of more one month. The record actually confirms that the claimant worked occasionally for the respondent.

24. The claimant despite maintaining that he was employed by the respondent continuously for 13 years, failed to produce an employment contract nor a pay slip to confirm that his employment was for more than one month. In support of his claim, the claimant produced a receipt from Mawazo Co-operative Savings & Credit Society Ltd (Sacco) dated 4th July, 2014 and 20th May, 2014 as well as a member statement from the said Sacco. It is noteworthy that the receipt from the Sacco indicates that it is the claimant who made the payment/remittance. It does not bear the respondent’s name at all. The claimant also produced a statement from the National Social Security Fund (NSSF) for the period beginning 1st April, 2010 to 31st May, 2015. Once again, the said statement does not indicate the name of the party that made the remittances.

25. Needless to say, the claimant has not adduced any evidence in support of his claim of employment with the respondent. In any event, the documents produced by the claimant in support of his case further go to prove the fact that the claimant and the respondent were not in any formal structured relationship to allow for remittances to third parties. Indeed, it was incumbent upon the claimant to prove the existence of the employment relationship and I find that he failed to discharge this burden.

26. In view of the foregoing, I am inclined to agree with the respondent that the claimant was not engaged on a fulltime/permanent basis by the respondent but instead, rendered services on a casual basis.

27. I have also noted from the attendance record that the claimant was not paid at the end of each day but would be paid after a week and at times, after 11 days. This court (Abuodha J) in the case of **Josphat Njuguna v High Rise Self Group [2014] eKLR**, held as follows;

“Whereas section 2 of the Employment Act defines a casual employee as a person whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time, it does not mean that a casual employee who is not paid at the end of each day and who is hired for more than 24 hours automatically becomes a regular or what is mundanely called permanent employee. It is a misinterpretation of section 37(1) of the Employment Act to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day or make the hiring be for more than 24 hours.”

28. I fully associate myself with the sentiments of the learned Judge and in this regard, find that despite the claimant not being paid at the end of each particular day worked, he remained a casual employee.

29. Further, the claimant having failed to adduce evidence to the effect that he worked continuously for a period of 30 days, I find that the provisions of section 37(1) do not come into play.

Reliefs available to the Claimant

30. The claimant has sought various reliefs against the respondent namely, one months’ salary in lieu of notice, off days, service pay where NSSF was not paid, house allowance, unpaid leave and damages for unlawful unfair termination.

31. Having found that the claimant was engaged on a casual basis by the respondent, I find that he is not entitled to any of the reliefs sought. The nature of the employment between the parties was terminable within the ambit of **Section 35 (1) (a) of the Employment Act** and thus no notice is required prior to termination. As such, the claimant is not entitled to payment of one month’s salary in lieu of notice as claimed. In the same breath, the claimant is not entitled to damages for unlawful termination as he has not proved that he was unlawfully terminated
by the respondent.

32. Similarly, on account of his nature of employment and having produced no contract, pay slip, nor any document to support his claim, I find that the claimant is not entitled to unpaid leave, service pay, house allowance, off days and holidays as claimed.

33. In the final analysis I dismiss the instant claim in its entirety.

34. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2021

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STELLA RUTTO

JUDGE

Appearance:

Mr. Namada for the Claimant

Ms. Kahura for the Respondent

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 had 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.

STELLA RUTTO

JUDGE