



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1065 OF 2015

DENIS NGURA MURIGI.....CLAIMANT

-VERSUS-

EPCO BUILDERS COMPANY LIMITED.....RESPONDENT

JUDGMENT

1.The Claimant brought his suit on 19/06/2015 seeking salary arrears occasioned by underpayment of his salary by the respondent from 8/04/2011 to 2/04/2015 when his services were terminated on account of redundancy. He also prayed for accrued leave, gratuity, salary in lieu of notice, weekly off days and public holidays not paid plus cost of the suit.

2. The respondent filed defence on 14/07/2015 denying any employment relationship with the claimant. She further denied that she terminated the alleged employment relationship through redundancy. Finally, she denied that the claimant is entitled to the Ksh. 740,961.90 and prayed for the suit to be dismissed with costs.

3. The suit was heard on 29/07/2019 when both parties gave evidence and thereafter filed written submissions.

Claimant's case

4. The claimant testified as CW1 and told the court that he was employed by the respondent on 8/04/2011 as a welder earning Ksh. 250 per day, but paid weekly in arrears. In April 2011 the pay was increased to Ksh. 300 per day, in November 2011 it was increased to Ksh. 325 per day, in February 2012 it was increased to Ksh. 350, in May 2012 Ksh. 375, in May 2013 Ksh. 400 and in July 2013 Ksh.450. He contended that the said pay was less than the Gazetted wage and therefore an underpayment.

5. He further testified that he worked continuously and never went for any annual leave or off day or even public holidays, but worked through out for 4 years. He contended that he was dismissed on account of redundancy without prior notice when he was told that work had reduced. He therefore prayed for the reliefs sought in his claim.

6. On cross examination he admitted that he was never given any written contract, but contended that he verbally sought the job and he was employed verbally. He further contended that the employees kept on complaining about the low pay and that is why it kept on being increased every now and then. H reiterated that he was working for 7 days a week including Sundays either at the sites or the workshop.

7. He contended that although the company used to close down from 21st December and during the Easter holidays he used to continue working on the Good Friday and Easter Monday at the site because work never stopped there and he could not fail to attend. He maintained that the office used to close during the public holidays, but work continued at the site.

Defence case

8. Mr. Benard Owino respondent's Human Resource Manager testified as RW1. He confirmed that the claimant was employed by the respondent as a welder on casual basis in one of her sites, but he was dismissed due to his laziness, negligent to perform duties and habitual absenteeism from work. He disowned recommendation letter dated 21/04/2015 contending that the signature was not his.

9. On cross examination he denied knowledge of when the claimant joined the respondent holding that he had no employment records for the claimant. He maintained that the claimant misconducted himself but admitted that he was not accorded any hearing before the termination. On further cross examination, he changed his story and admitted that the Employee Termination Notification produced as defence exhibit cited the reason for the termination as minimum work at the workshop. He further admitted that he never met the claimant before the termination.

Claimant's submissions

10. The claimant submitted that his employment relationship with the respondent was not contested by the evidence. He further contended that under section 37 of the employment Act he had converted to permanent employee and as such the termination of his employment through redundancy was unfair and unjustified. He therefore prayed for one month salary in lieu of notice under section 40 (1) (f) equalling to Ksh. 19,045.50, and compensation.

11. He further submitted that he was under paid during the entire period of his employment by the respondent and prayed for the arrears assessed at Ksh. 225,248.50 plus other dues sought in his statement of claim.

Respondent's submissions

12. The respondent submitted that she engaged the claimant on casual basis which under section 2 of the Employment Act means employment for a period of 24 hours at a time and payment at the end of every day. He relied on **Josephant Njuguna V High Rise Self Group [2014] e KLR** where Abuodha J held that section 37(1) of the Employment Act should not be misused to hurriedly convert a casual employee to permanent employee.

13. The respondent further submitted that the claimant's services were not terminated unfairly. She contended that the redundancy that was preceded by meaningful consultations and fair selection criteria was followed in conformity with section 40 (c) of the Act which relates to seniority, skill, ability and reliability of each employee.

14. She further argued that the termination was fair because under section 35 (1) (a) of the Act, casual employment is terminable without notice. She contended that the termination was also done under section 44(4)(g) of the Act because the claimant misconducted himself by absenting himself from work without leave and for neglecting his duties.

