



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1993 OF 2015
JOASH OGARA MAINGA.....1ST CLAIMANT
CHRISTOPHER MUNYOKI MUNENE2ND CLAIMANT
-VERSUS-
DHL EXEL SUPPLY CHAIN (K) LIMITED...RESPONDENT
JUDGMENT

Introduction

1. Through a memorandum of claim dated 30th October 2015, the claimants commenced suit against the respondent, seeking for a number of reliefs thus;
 - a. A declaration that his dismissal and redundancy from his employment was unlawful and unfair.
 - b. A declaration that he is entitled to payment of his terminal dues and compensatory damages as pleaded Kshs. 1,428,951.85 in total.
 - c. An order that the respondent gives the claimant a certificate of service.
 - d. Costs of this suit; and
 - e. Interest.
2. The statement of claim was contemporaneously filed with witness statements of the claimants, and a list of documents under which five documents were filed.
3. Upon being served with the claimants' pleadings, the respondent filed a memorandum of response dated 23rd November 2015. Subsequent to this the claimants filed a response to the memorandum of response, and at this stage the matter became one to be proceeded with on merit, by hearing both parties.
4. When this matter came up for hearing it dawned on this Court that the claim by the 1st claimant had been compromised in another suit based on the same facts as herein, namely ***ELRC 9580 OF 2016 – JOASH OBARA MAINGA =VS= DHL EXEL SUPPLY CHAIN (K) LIMITED***. The 1st claimant's claim herein was marked as settled and a direction given that, the matter proceeds with the 2nd claimant's (hereinafter referred to as the claimant).
5. Imperative to state that the respondent denied the claimant's claim in total.

The Claimant's case

6. From the onset, it is imperative to state that by consent of both parties herein, the claimant's witness statement was deemed as his evidence in chief, and the documents that he had filed under the list of documents dated 30th October 2015, admitted as exhibits. The claimant orally testified, clarifying a few areas of his pleadings and the witness statement, before he was cross examined by counsel for the respondent, and subjected to a re-examination by his counsel.

7. The claimant stated that he got into the employment of the respondent on the 7th June 2012, as a loader, his role being loading and offloading bear crates.

8. He asserted that throughout his employment, his work started at 8.30 a.m. and he would call off his day of work, at 7.50 p.m. He was earning a salary of Kshs. 32,253.00.

9. On the 18th January 2015 the claimant and 47 other employees were informed that their employment had been terminated with immediate effect. The claimant asserted that the termination was as a result of a redundancy situation. That the termination substantively and procedurally was not in accord with the provisions of the employment Act. There was no prior notice given to them, the requisite notice issuable to the labour officer was not issued too.

10. The claimant contends that he was not paid salary for the month of January 2015, and salary in lieu of notice. In the circumstances of the matter, he is entitled to the reliefs sought in the memorandum of claim.

11. In his brief oral testimony in chief, he stated that he worked from 7.50 a.m. to 7.50 p.m. without overtime pay. He also worked during public holidays without compensation. Working on public holidays was a must for if one were not turned up, dismissal from employment was almost automatic.

12. Payment of his salary was effected through the bank. His exhibit 1 (the bank statement) demonstrates that on 30th September 2014, he was paid Kshs. 27,533.60, as salary for September 2014, and on 27th October 2014, Kshs. 23,831.75, salary for October 2014.

13. He concluded that the termination was so abrupt. The reason that was given for this abrupt termination being that work had diminished. There were neither prior notifications nor consultations.

14. Cross examined by Ms. Akello, the claimant stated that he came into the employment of the respondent on 4th June 2012. There was no written contract.

15. Asked about the difference in figures between the salary of September 2014 and October 2014, the claimant stated that the difference was occasioned by the fact that in some days they would work during day time and in others during night time. The Pay for night works was higher.

16. Not being a casual worker, he was entitled to leave or in lieu thereof untaken leave pay and house allowance, he asserted.

17. Under re-examination by his counsel, the claimant stated that his salary was paid monthly. The pay slip tendered before court is testimony that he was an employee of the respondent.

18. The termination of the 48 employees was without a specific criterion of selection. The person who was picking the job cards from the employees was the one determining who was to be terminated.

