REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1454 OF 2015

PERTER MAUNDU MALONZA..........................CLAIMANT

-VERSUS-

FRIGOKEN LIMITED......................................RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 19/08/2015, contending that he was continuously employed by the respondent as a Machine Attendant on 21/10/2013 earning basic salary of ksh. 11,086 plus house allowance of ksh.1663 per month, and worked until 23/3/2015 when his services were terminated by the respondent. He therefore sought the following reliefs: -

a) A declaration that the termination was unfair.

b) Terminal dues and benefits totalling Ksh 165,737.

c) Certificate of Service

d) Costs and interest.

e) Any other relief that the court may deem fit and appropriate.

2. The Respondent filed defence on 12/1/2016 admitting that she employed the claimant but contended that he engaged him as a casual employee, intermittently and on need basis. She averred that the claimant never worked for 30 days continuously in any single month during the period of 27 months she intermittently engaged him as a casual employee. She contended that in 10 months he worked for less than 15 days, in another 6 months he worked for less than 20 days, and in another 9 months he worked for less than 25 days. He further contended that from 22.10.2013 to 22.11.2013 he was engaged under one-month fixed term contract, while in January, February and March 2015 he worked for 3 days, 9 days and 13 days respectively.

3. The respondent further averred that, except when the claimant served under the said fixed term contract, he used to earn a daily wage which was paid at the end of each day worked. She also averred that the claimant was a member of the NSSF and she remitted contributions for him during his service. She denied the reliefs sought contending that she never terminated the claimant's services but rather ended automatically at the end of each day. She therefore prayed for the dismissal of the suit with costs.

4. The suit was heard on 28/10/2019 when both parties tendered evidence and thereafter their respective counsel filed written submissions.

Claimants Case

5. The claimant testified as CW1 and briefly stated that he was employed by the respondent as a Machine Operator/ Attendant on 21/10/2010 without a written contract but on 22/10/2013, he was issued with a written contract. He was stationed at the Packing department and his salary was ksh. 11,086 per month. He worked faithfully until 23.3.2015 when the HR Manager Ms Beth verbally dismissed him and failed to pay his dues. He contended that he never went for any leave during his service and the NSSF contributions of ksh.200 deducted from his salary every month was not remitted to the Agency by the respondent.

6. He contended that he was working continuously from 1st January to 31st December every year and in many months he used to work for 30 days continuously. He used to work 8 hours per day and he clocking in and out to indicate hours worked. He disputed the attendance register filed by the respondent contending that it was incomplete and had some days omitted. He further testified that his services were terminated by the HR Manager Ms Beth for the reason that he sued the employer for injuries suffered on 25/9/2014 while on duty. He contended that the HR Manager accused him of suing the company and told not step back there, and further ordered the watchman not to allow him back there. According to him, the termination was unfair and prayed for reliefs sought herein.

7. On cross-examination, he admitted that paragraph 3 of his Claim stated that he joined the respondent in 2011 but contended that the correct date was 21.10.2010. He further admitted that his job involved capping tinned beans which was grown through irrigation during the dry season. He admitted that production was high during the dry season and low during the cold season when some employees were reduced. He admitted that when work was low he could miss work in the middle of the week but when it was a lot he could work even on Sundays. He contended that he was paid weekly but admitted that his pay varied depending on the number of days worked and availability of work.

8. He admitted that he signed the contract of employment dated 26.10.2013 for one month and contended that he worked continuously through the month and received a salary and a pay slip. He further admitted that he never received any other pay slip during his entire service. He reiterated that he was dismissed on 23.3.2015 for suing the respondent for injuries suffered while on duty and thereafter the security guards barred him access to the respondent's premises. He further admitted that he sued the company in 2014 and continued to work until 23.3.2015. He admitted that he never lodged a complaint at the Labour office but rather instructed a lawyer to represent him.

Defence Case

9. The respondent's HR Manager, Ms Sylvia Kaburu, testified as RW1. She stated that the respondent deals with processing of French beans for export which has pick season and low season. She further stated that the respondent has permanent staff but during the peak season she hires casual employees or seasonal contract staff. She contended that the claimant was at one time he was engaged on one month fixed term contract but all the other times he was engaged as a casual employee intermittently for 3 or 4 days a week. He relied on the bundle of Attendance register marked Appendix 1 to prove that the claimant never worked continuously.

10. Rw1 denied that the claimant was dismissed on 23.3.2015 by the respondent and averred that the issue of dismissal did not arise because the claimant was only a casual employee. He denied that the claimant was dismissed for suing the company and contended that the company does not dismiss employees who sue it for compensation for work related injuries. She contended further that there are still vacancies for casual workers during the peak seasons.

11. Upon cross-examination RW1 admitted that he did not know the claimant personally but rather through records he interacted with in the office. She admitted that she could not confirm or deny whether the claimant worked for 30 days continuously per month during peak season. She admitted that the attendance register produced showed that the claimant worked for 24 days excluding off days. She further admitted that she is not the one who printed the attendance registers filed by the respondent and further admitted that she did not produce a certificate under section 106 of the Evidence Act.

