



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1544 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

KIOKO NGILA.....CLAIMANT

VERSUS

VISHAK BUILDERS LIMITED.....RESPONDENT

JUDGMENT

The claim herein was filed on 5th August 2016. The claimant alleges therein that the respondent unfairly terminated his employment on 5th February 2016. He prays for the following remedies –

- a. One month's salary in lieu of notice Kshs.19,500
- b. Unpaid leave allowance for 6 years and 8 months Kshs.130,000
- c. Service gratuity for 6 years and 8 months worked Kshs.78,000
- d. NSSF not paid Kshs.28,000
- e. Payment for 12 months for unfair termination Kshs.234,000
- f. Interest on (a to 3) at court rate
- g. Costs of the claim

The respondent filed its response on 1st September 2016 denying the averments in the Memorandum of Claim. It avers that the claimant did not work continuously. It further avers that the claimant deserted duty. It avers that the claimant who was a casual employee was never terminated from employment.

The respondent denies that the claimant is entitled to the remedies sought and prays that the claim be dismissed with costs.

At the hearing of the case the claimant testified that he started working for the respondent in July 2009 as a welder and worked until 5th February 2016. His starting wage was Kshs.300 per day. At the time of leaving work it had increased to Kshs.650 per day.

He testified that he was not issued with any letter of appointment or contract.

It was the claimant's testimony that on 5th February 2016 he worked until 5 pm. That he was asked to work until night but declined on grounds that he was going far and cannot walk in the night. He was then told to go home and never go back to work.

The claimant testified that he never took leave or rest days. He further testified that for the entire period he worked for 6 years, the respondent paid only Kshs.3,600 for NSSF. He relied on the NSSF statement which he had filed.

Under cross examination the claimant testified that he worked as a casual on several sites being General Mathenge, Adams, Brookside, two buildings in Westlands and on Chiromo Road. He testified that he did not work on a daily basis but could not recall the days he worked or those he did not work. He testified that he was paid for all days worked. That whenever he worked on Sundays he was paid double. That he reported to work at 7.30 am and worked until 5 pm with no lunch break.

He testified that his supervisors were Mwanzia and Mukundi.

He testified that he had submitted NSSF statements for 2015 and 2016 only because he was not registered before 2015.

Under re-examination the claimant testified that he was registered with NSSF in 2008. He further testified that he did not agree with the attendance records produced by the respondent.

For the respondent STEPHEN NJOROGE MWANGI, RW1, testified that he works with the respondent as a Supervisor from 2009. He testified that the claimant worked for the respondent from 2009 to 2016 but intermittently. That he worked in Adams Arcade Greenhouse Project for 107 days, in Westlands Chiromo Lane Mirage Project for 88 days, in Parklands Park Suite for 165 days in 2012 and 2013 and at Westlands Heights Project for 116 days in 2014. That the claimant again worked at Canhar Project in Westlands for 175 days.

RW1 testified that the claimant was a steel fixer and only worked when work was available.

He testified that the claimant's employment was not terminated, that it is the project which came to an end upon completion and handing over to the client.

He testified that it is the claimant who left work as there is still work but the claimant never went back to seek employment.

Under cross examination RW1 testified that he did not work with the claimant in the same project. He further testified that he did not have completion certificates for the completed projects. He testified that the register of employees was kept at the project site. He testified that he did not have the Master Roll in court. He testified that he knew the claimant even though he did not work with the claimant on the same site. He further testified that the claimant was a casual and could come and go as he wished. That there were times that the respondent lacked workers.

Under re-examination RW1 testified that workers would be aware when a project was completed.

Analysis and Determination

I have considered the pleadings, the evidence and the written submissions filed by the parties. The issues arising for determination are the following –

- (i) Whether the claimant was a casual employee.
- (ii) Whether the claimant's employment was unfairly terminated.
- (iii) Whether the claimant is entitled to the prayers sought.

Casual Employment

The Employment Act defines a casual employee at Section 2 as follows –

“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;

Section 37(1) of the Employment Act provides for conversion of casual employment to term contract as follows –

37. Conversion of causal employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

From the evidence on record, it is evidence that the respondent is a building contractor. The terms of employment of its workers would therefore be covered under the Regulation of Wages and Conditions of Employment (Building, Construction, Timber and Furniture) Order which recognises that the nature of the construction industry is such that not all employees can be on permanent terms of employment. But that does not mean that they are casual employees. A casual employee is as defined by the Employment Act, one who does not work longer than 24 hours.

The Regulation of Wages Building Order provides as follows

20. Continuity of service

The service of an employee, who is transferred to a different site as a result of completion or mere completion of work at any particular site where such employee had been engaged, shall be deemed to be continuous and unbroken.

From the evidence produced by the respondent, it is clear that the claimant was not a casual employee but worked on building sites for as long as there was work in his line as a Steel Fixer. I thus find that the claimant was not a casual employee.

Unfair Termination

The claimant testified that he was told not to report back to work when he declined to work overtime. The respondent however states that the claimant's employment was not terminated, that he is the one who stopped reporting to work.

The burden of proof in termination cases is provided for in Section 47(5) of the Act as follows –

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment 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.

The claimant did not state who specifically told him to go away and not report back. The evidence was not corroborated by any other evidence. It is the word of the claimant against the respondent who denies terminating his employment.

It is the duty of he who asserts to persuade the court to accept his evidence. On a balance of probabilities, I find that the claimant has not discharged the burden placed upon him by the law. I thus find no proof of unfair termination of employment.

Remedies

The claimant having not proved unfair termination of employment is not entitled to pay in lieu of notice.

The respondent did not deny that the claimant never took annual leave for the entire period he worked for the respondent. Having worked for longer than 2 months' continuously, he is entitled to annual leave in terms of Section 28(1) of the Act.

Both the claimant and respondent agreed that the claimant did not work continuously over the period he was in the employ of the respondent. Based on the admissions and documents produced by the respondent, I find that the claimant worked for about 50 months cumulatively and award him leave for the same at 1.75 days per month being 87.5 days. At Kshs.650 per day, I award him **Kshs.56,875** on account of annual leave.

In view of the fact that the respondent did not adduce any evidence on payment of NSSF or service pay, I will award the claimant service pay for the years before 2015 at 15 days per year being 5 years at **Kshs.48,750**.

The prayer for NSSF fails as it can only be awarded as an alternative to service pay.

The prayer for compensation also fails as the claimant did not prove unfair termination of his employment.

In the final analysis, I enter judgment for the claimant against the respondent in the total sum of Kshs.105,625.

The respondent shall pay claimant's costs. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They 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, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE