



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1403 OF 2016

JOSEPH AMUDAVI ILAHALWA

(Suing as the legal Representative of

CHRISTOPHER MUCHERA (Deceased).....CLAIMANT

VERSUS

DICKWAYS CONSTRUCTION COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed by the deceased claimant on 18th July, 2016 against the respondent company. The deceased claimant was substituted by a legal representative **Joseph Amudavi Ilahalwa**, who is a brother of the deceased.
2. The claimant prays for maximum compensation for unlawful termination of employment and payment of terminal benefits including: -
 - (a) **One-month salary in lieu of notice – Kshs 27,000**
 - (b) **Service gratuity for 5 years worked – Kshs 67,500**
 - (c) **Unpaid overtime for 5 years – Kshs 972,000**
 - (d) **Unpaid Annual leave for 5 years – Kshs 135,000 and**
 - (e) **Provision of Certificate of service.**
3. The suit is based on the testimony of the Legal representative of the claimant who testified as C.W.1 who adopted a witness statement dated 25th October, 2019 and filed on 28th October, 2019. The deceased claimant had also filed a witness statement dated 18th July, 2016 which C.W.1 also adopted as part of his evidence in chief in this matter.
4. C.W.1 testified that the claimant was employed by the respondent as a supervisor at the respondent's construction company with a starting salary of Kshs 750 per day which was later increased to Kshs 900 per day.
5. C.W.1 testified that the claimant was not issued with an appointment letter, he was not paid house allowance and was not given annual leave in violation of the provisions of Employment Act, 2007.
6. C.W.1 testified that the claimant worked during public holidays and did overtime but was not paid overtime pay.
7. That on 2nd November, 2015, the employment of the claimant was terminated without any valid reason and without opportunity to show cause why his employment should not be terminated.
8. The claimant was aggrieved by the termination and non-payment of terminal benefits set out in the witness statements and in the statement of claim and instructed his advocate to write a letter of demand to the respondent on 10th November, 2016 which letter was not responded to.
9. C.W.1 testified that the termination of the claimant was unlawful and unfair and that the claimant is entitled to all the reliefs set out in the statement of claim.

10. The respondent filed a statement of response to the claim on 10/8/2016 in which the respondent denies the particulars of claim and puts the claimant to strict proof hereof. R.W.1, **Silas Githinji** testified that he worked for the respondent as an accountant for a period of 10 years from the year 2011. He relied on a witness statement recorded on 19/12/2019 as his evidence –in- chief and produced list of documents marked ‘1’ to ‘4’ in support of the respondent’s case.

11. R.W.1 stated that the deceased was employed by the respondent as a general worker on casual basis in the masonry department. That the deceased was not a supervisor as alleged or at all. That the claimant was paid on daily basis at Kshs.600 per day. That the amount varied from time to time depending on the status of the economy and work done.

12. That for example, when the deceased was mixing ballast, which is more involved he was paid Kshs.600 plus Kshs.50 or 100 per day.

13. That in the year 2015, the deceased did not show up at work. The respondent did not follow to find out his whereabouts because he was hired as and when he showed up and was not on continuous employment. That the casual workers were hired at the site on daily basis when they showed up depending on the daily workload. That payments were done weekly for convenience and overtime was also calculated and paid depending on any extra hours worked.

14. C.W.1 produced records showing that the deceased worked for 6 days at times and other days he worked half day. On certain days, the deceased did not work.

15. R.W.1 denied that the letter of recommendation produced by the claimant which states that he worked for the respondent for a period of 3 years was a genuine letter. R.W.1 stated that the same was not written on company letter head.

16. R.W.1 stated that the supervisor on duty hired the workers on site, kept records. That this was Stephen Kimotho at the time. P.W.1 stated that he did head count of workers per day and did the payroll. R.W.1 said that the claimant was first employed in the year 2014, May. That no letter of employment was given to the casual employees. That the deceased is not in the company records between the period 2010 to 2014 as alleged. R.W.1 stated that weekly payment was done vide Equity bank to the employee’s account. That the casual employees worked from 5 am in the morning to 5 p.m in the evening.

17. That they were not given annual leave since they did not work daily. That they were not deducted National Social Security Fund (NSSF). R.W.1 produced records to show the weekly payments made to the account of the deceased. The payments indicated arrears of payment for a particular week had been skipped due to cash flow issues.