Claimant's Submissions

12. The claimant submitted that he started off as casual employee but his continuous employment automatically converted to regular contract of service by didnt of section 37 of the Employment Act and urged the court to make such finding. He contended that he has proved by evidence that he was working continuously for a number of days amounting in aggregate to more than a month and the work he was doing could not be completed within three months. He further urged the court to disregard the Attendance register filed by the defence because it is inadmissible. According to the claimant, RW1 admitted that she is not the one who printed the Register form the computer and she did not produce a certificate under section 106B of the Evidence Act to authenticate the document.

13. The claimant further submitted, that having converted to regular terms employee, he was protected by the law from unfair dismissal and urged the court to find that he was unfairly dismissed verbally. He contended that the termination of his services was unfair because the reason for the dismissal was that he sued the employer for work related injuries, and that a fair procedure was not followed. He therefore contended that he is entitled to the reliefs sought in the suit.

14. He relied on **Nanyuki Water & Sewerage Company Limited v Benson Mwiti Ntiritu & 4 others [2018] e KLR** where the Court of Appeal upheld the finding by this court that, casual employees who had worked continuously for more than a month, and that the job could not be completed within 3 months had converted to permanent staff by dint of section 37 of the Employment Act. He further relied on **Charles Onchoke v Kisii University [2018] e KLR** where Marete J held that the casual employment of the claimant had converted to permanent employment because he worked continuously on average of 27 days per month inclusive of rest days and public holidays.

Respondent's Submissions

15. The respondent submitted that the claimant was a casual employee and not one the respondent's permanent staff. She contended that the claimant admitted during cross examination that he was not employed continuously every day of the week. She further contended that the evidence by Rw1 was not contradicted by the claimant, that is, the respondent's business has peak and low seasons; that during the peak season, she engages casual labourers like the claimant; and that the claimant never worked continuously for more than one month as per the Attendance Register she filed.

16. She urged the court to dismiss the suit because the claimant was employed as a casual employee depending on the availability of work and there is no time he worked continuously for a month. She relied on **Rashid Mazrui & others v Dosh & Co. and Another [2018] e KLR** where the Court of Appeal upheld the decision of this court where it declined to convert casual employment to permanent employment because the employees admitted that they never worked continuously for more than one month.

Issues for Determination

17. There is no dispute that the claimant was employed by the respondent as a casual employee and seasonal contract staff on diverse dates between 21.10.2013 and 23.3.2015. The issues for determination arising from the pleadings, evidence and submissions are: -

a) Whether the claimant's casual employment converted to regular terms contract of service.

b) Whether the claimant was unfairly dismissed.

c) Whether the claimant is entitled to the reliefs sought.

Conversion of Casual Employment to Regular Terms Contract of Service

18. The jurisdiction of this court to convert casual employment to a regular terms contract of service, otherwise called as permanent employment is recognised under section 37 of the Employment Act. The said jurisdiction is exercisable if the employee proves that he has worked for the employer continuously for more than one month. In **Rapid Kate Services Limited v John Mutisya & 2 others [2018] eKLR,** the Court of Appeal held that:

> ***"our reading of section 37 of the Employment Act reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been employed by the employer in question on casual basis and second, he/she has worked for the said employee for a period aggregated to more than one month."***

19. In this case, the claimant admitted during cross examination that there is peak and low season in the respondent's business. He further admitted that during low season workers are reduced. He also admitted that he used to miss work sometimes even in the middle of the week depending on the availability of work. Finally, he admitted that his weekly pay varied depending on the number of days worked. The foregoing admissions corroborates the contention by Rw1 that the claimant never worked continuously but intermittently depending on the availability of work, and especially the contention that he was working 3 or 4 days a week and at no time did he work for a number of days amounting to one month in aggregate.

20. After careful consideration of the evidence and the submissions presented by both parties, I find and hold that the claimant has failed to prove by evidence that he worked for the respondent on casual basis continuously for an aggregate period of more than one month. He did not adduce any documentary evidence or call any witnesses to prove that he worked continuously for a number of working days amounting in aggregate to more than one month. Consequently, his casual employment did not automatically convert to regular term contract of service under the Employment Act by dint of section 37 of the Act.

21. In **Rashid Mazrui & others v Dosh & Co. and Another [2018] e KLR** the Court of Appeal held that:

> ***"Looking at the evidence we are unable to disagree with the findings of the learned Judge and indeed there is no justification for doing so as the evidence shows the appellants were casual employees who used to work for 2 days in a week depending on the availability of materials. They used to clock their time on the said days when they reported at work."***

Unfair termination

22. In view of the finding above that the claimant's casual employment did not convert to regular term contract of service under the Employment Act, the alleged unfair dismissal did not arise. Under section 35(1) (a) of the Employment Act, his casual employment was terminable by either party without notice at the end of each day for no reason.

Reliefs sought

23. In view of the finding that the claimant's casual employment never converted to regular term contract of service under the Act, I return that he is not entitled to the compensatory damages sought because they are benefits available only to employees serving continuously under regular contract of service, and who become victims of unfair termination.

24. As regards the claim for deducted not remitted NSSF contributions, the claimant did not plead the particulars of the claim and tender evidence in support, like statement from the NSSF office. Consequently, that prayer also fails and I dismiss the suit with costs.

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

ONESMUS N. MAKAU

JUDGE