



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.135 OF 2018

NELSON BOOKER OGINDO.....CLAIMANT

VERSUS

ATHINAI SISAL ESTATE LIMITED.....RESPONDENT

JUDGEMENT

The claim is that the claimant was employed by the respondent sisal estate in August, 2007 and placed in the Brushing section earning a wage of ksh.13, 344 per month which was paid through his Sacco account with Skyline Sacco Society Limited.

The claim is that the claimant worked for 10 years without going on annual leave and without payment in lieu thereof contrary to section 28 of the Employment Act, 2007 (the Act). There were no statutory contributions to NSSF and gratuity is due under the terms of the Collective agreement (CBA).

The claim is also that on 9th September, 2017 the manager, Moses Kabargei told the claimant not to report on duty the next day as his service had been terminated. There was no notice, reasons or payment of terminal dues.

The claim is for dues;

- a. 3 months' notice pay ksh.40,032;
- b. Leave pay for 35 years Ksh.124,5444;
- c. Gratuity pay for 10 years ksh.84,512;
- d. Compensation for unfair termination of employment; and
- e. Costs

The claimant testified that he was under a verbal contract with the respondent and working in the sisal brushing section for 10 years. He worked continuously until 9th September, 2017 when the manager told him there was no work. He was not a causal employee as alleged in defence. His statutory dues to NSSF and NHIF were not paid and at the end of employment no gratuity was paid. The defence that he absconded duty is not true as Mr Kabargei told him not to report to work.

Upon cross-examination, the claimant testified that he worked for the respondent for 10 years. He was born in the year 1993 and now aged 26 years meaning employment started in the year 1997 when he was 14 years old and that at the time the respondent was not checking identity cards. His parents were employed by the respondent and in September, 2017 the supervisor Mr William Olila terminated his employment. This was a clerk in the brushing room who said that the manager told him to terminate employment.

The claimant also testified that he was not unionised but would be paid monthly.

On 11th March, 2017 the claimant was paid his wage arrears of ksh.9, 109. This was paid through the Sacco. He had a loan at the time.

The claim for leave for 35 years is because the claimant is aged 30.

The defence is that the claimant was employed as a casual labourer on a needs basis and depending on availability of sisal in the f=estate. He would be paid his wages through his Skyline Sacco account. The claimant being a casual employee was not entitled to leave, gratuity and other benefits claimed in the memorandum of claim. The claimant was paid on a daily basis for work done.

The defence is also that the respondent has been experiencing shortage of sisal at Athinai Estate and there was suspension of operations and casual employees including the claimant were duly notified of the same and that they would be recalled when operations resumed.

The respondent also filed work records.

Moses Kabargei testified that he is the manager at the respondent and worked with the claimant from the year 2011, May. The claimant's mother was an employee of the respondent and she retired. The claimant would be taken in the bushing room when more workers were needed and without continuous employment. Before the claimant could be employed as a full time employee he was required to have an identity card which he did not have. The claimant was then issued with a job card to record his days at work.

Mr Kabargei also testified that there was no clerk called William Olila at the brush section with authority to terminate employment. In September, 2017 the claimant did not report to work. At the time there was less work and only permanent staffs were left. The respondent had not reasons to terminate the claimant's employment.

The claimant was not bound under the CBA and cannot claim from therefrom.

At the close of hearing the parties filed written submissions.

The claimant alleges that he was employed by the respondent in August, 2007. He has attached his national Identity Card No.30244276 which show his date of birth to be 2nd January, 1993 meaning in August, 2007 he was aged less than 14 years. He only attained the age of 18 on 2nd January, 2011. His identity card was not issued until the 22nd March, 2012. I take it employment into the service of the respondent was as stated in defence from the year 2011.

The claim is that the claimant's employment was unfairly terminated on 9th September, 2017 by Moses Kabargei. This was denied in defence. The claimant replied thereto without giving any particulars.

In his evidence the claimant testified that on the material date, 9th September, 2017 William Olila told him that Moses Kabargei had told him to tell the claimant not to report to work the next day. This was denied by Mr Kabargei in his evidence and further that there was no Mr Olila in the brushing department and even where there was such a person, there was no authority to terminate employment.

The court takes it that the claimant started work with the respondent at a very early age and largely due to the fact his mother was employed by the respondent. It is therefore possible that he would be taken as and when there was a lot of work but formerly started employment sometime in the year 2011 or 2012 when he attained the age of majority and or secured his identity card and would therefore be entered in the work records of the respondent.

Where the claimant was employed while underage, he ought to have invoked the provisions of the Employment Act, 2007 in this regard. With advantage of legal representation, this was not addressed. The court shall leave it at that.

The respondent in defence admits employing the claimant on casual terms from May, 2011. This shall therefore apply and the cut off and start of formal engagement of the claimant as an employee.

On the work record filed, the respondent picked on several months and years;

In September, 2017 the claimant is noted as either absent [=A] or the day being a Sunday [= S];

August, 2015 work for 29 days;

July, 2016 28 days at work;

February, 2015 at work for 23 days.

On the records filed, the payment statement and Sacco account with Skyline Sacco Limited, the claimant was receiving monthly payments by the respondent meaning there was no daily payment of his wages for work done for the days worked. This does not define him as a casual employee;

“casual employee” means 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;

As correctly submitted by the claimant in the case of **Martin Ireri Ndwiga versus olerai Management Company [2017] eKLR** the employer has the duty to issue the employee with his terms and conditions of employment. Also as submitted by the respondent in the case of **Rashid Mazrui Ramadhan versus Doshi & Co. (Hardware) Limited & another [2017] eKLR** a casual employee is one who is paid at each end of day. To retain such an employee for over a month for work that is not finished, the employee enjoys the rights under the Employment Act, 2007.

In this case, the claimant failed to attend work after the 9th of September, 2017 after a stranger and or a person not authorised directed him not to report to work. Without verifying such information, the claimant proceeded and absconded duty. This is despite the fact that he was aware Moses Kabargei was the estate manager and not one William Olila. He did not seek to find out why his employment was being abruptly ended in the manner alleged and through William Olila.

Even though the work records filed indicate the respondent had an employee called *William Olila Mus*, number 23902 the link with the claimant is not addressed. There was no effort to have this person attend and clarify the information alleged to have been issued for and on behalf of the estate manager, if at all.

To thus allege there was unfair termination of employment in the circumstances has no foundation.

On the claims made for leave pay for 35 years based on the CBA, the claimant testified that he was not unionised and even where he was; there is no justification for the claim for leave for 35 years. for the period of May, 2011 to 9th September, 2017 the claimant only worked for 6 years and the only leave pay due in lieu of taking leave based on the last due basic wage is ksh.6,415.55 x 6 all at ksh.38,495.30.

With regard to the claim for gratuity pay, the claimant was not unionised to claim under the subject CBA for a benefits only secured for members therefrom and without being disadvantaged for not being unionised and where there was no payment of statutory dues and or compliance with sections 35(5) and (6) of the Employment Act, 2007 the claim in lieu thereof was not pleaded.

Accordingly, judgement is hereby entered for the claimant for the respondent for the payment of leave pay due all at ksh.38, 495.30 to be paid with interest from the date of filing suit until paid in full. Each party shall bear own costs.

Delivered at Nakuru this 20th day of February, 2020.

M. MBARU

JUDGE

In the presence of: