



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 793 OF 2017

NICHOLAS NGULA MWANIKI.....CLAIMANT

VS

R.K SANGHANI LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim against the Respondent is for compensation for unlawful termination of employment. The claim is documented by a Memorandum of Claim dated 2nd October 2017 and filed in court on 3rd October 2017. The Respondent filed a Memorandum of Response on 22nd December 2017.

2. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Administrator, Said Chero Kaingu. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a turn boy on casual basis, earning a daily rate of Kshs. 470 from February 2009. His duties involved loading goods into trucks at the Kenya Ports Authority in Mombasa.

4. The Claimant claims that he worked for a continuous and uninterrupted period of five (5) years and the Respondent therefore ought to have employed him on permanent terms. He adds that the Respondent’s failure to employ him on such terms violated his right to fair labour practices, the provisions of the Employment Act, 2007 and the Constitution of Kenya, 2010.

5. The Claimant therefore seeks a declaration that he was a permanent employee of the Respondent.

6. The Claimant further avers that in December 2014, the Respondent, without any lawful cause and/or justification, wrongfully summarily dismissed him, thereby depriving him of his source of income and livelihood.

7. The Claimant now seeks the following from the Respondent:

- a) Notice pay.....Kshs. 12,220
- b) 12 months’ salary in compensation.....146,640
- c) Service pay.....35,250
- d) House allowance.....109,980
- e) Unpaid leave.....427,700
- f) Unpaid overtime.....366,600
- g) Unpaid public holidays.....141,100

h) Certificate of service

i) Costs plus interest

The Respondent's Case

8. In its Memorandum of Response dated 21st December 2017 and filed in court on 22nd December 2017, the Respondent denies ever employing the Claimant as pleaded in the Memorandum of Claim and puts the Claimant to strict proof.

9. The Respondent further denies dismissing the Claimant and states that it could not have dismissed him as he was not its employee.

10. The Respondent maintains that the Claimant's claim is fatally defective as there was no employment contract between the parties. The Respondent asks the Court to strike out the claim.

Findings and Determination

11. There are three (3) issues for determination in this case:

- a) The nature and status of the Claimant's engagement with the Respondent;
- b) Whether the Claimant has made out a case of wrongful dismissal against the Respondent;
- c) Whether the Claimant is entitled to the remedies sought.

Nature and Status of the Claimant's Engagement

12. The Respondent's line of defence against the Claimant's claim is that the Claimant was engaged as a casual employee, with the longest continuous period of engagement being 11 days.

13. Section 2 of the Employment Act defines a casual employee as:

“a person the terms of 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.”

14. In his witness statement dated 2nd October 2017 and filed in court on 3rd October 2017, the Claimant states:

“My name is Nicholas Ngula Mwaniki. I was employed by the Respondent in February, 2009 as a turn boy. My duties involved loading goods, on diverse dates, into trucks at the Kenya Ports Authority on behalf of the Respondent.

I was never issued with a letter of appointment by the Respondent. We were working in a group of 24 employees all engaged in loading. We worked in two shifts of about 12 employees. We would be paid at rate of Kshs. 470/- for each day worked. The monies would be paid to us by the supervised (sic) immediately after work or within 2 to 7 days.

The (sic) whenever a ship docked the Port, the Respondent called us on our phones to immediately report to work. We would work for straight 12 hours and until the task is completed and many times we worked on Saturdays and Sundays.”

15. By this statement, which was corroborated by the Respondent's witnesses, the Claimant concedes that he was only engaged when a ship docked at the Port and was paid for each assignment. This is not the mark of a regular employee.

16. The Respondent produced employment records showing that the longest period in which the Claimant was engaged continuously was eleven (11) days. The Claimant did not contradict the Respondent's evidence in this regard.

17. I therefore find and hold that because the Claimant did not at any time work for a continuous period of at least one month, the provisions of Section 37 of the Employment Act, which provide for conversion of casual employment to term contract are not available to him.

18. The corollary finding is that the Claimant was a casual employee and his claim now before the Court will be considered within the confines of that form of employment.

Wrongful Dismissal?

19. The Claimant claims to have been wrongfully dismissed sometime in December 2014. He however could not recall the exact date of dismissal nor did he disclose the circumstances of the dismissal. Section 47(5) of the Employment Act requires an employee alleging wrongful dismissal to prove it. It is therefore not enough for a claimant to simply state that they have been wrongfully dismissed; they must tell the Court the details of the occurrence they term as wrongful dismissal.

20. The Claimant failed to satisfy the burden of proof placed on him by Section 47(5) of the Employment Act. This mismatch can only be explained by the fact that he was a casual employee, whose employment terminated at the end of each day.

21. My sister, **Mbaru J** dealt with a similar matter in *Livingstone Oundo v Polypipes Ltd (Steel Division) [2016] eKLR* and held as follows:

“It is therefore not all terminations of employment that must result in claim for unfair termination. The characteristics for employment must be assessed and each case judged on its own merits. The Employment Act recognises that casual employment is one form of employment and as such, it is not a violation of the law for the Respondent to engage the Claimant on casual terms based on the operational requirements of the business.”

22. Following in the steps of the foregoing decision, with which I fully agree, I find and hold that the Claimant has failed to establish a case of wrongful dismissal. The claim for compensation therefore fails and is dismissed.

Other Claims

23. Regarding the claim for notice pay I will say this; having found that the Claimant was a casual employee, he cannot lay a claim for a month’s notice because his employment was terminable at the end of each day. This claim therefore also fails and is disallowed.

24. Having worked intermittently for periods of less than a month, the Claimant is not entitled to service pay nor leave pay. These claims are therefore dismissed.

25. By his own testimony, the Claimant was paid a daily rate, which would ordinarily be inclusive of house allowance. The claim thereon is therefore without basis.

26. The claims for overtime and public holidays were not proved and are also dismissed.

27. Due to the nature of the Claimant’s engagement as determined above, he is not entitled to a certificate of service.

28. In the ultimate, the Claimant’s entire claim fails and is dismissed.

29. Each party will bear their own costs.

30. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Ngigi for the Claimant

Miss Kerubo for the Respondent