



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 375 OF 2017

BAKARI ABDALLA MWANGAZI.....CLAIMANT

VERSUS

KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. What is before me is an employment dispute between Bakari Abdalla Mwangazi and Kwale International Sugar Company Limited.
2. The Claimant’s claim is contained in a Memorandum of Claim dated 10th May 2017 and filed in court on the same date. The Respondent filed a Reply on 29th August 2017.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource and Administration Officer, Rhodah Wambui Thuo. Both parties further filed written submissions.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent in November 2014. His entry monthly salary was Kshs. 5,100 which was increased to Kshs. 6,300 as at the time of termination. The Claimant claims that his salary was all along below the statutory minimum wage.
5. The Claimant states that in December 2016, the Respondent terminated his employment, without notice and valid reason. The Claimant adds that he was not afforded an opportunity to be heard, prior to the termination.

6. The Claimant therefore avers that the termination of his employment was unlawful and unfair. He now claims the following:

- a) One month’s pay in lieu of notice.....Kshs. 10,954.70
- b) Unpaid annual leave for 12 years.....92,031.60
- c) 12 months’ salary in compensation.....131,456.40
- d) Salary underpayment.....190,078.30
- e) Costs plus interest

The Respondent’s Case

7. In its Reply dated 28th August 2017 and filed in court on 29th August 2017, the Respondent states that the Claimant was engaged as a casual labourer, from time to time, at a monthly salary of Kshs. 5,100.
8. The Respondent denies terminating the Claimant’s employment and avers that the Claimant merely failed to report to work at the beginning of the month of June 2015.
9. The Respondent maintains that the Claimant’s salary was in accordance with the requisite minimum wage applicable in the Agricultural Industry.

Findings and Determination

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

- a) The nature and status of the Claimant's employment;
- b) Whether the Claimant has established a case of unlawful termination of employment;
- c) Whether the Claimant is entitled to the remedies sought.

Nature and Status of the Claimant's Employment

11. In its Reply to the Claimant's claim, the Respondent states that the Claimant was a casual employee, engaged from time to time, on need basis.

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

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

13. In the final submissions filed on behalf of the Respondent on 9th March 2020, reference was made to the decision in ***Josphat Njuguna v High Rise Self Group [2014] eKLR*** where it was held that the mere fact of an employee being paid on intervals other than daily basis does not mean that the employee is elevated from casual employment status.

14. This may well be the case because the mode of salary payment is just one of the factors to consider. What is clear is that the provisions of Section 37 of the Employment Act, which provide for conversion of casual employment to term contract, were enacted to guard against exploitation of employees employed by verbal contracts.

15. In its Reply, the Respondent states that the Claimant was engaged as a casual labourer from time to time, at a monthly salary of Kshs. 5,100.

Further, in her witness statement filed in court on 15th January 2020, the Respondent's Human Resource and Administration Officer, Rhodah Wambui Thuo states that the Claimant was engaged as a casual labourer from time to time, on a daily wage of Kshs. 210 paid in arrears at the end of the week.

16. Further still, in her testimony before the Court, Thuo stated that the Claimant worked six (6) days a week. Thuo added that the Claimant and other casual employees were managed and paid by a supervisor in the field. The supervisor was not called as a witness and the Respondent did not avail any casual employment records to confirm that the Claimant was indeed a casual employee.

17. The assertion that the Claimant was a casual employee was therefore unproved and is rejected.

Unlawful Termination?

18. In his Memorandum of Claim, the Claimant states that his employment was terminated in December 2016. However, in his witness statement filed in court on 10th May 2017, he gives the date of his termination as 22nd September 2015. No explanation was given for this stark contradiction.

19. The burden of proof in unlawful termination claims is contained in Section 47(5) of the Employment Act, which provides as follows:

(5) For any complaint of unfair termination or wrongful dismissal the burden of proving that an unfair termination or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

20. In my view, an employee who cannot tell the date of the termination complained of cannot be said to have discharged the evidential burden imposed by Section 47(5) of the Employment Act.

21. That said, I find and hold that the Claimant has failed to establish a case of unlawful termination of employment. The claims for compensation and notice pay are therefore disallowed.

Other Remedies

22. The Claimant also claims leave pay for the entire period of employment with the Respondent. The Respondent's Human Resource and Administration Officer, Rhodah Wambui Thuo told the Court that the Claimant did not go on leave because he was a casual.

23. Having debunked the averment that the Claimant was a casual employee, I find and hold that he is entitled to leave pay.

24. The claim for underpayment was not proved and is dismissed.

25. Finally, I enter judgment in favour of the Claimant in the sum of **Kshs. 8,820** being leave pay for two (2) years.

26. This amount will attract interest at court rates from the date of judgment until payment in full.

27. The Claimant will have the costs of the case.

28. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF MAY 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

LINNET NDOLO

JUDGE

Appearance:

Mr. Otieno for the Claimant

Mr. Kulecho h/b for Mr. Njoru for the Respondent