18. R.W.1 denied that the employees were paid in cash before the year 2014. R.W.1 insisted under cross-examination that the deceased was paid all his dues and was not owed any money by the respondent. R.W.1 insisted that the deceased never worked continuously and he worked at two different sites as a mason. R.W.1 stated that supervisors had extra qualifications which the deceased did not have. That he only served the respondent as a mason.

19. The respondent prays that the suit be dismissed with costs.

Determination

20. The issues for determination are: -

(i) Whether the deceased was a daily paid mason or he was a permanent supervisor of the respondent.

(ii) Whether the employment of the deceased was terminated by the respondent if (i) above is in the affirmative.

(iii) What reliefs if at all the claimant is entitled to.

21. In answer to issue (i) above, there is conflicting evidence from C.W.1 and R.W.1 as to whether the deceased was a daily paid mason or he was employed permanently, and continuously by the respondent as a construction site supervisor.

22. On this issue and in terms of section 107 and 108 of the Evidence Act, Cap. 80 Laws of Kenya, the claimant has the onus to prove on a balance of probabilities that he was not a daily paid casual who worked intermittently but was continuously employed by the respondent as a site supervisor from the year 2010 to the year 2015. The claimant did not produce any letter of employment it being common cause that none was given to him. It is also common cause that the deceased was not registered with National Social Security Fund (NSSF) and so there is no record of payments on his behalf by the respondent to the funds. The claimant relied on statements of account at Equity bank to which the respondent remitted his weekly dues. The statements produced are for the years 2014, and 2015 and reflect the regular payments to the account of the deceased by the respondent. The amounts paid differed and ranges from Kshs.2,39600 to Ksh. 11,587.50.

23. The claimant also produced a payroll dated 8th May, 2014 which shows the deceased listed therein as a mason with the daily rates payable to him for the period totaling Kshs 6,694. The payroll for the period 24th January, to 6th February, 2014, also show the deceased as a mason and had worked for 8 continuous days that period. The presence of the workers is marked by ticks. The record shows that the deceased received Kshs 6,094 for the period. These records produced by the claimant contradicts the testimony and pleadings by the claimant that the deceased worked as a supervisor. The records affirm the testimony by R.W.1 that the deceased worked as a mason and was paid weekly based on daily rates.

24. In the statement of claim, the claimant prayed to be granted a Certificate of Service which had not been given to the deceased by the

respondent.

In the same vein, the claimant produced a certificate of service dated 2nd November, 2015 which purports to have been issued to the deceased by the Respondent indicating that the deceased worked for the respondent for a period of 5 years as a supervisor.

25. The letter was denounced by the respondent as not genuine and was not on a proper company letter head.

26. The testimony by the claimant in this respect is not credible and the Court finds that the purported certificate of service produced by the claimant is not a genuine letter done for the claimant by the respondent and cannot be evidence to show that the deceased served the respondent continuously for a period of five years. The purported letter is not signed at all by Mr. Joseph Kariuki, indicated therein as the Managing Director of the respondent.

5. The Court is accordingly not satisfied that the deceased worked for the respondent as a supervisor for any period. The Court finds that the deceased worked as a daily paid mason for the respondent and did not work continuously for five years in that capacity as alleged by the claimant or at all.

6. In answer to issue (ii) above, following the finding in issue (i) above, it follows that the claimant has failed to demonstrate on a balance of probabilities that the employment of the deceased was terminated unlawfully and unfairly by the respondent. The deceased simply stopped going to look for work at the two construction sites where the respondent was situated in the year 2014/2015.

7. This being the case, the answer to issue number (iii) is that the claimant has not proved that the deceased was entitled to the terminal benefits set out in the statement of claim nor is the deceased entitled to payment of compensation as prayed or at all.

8. In the final analysis, the suit by the claimant is devoid of merit and is dismissed with no order as to costs considering the entire circumstances of the case, including that the initial claimant has since died.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 23RD DAY OF SEPTEMBER, 2021.

Mathews N. Nduma

Judge

Appearances

Mr. Nyabena Advocate for the claimant

Njuguna, Kahari Okai Advocates for the Respondent

Ekale- Court clerk