19. He clarified that at night the work load was less. Therefore, for the month worked at night, the salary would be less.

The Respondent's case

20. The respondent presented Mr. Elisha Onyango to testify on its behalf. At the time to testifying Mr. Onyango was the driver lead and customer services manager. However, he pointed out, at the material time he was a ware house manager. The witness asserted that he had a chance to work with the claimant, who was a casual labourer.

21. He contended that the claimant was working on a piece rate basis. He would only be called in to work whenever there was work. In such a scenario, at termination they could just converge with the workers, pay and release them. The claimant and the others were casuals; therefore, they were not entitled to any other benefits like permanent employees would.

22. He stated that payment for the casual labourers was done daily, however, there were extents where some of the casual labourers would opt to be paid monthly.

23. The witness testified that during the season when the claimant was terminated, about 500 other employees were also. The reason for this was that there was no work for them to carry out. The respondent's client, KBL terminated the customer-client relationship that were between it and the respondent, occasioning work to diminish.

24. Cross-examined by Mr. Muchiri, counsel for the claimant, the witness confirmed that the working hours were from 7.50 a.m. to 7.00 p.m. He reiterated that in 2015, he was a ware house manager and by virtue of the position, payment of the casual labourers was processed through him. However, the claimant was under Human Resource Management Department.

25. He stated that there was no written contract for casual workers. They would be called in the morning and released in the evening.

26. On the bank statement entries, the witness confirmed that there were entries for salary payment from the respondent company, into the account of the claimant. He stated further that the payments would be made daily, weekly or after two weeks.

27. The witness alleged that payments to the claimant were at monthly intervals.

28. Counsel referred the witness to the claimant's Exhibit 2 (the NSSF statements). On it, the witness stated that the entries thereon, reflect that the 1st date and contribution was 16/11/2012, this during the period of the claimant's employment with the respondent. That the last payment (NSSF) being in the month of February 2015, the time when the claimant was terminated. The payroll officer would make deductions from the claimant's salary, and remit the same towards the NSSF contribution.

29. The staff identity card Exhibit 3 was issued by the respondent. It reflected the claimant as support staff. He stated that even casual labourers would be given pay slips by the respondent. The claimant's and other employees' contracts were terminated because work had diminished and prior to the termination the employees were appraised of the situation. That this was done through a trade union, the intention to terminate was mentioned to the labour officer through a letter. However, the latter is not an exhibit placed before Court, he admitted.

30. Under re-examination by Ms. Akello, the witness asserted that the payments were made on account of the number of crates an employee moved. The difference in salary figures for the months of September and October 2014, finds an answer here.

31. That the card is for purposes of identification only. It does not show status of an employee.

The Claimant's submissions

32. Counsel for the Claimant submitted that the Claimant was not a casual labourer as he was consistently paid at the end of the month. He submitted that the Claimant did not fit the description provided for under Section 2 of the Employment Act on the definition of a casual employee, adding that the Claimant was engaged from 18th January 2013 to 8th January 2015 which falls beyond the timeline of a casual laborer's engagement which is strictly twenty – four hours.

33. Counsel argued that the Claimant would receive an itemized pay slip showing the gross salary and deductions made thereof in accord with the requirement of Section 20 of the Employment Act. This practice was contrary to the provisions of Subsection 3 of the above Section which specifically provides that the itemization would not apply to a casual employee or someone engaged on piece rate or task rate terms or for any period not exceeding six months. He further submits that in its pleadings, the respondent has not settled on a specific description of the Claimant's type of employment.

34. It was further submitted that the Respondent had failed to reduce its contract with the Claimant into writing contrary to the provisions of Section 9 of the Employment Act for the two years the Claimant had worked for it. That Section 10[7] of the Act places a duty to prove a disputed term on a contract of employment on an employer. The Respondent did not discharge this burden.

35. Counsel submitted that the argument by the Respondent that the Claimant was a piece – rate worker was not only unsubstantiated but his termination procedure ran afoul of Section 18(5) (b) of the Employment Act. He stated that this breach was enough to bring this summary dismissal claim under Section 45(2) (c) as unfair for not following the mandatory procedure for dismissal of piece rate workers.

