



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 55 OF 2016

ALI JUMA MGALA.....CLAIMANT

VS

ELEPHANT STEEL INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This matter was initially heard by my brother, **Makau J.** When the parties appeared before me, they agreed that I proceed from where my brother Judge had stopped.

2. The Claimant’s claim is by way of a Memorandum of Claim dated 3rd February 2016 and filed in court on 4th February 2016. The Respondent filed a Response on 26th February 2016.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent in May 2013 in the position of Nail Machine Operator, earning a daily rate of Kshs. 500.

4. The Claimant further states that he worked for the Respondent until 7th November 2015, when his employment was terminated for no good reason. He claims that the Respondent recruited another employee to replace him.

5. The Claimant’s case is that the termination of his employment was unlawful and unfair as no proper reason was given for it. He adds that he was not paid his terminal dues and that the Respondent did not remit his National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) dues.

6. The Claimant now claims the following from the Respondent:

- a) One month’s salary in lieu of notice.....Kshs. 13,000
- b) Unpaid leave for 2.2 years.....23,100
- c) Public holidays for 2.2 years.....19,800
- d) Service pay for 2.2 years.....16,500
- e) Compensation for unfair termination.....156,000
- f) Costs plus interest

The Respondent’s Case

7. In its Response dated 26th February 2016 and filed in court on even date, the Respondent denies having employed the Claimant in May 2013 as a Nail Machine Operator, earning a daily rate of Kshs. 500.

8. The Respondent states that the Claimant was engaged as a casual employee in the year 2015 and that his engagement depended on

availability of work. The Respondent adds that the Claimant's wages were dependent on the amount of work he performed at any given time.

9. The Respondent further denies the Claimant's averment that his employment was unlawfully terminated on 7th November 2015.

10. The Respondent denies the Claimant's entire claim and asks the Court to dismiss it.

Finding and Determination

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

- a) The nature and status of the Claimant's employment with the Respondent;
- 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 Employment

12. In its defence to the Claimant's claim, the Respondent states that the Claimant was a casual employee engaged on need basis.

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

“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.”

14. In his witness statement filed in court on 27th October 2016, the

Respondent's Administration Manager, Francis Mulili states that the

Claimant started working for the Respondent from July 2015 and not May 2013 as pleaded by the Claimant. When he appeared before the Court however, Mulili changed tune and testified that the Claimant started working in 2013. Mulili further testified that the Claimant was paid weekly.

15. In support of its case that the Claimant was a casual employee, the Respondent filed Casuals Payroll and Worksheet for period between July and December 2015. On the face of these records, the Claimant worked six (6) days a week for which he was paid a daily rate of Kshs. 500.

16. While the records produced by the Respondent show that the Claimant did not work on some days in the months of November and December 2015, they also show that, allowing for one rest day in each week, the Claimant worked for a continuous period of more than a month. Moreover, the Respondent did not produce any employment records for the period prior to July 2015.

17. The question as to whether an employee is a casual is a legal question to be determined upon examination of the conduct of the parties. The Court was referred to the decision in ***Sebastian Githaiga Mwangi v Commission for the Implementation of the Constitution [2015] eKLR*** where the Court converted a casual employment to term contract, on the basis of longevity of period of service beyond one month.

18. In this case, the Claimant worked for a continuous period of more than a month and his wages were paid at the end of the week. This is therefore a proper case for conversion of the employment terms to term contract under Section 37 of the Employment Act.

Unlawful Termination?

19. The Claimant lays a claim for unlawful termination of employment. Nevertheless, at paragraph 8 of his Memorandum of Claim, the Claimant discloses that the Respondent sent word through the Claimant's colleagues asking the Claimant to go back to work. The Claimant however declined the Respondent's offer, ostensibly because the request came after his Advocate had served a demand letter on the Respondent.

20. In its decision in ***Samin Juma Pekeshe v Mohamed Karim T/A Zamza Enterprise [2019] eKLR*** this Court held that an employee who declines an offer to go back to work cannot come to court and complain of unfair termination of employment. This holding, from which I have no reason to depart, is premised on the understanding that the remedies under Section 49 of the Employment Act are meant to cushion employees from the vagaries of sudden unlawful loss of employment.

21. Having rejected a job offer from the Respondent, the Claimant is not entitled to compensation. But because the Respondent did not justify the termination of employment in the first place, I will allow the claim for one (1) month's salary in lieu of notice.

22. The Respondent's witness, Francis Mulili admitted that the Claimant did not go on leave and further that the Respondent did not remit the Claimant's NSSF dues. The claims for leave pay and service pay therefore succeed and are allowed.

23. The Claimant himself told the Court that he did not work on public holidays. This claim is therefore without basis and is disallowed.

24. Finally, I enter judgment in favour of the Claimant as follows:

a) 1 month's salary in lieu of notice (500*30).....Kshs. 15,000

b) Leave pay for 2 years (500*21*2).....21,000

c) Prorata leave for 6 months (500*1.75*6).....5,250

d) Service pay for 2 years (500*15*2).....15,000

Total.....56,250

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

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

27. It is so ordered.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 21ST 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:

Miss Kitoo for the Claimant

Mr. Busiaka for the Respondent