15. She relied on **Insurance & Finance Union (Kenya) V Barclays Bank of Kenya Ltd [2014] e KLR** where Mbaru J held that being away from work without authority amounts to absconding duty and it attracts serious labour sanctions. She argued that the claimant has failed to discharge his duty of proving unfair termination as required by section 47 (5) of the Act.

16. She further submitted that no evidence was adduced to prove the alleged salary underpayment and contended that she paid the claimant all his rightful salary under the law. She further denied the claim for salary in lieu of notice and 4 years leave contending that the claimant was a casual employee. She further denied the claim for gratuity contending that it was not founded on the contract of service. Finally, she denied the claim for compensation, off days and public holidays not paid contending that the claim is not supported by any evidence and that the claimant's evidence on the same was inconsistent. She therefore prayed for the suit to be dismissed with costs.

Issues for determination

17. There is no dispute that between 8/04/2011 and 2/04/2015 the claimant was employed by the respondent earning a daily wage, but payable weekly in arrears. The issues for determination are:-

- (a) Whether the claimant's casual employment converted to permanent employment.
- (b) Whether the termination of the employment was unfair.
- (c) Whether the claimant is entitled to the reliefs sought.

Conversion from casual to permanent employment

18. The claimant contended that he was employed for a daily wage but worked continuously from 8/04/2011 to 2/04/2015 when his employment was terminated on account of redundancy. The respondent contended that the claimant was a casual employee, but failed to produce any employment records to rebut the claimant's evidence that he worked continuously. She also failed to produce any records to prove that the claimant was habitual absentee. Consequently, I find that the claimant has proved on a probability that he worked for the respondent on casual basis continuously from 8/04/2011 to 2/04/2015 when he was discharged on account of redundancy.

19. Under section 37 (1) of the Employment Act, if a casual employee works continuously for over one month, the casual employment is deemed to convert to permanent contract of service which is protected from termination without prior notice under section 35 of the Employment Act. In this case the claimant has proved that he worked for the respondent continuously for about 4 years and as such, I find and hold that his casual employment converted to permanent employment as if he did not start as a casual employee.

Whether the termination was unfair

20. The respondent acknowledged in her written submissions that the claimant's employment was terminated on account of redundancy. The claimant contended that he was not served with a prior notice as required under section 40 of the Employment Act. The said section requires, in mandatory terms, that before terminating employee's services on account of redundancy, the employer must first serve at least one month notice in writing to the employee or his trade union, and the area labour officer. In this case that procedure was not followed as the respondent did not produce any copy of the notice as an exhibit and as such the said redundancy amounted to unlawful and unfair termination with the meaning of section 45 of the Employment Act.

Reliefs

21. In view of the finding above that the termination of the claimant's services was unfair, I award the claimant one month's salary in lieu of notice, plus 3 months' salary as compensation for unfair termination under section 49 of the Act. The said award is based on the minimum wage under the general wage rule applicable in April 2015. The latest wage order produced as evidence by the claimant in legal notice No. 197 published on 1st May 2013 which provided a minimum wage of Ksh. 470.60 equaling to Ksh. 14,118 per month. I have used the minimum wage because the claimant did not demonstrate where else a welder fell in the job grading under the wage order.

22. The claim for annual leave for 4 years lacks particulars and evidence and it is dismissed. The claim is also exaggerated because claimant admitted that the company used to close down from 21st or 23rd of December for holiday which has not been factored in computing the leave not taken. Likewise, the claim for gratuity fails because it lacks particulars and evidence in writing or basis in law. As correctly submitted by the defence, gratuity is a contractual issue and it must have a basis in the contract of service. In this case it has not also been shown how the claimant calculated the 80 days gratuity and as such it must fail.

23. The claim for weekly rest days and public holidays not paid for also lacks particulars and evidence and it must fail too. In any event the claimant admitted that the company was closing down during the public holidays. Although he alleged that he remained working during the holidays, he did not prove that sites were left operating while the office was closed.

24. Finally, the claim for underpaid wages fails because the claimant did not substantiate the same by documentary evidence or even call any eye witnesses to confirm his allegations.

Conclusion and disposition

25. I have found that the termination of the claimant's employment contract on account of redundancy amounted to unfair termination. I therefore enter judgment for:-

(a) Notice	Kshs. 14,118
(b) Compensation	<u>Kshs. 42,354</u>
Total	<u>Kshs. 56,472</u>

The sum awarded is less statutory deductions but in addition to costs and interest at court rates from the date hereof.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS N. MAKAU

JUDGE