36. Counsel submitted that by virtue of the provisions of Section 37 of the Employment Act, the casual employment of the claimant had been converted into a term contract. He urged the court to find that the terms had been changed by operation of the law and as such was entitled to a written notice of termination of employment as provided for under Section 35(1) (c) of the Act. That since the same had not been produced in this court and the Respondent's witness had admitted to its non-issuance, the termination was ipso facto unfair.

37. On the issue of redundancy, counsel submitted that the Respondent's witness admitted that the situation that led to the termination of the Claimant's employment was a redundancy. The termination did not follow the mandatory redundancy requirements under Section 40 of the Employment Act and as such made it unfair in terms of Section 45(2) (c) the Act. He stated that there was no clear discernable criteria on how the Claimant was picked for termination. He was arbitrarily picked. The Respondent did not act with justice and equity.

38. The court was urged to find that the claimant had proved its case and therefore entitled to a grant of the remedies pleaded in the memorandum of claim.

39. On the claim for one month's salary in lieu of notice counsel submitted that Section 35[1] of the Employment Act requires an employer to give an employee notice before termination of an employment contract. In the instant matter neither notice was given nor was payment made in lieu of the notice. He urged this Court to award the Claimant Kshs. 32,253, being one month's salary.

40. On compensation for untaken and unpaid leave, Counsel submitted that the Claimant worked for two years without proceeding for leave. That the Respondent's witness's evidence was not in any way directed to rebut this evidence, and indeed did not. That should this Court find that indeed the Claimant was not a casual laborer, the Court should order compensation under this head to an extent of two months' salary, hence Kshs.64,506.

41. It was further submitted that the Claimant proved that for the two years, he could work for seven days in a week without a one day's off as provided for in Section 27[2] of the Employment Act. The Claimant should therefore be compensated to an extent of 4 days in a month for two years. Therefore Kshs.119,088.00.

42. The Court is further urged to grant compensatory damages for the unfair termination pursuant to the provisions of Section 49[1][c] of the Employment Act,2007. Citing a decision in **Faiza Mayabi v First Community Bank Limited [2019] eKLR**, counsel urged the Court, to give the maximum compensation awardable under the provision, 12 months' gross salary, Kshs. 387,037.00.

43. That the Claimant and the Respondent's witness testified that the former used to work from 7.00 Am to 7.00 pm each day. That this is the

reason why the Claimant pleaded for 313 days a year for two years. That the Claimant worked four and half hours a day, overtime. That therefore under the head- overtime, he is entitled to Kshs. 655,375.00

Respondent's submissions

44. Counsel for the Respondent submitted on conversion of casual employment to a contract of service as provided for under Section 37 (1). He argued that the same was not possible as the Claimant had never worked continuously from the time of employment to the time of termination. He relied on the provisions of Section 35(1) (c) of the Act, and the decision of **Bernard Ochieng Odhiambo & Another vs Prime Aluminium Cement Casement (2016) eKLR** where the court dismissed the suit because the claimant did not plead or tender any evidence to prove that he worked continuously as required under Section 37 of the Act.

45. Counsel submitted that following the above, the Claimant is not entitled to the reliefs sought and as such urged the Court to dismiss the suit with costs.

46. It was further submitted that the Claimant departed from his pleadings, a thing the court should not sanction. That the Claimant's cause of action as can be discerned was on basis of a redundancy, however in the course of the proceedings, the Claimant packaged his case as though it was one for dismissal.

47. The Respondent's Counsel submitted that redundancy situations are never available in situations of casual labourers.

Issues for Determination

48. From the material placed before this Court, the following issues commend themselves as the issues for determination in this matter, thus:

- a. What was the nature of the Claimant's employment with the Respondent?
- b. In the circumstances of the relationship between the Claimant and the Respondent, was the termination procedurally and substantively fair?
- c. What reliefs, if any is the Claimant entitled to?
- d. Who should bear the costs of this suit?

What was the nature of the claimant's employment with the Respondent?

49. The protagonists herein took a diametrically opposed position as regards the nature of employment. The respondent asserted in its pleadings and through the testimony of the of its witness, that the former was at all material times a casual piece-rate worker who it engaged on an on and off basis. The engagement coming in only whenever there was work to be done. The Claimant on the other hand took a position that he was in the employment of the Respondent from 18th January 2013 to 8th January 2015, working on a daily basis and earning a monthly salary. That as at the time when the relationship between him and the Respondent was coming to an end, his monthly salary was Kshs. 32,253.

50. A casual employee is defined in Section 2 of the Employment Act as;

“A person the terms of whose engagement provide for his employment at the end of each day and who is not engaged for longer than twenty-four hours at a time.”

The same section gives a description of what piece work entails. It describes;

“piece work” means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance.”

51. Section 18 of the Employment Act provides for when wages or salaries for various categories of employees become due, providing *inter alia*;

“1. Where a contract of service entered into under which a task or piece-work is to be performed by an employee, the employee shall be entitled-

[a] when the task has not been completed, at the option of his employer to be paid by his employer at the end of the day in proportion to the amount of task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or

[b] in the case of piece-work, to be paid by his employer at the end of each month in proportion to the amount which he has performed during the month, or on completion of the work, whichever date is earlier.

2. Subject to subsection [1], wages or salaries shall be deemed to be due-

[a] in the case of a casual employee, at the end of the day.

[b].....

[c].....”.

52. From the definitions hereinabove cited and the mode of payments provided by the Act, I have no doubt in my mind that there is a definite line differentiating casual workers from piece-work rated workers. One cannot be both. Consequently, the description accorded to the relationship between the Respondent and the Claimant by the former as casual piece-rate worker is one that does not exist in our statute[s].

53. In *Krystaline Salt Limited V Kwakwe Mwakele &67 others C.A, Civil Appeal number 79 of 2015*, their Lordships, while appreciating that there is a distinction between the two forms of employment, held that section 37 of the Act applies to casual as opposed to piece work employees and the Act deals differently with those two types of employees. That parliament had intended to draw the distinction and that is why section 37 does not mention piece work employees.

54. The state of confusion as regards legal status of an employee as is in this matter, where even the employer itself does not seem to be sure of the exact character of its relationship with its employee, shall continue to abound for as long as employers are unwilling and/or unconcerned to adhere to the duty bestowed upon them to by provision in section 9 of the Employment Act,2007 to reduce contracts of employment into writing, and in so doing supply the particulars of employment therein in terms of section 10 of the Act.

55. What came out of the material placed before me by the parties, does not even to the slightest extent suggest a character[s] of a casual worker in the context of the definition accorded by the Employment Act. I am therefore not in agreement with the Respondent that the Claimant was a casual worker.

56. The Claimant in its submission has suggested that even if the court were to find that the Claimant was a casual worker, then that status converted to a term contract of employment under section 37 of the Employment Act. My view is that in order for the court to engage, and give effect to the provision in section 37[4] of the Act, as a precondition it must be established that the employee started working as a casual worker and continued to so work for a time that would allow operation of the law to set in for the conversion. I have hereinabove made a finding that there was not in existence a casual employment. The precondition was therefore not satisfied.

57. The Respondent’s witness testified that the work of the Claimant was that of a loader, shifting crates at the Respondent’s ware house. And that the Claimant’s salary was dependent on the number of crates he moved per a day and cumulatively in a month. This is a clear pointer that the type of employment that the claimant was engaged in, was a piece-rate employment. The evidence tendered by the Claimant is consistent with this type of employment for instance, there is a clear difference between the salary that the Claimant earned on various months, others [months] which were successive to each other. The Pay slips on record for the other Claimant whose claim was compromised as hereinabove indicated were of this character too. It is apparent that two loaders doing same work were making different earnings in same months, giving an inescapable impression that the earnings were anchored on tasks completed.

58. In sum, I come to a conclusion that the Claimant’s employment was a piece-rate employment.

In the Circumstances of the Relationship Between the Claimant and the Respondent, was the Termination procedurally and Substantively Fair?

59. There is no contestation that there was a termination of the Claimant’s employment. However, the parties have taken different positions as regards how it ought to have been terminated. The Claimant argues that he was entitled to a notice, while the Respondent’s position as reflected in the testimony of its witness, was that they would just release the workers informing them that there was no work for them.

60. Section 45 of the Employment Act provides *inter alia* that a termination of an employee’s contract of employment is unfair if the employment was not terminated in accordance with fair procedure. Fair procedure, can obtain in Statute, the Constitution, applicable and relevant International Standards and Human Resource Manuals or Policies of employers.

61. Part VI of the Employment Act provides for termination and dismissal. Section 35 provides for the requisite notices that have to precede a termination in respect of various employment relationships. Relevant to the instant matter is section 35[1][c], which provides;

“where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty- eight days next following the giving of notice in writing.”

62. There is no dispute that the notice was not given. In fact, the Respondent’s witness admitted this. The legislatures saw value in putting in place this statutory procedural requirement. It did not do it for ornamental purposes. I have no doubt in my mind that it took into consideration how employees and society perceive employment; what employment means to the lives of many and the disruptive effect that an abrupt dismissal can have on one.

63. Having failed to issue the notice contemplated in the afore-stated provision, and having not paid the Claimant salary in lieu of notice pursuant to the provisions of section 36 of the Act, this court concludes that the termination was absent of procedural fairness.

64. In a claim arising out of termination of a contract, as is in this matter, section 43 of the Employment Act places upon the employer a burden to prove the reason or reasons for termination. Where the employer fails to prove the reason, the law deems the termination unfair. In this matter, the Claimant asserted that termination of his employment was without as valid reason, that he was arbitrarily chosen for dismissal. The Respondent’s witness made a bare assertion that the termination was as a result of a diminished availability of work, caused

by a withdrawal of one of its major clients from giving the Respondent business. No material was placed before court to establish this. I find that the Respondent did not discharge the burden placed upon it by the stated section. I consequently invoke the defaulting implication. The termination was unfair in terms of the provisions of section 45.

65. In the upshot I find that the termination was substantively unfair.

What Reliefs if Any are Available to the Claimant.

66. I have indicated and found hereinabove, the Claimant was entitled to a notice pursuant to the provisions of Section 35[1][c], and in absence of the same a payment in lieu on notice under the provision of section 36. He did not get either of this. By reason of this premise, I award him one month's salary in lieu of notice, Kshs.32,253.00.

67. Having found that the Claimant's employment was in character a piece-rate employment, the Claimant cannot be heard to urge this court to award reliefs anchored on an alleged redundancy.

68. The Claimant sought for overtime compensation, payment for off days not taken, and unpaid public holidays. Unlike other forms of employment, in piece-rate employment, time is not central, but the number of tasks completed. The employer strictly speaking does not control the amount of time the employee puts into the task[s]. Any claim associated with time, cannot find accommodation in the circumstances of the current matter therefore.

69. I decline to award the house allowance sought by the Claimant, I am not convinced that it is entitled to, and that it is a relief that is grantable in view of the nature the employment, the subject matter herein.

70. This Court finds that consequent to the finding hereinabove that the termination was both substantively and procedurally unfair an award pursuant to the provisions of section 49[1] of the Employment Act, 2007 is merited. Consequently, the Claimant is awarded 5 months' gross salary- Kshs. 161,265. In arriving at the extent of the award, I have considered, the attitude of the Respondent as expressed by its witness, that for employees [piece-rate] they terminate their employment without formalities. This is not in accord with the current employment and labour relations regime which largely has uprooted the common law principles on termination of employment contracts by employers. Too, the length of time that the claimant had worked for the Respondent, and that he did not in any manner contribute to the termination.

71. In sum, judgment is hereby entered for the Claimant for:

- a. A declaration that the termination of the claimant's employment was not procedurally and substantively fair.
- b. One month's salary in lieu of notices, Kshs. 32,253.00.
- c. Compensation pursuant to the provisions of section 49[1] [c], of the Employment Act, 2007, Kshs. 161,265.00.
- d. Interest on [b] and [c] above from the date of filing suit till full payment.
- e. Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF OCTOBER, 2021

OCHARO KEBIRA

JUDGE

Delivered in presence of

Wangira for the Claimant.

No appearance for the Respondent.