



THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1241 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

MAKORI ORINA JACKSON..... CLAIMANT

VERSUS

M/S VEE VEE ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

By Memorandum of Claim dated and filed on 2nd June, 2015 and filed on 15th July, 2015 (the **Memorandum of Claim**), the Claimant avers that he was employed by the Respondent as a general labourer on 1st September, 2013 at its building site situated at Makongeni Railway Station at a daily rate of KES 350/= paid weekly which was later increased to KES 370/= per day from 1st September, 2014 until he was unfairly terminated on 15th March, 2015.

The Claimant further avers that at all material times while working for the respondent, he was underpaid pursuant to **Legal Notice No. 197 of 1st May, 2013** of the **Regulation of Wages (Building and Construction Industry)**. He was also not paid for weekly rest days and public holidays.

The Claimant averred that he was unfairly terminated by the Respondent on 14th March, 2015 without notice or a hearing and was paid KES 12,935 as full termination dues.

The claimant prayed for Judgment to be entered against the Respondent for:-

1. *An Order that the Respondent be ordered to issue a certificate of employment to the Claimant.*
2. *An Order that the Respondent be ordered to pay the Claimant a sum of KES 298, 741.30/=.*
3. *Cost of Action.*
4. *Interest at Court rates.*
5. *Any other relief the Court may see fit to grant.*

On 25th June, 2018, the Claimant filed a witness statement of the same date in which he reiterates his averments in the Memorandum of Claim. He also filed a list of issues dated 5th July, 2015.

The Court record shows that the Respondent filed a Reply to Memorandum of Claim dated 19th August, 2015 and filed on 20th August, 2015, attached to the same is a Memorandum of Appearance by the Respondent in person dated 14th August, 2015. There is also a Memorandum of Appearance dated 3rd August, 2015 and filed on 4th August, 2015 by Muoki and Company Advocates and a subsequent Response to the Memorandum of Claim dated and filed on 20th August, 2015. It is unclear why there are two separate responses filed on the same date.

In the Respondent's Reply to the Memorandum of Claim dated 19th August, 2015, the Respondent denies all the allegations in the Memorandum of Claim save for the description of the parties. Further the Respondents denies employer-employee relationship or termination of the Claimant's employment.

In the Respondent's Response to the Memorandum of Claim dated and filed on 20th August 2015 through Muoki and Company Advocates,

the Respondent denies that the Claimant was in its employment but states that if at all the Claimant was in its employment which is denied, the Claimant was a casual labourer receiving wages on a daily basis. It denies there was underpayment of the Claimant or that he worked on rest days and public holidays. Further, the Respondent avers without prejudice to the denial of the employment relationship, that if at all any amounts were demanded, the same were paid in full to the various casuals including the Claimant upon completion of the job at the site.

The Respondent prayed that:-

- i. The Claimant's claim be dismissed.*
- ii. A declaratory order that the Claimant was not terminated neither was he employed.*
- iii. An order that the Claimant is not entitled to the monies claimed.*

The Respondent filed a List of Documents together with the Reply to the Memorandum of Claim dated and filed on 20th August, 2015 which contained a list with amounts demanded by the Claimant and others as well as a payment voucher signed by the Claimant acknowledging payment in full.

Hearing

The suit was heard before this Court on 31st July, 2019 where Mr. Thuo appeared for the Claimant and Mr. Kumbaya held brief for Mr. Muoki for the Respondent.

The claimant adopted his witness statement and relied on the documents filed with his claim.

The Claimant testified that he filed the suit against his former employer who engaged him as a general labourer at the Respondent's work site in Makongeni Railway on 4th January 2013. That he was paid him KES 350/= per day. He testified that in January the following year, his wage was increased to KES 370/= a day.

The Claimant testified that on 14th March, 2015 he reported to work as usual. When he arrived, he was informed there would be no work on that day. When he inquired as to the reason, he was informed that work had reduced. He did not receive any notice. He had never been issued with an appointment letter and was paid weekly.

The Claimant testified that he was underpaid and also worked Saturdays and public holidays but was paid the normal rate on those days. He also testified that he never went on annual leave and was never paid in lieu of leave not taken. He thus asked the court to find that he was unfairly terminated and sought compensation and costs.

On cross examination by Mr. Kumbaya, the Claimant testified that he knew one Onesmus Nzioka whom he worked with and was a mason. That he also worked with others whose names he did not know. He testified that the person who called him to work was Kofia who died. The said Kofia was the one who paid them but he was engaged by the Respondent and was the Supervisor. He stated that Kofia was not a contractor but was employed by the Respondent.

The Claimant testified that he did any general work and was paid KES 350/= per day which was what Kofia told them the Respondent had offered. At the time, he did not know he was underpaid.

It was the Claimant's testimony that they were told the work would end and they would be taken to another site in Kisumu. He testified that he was aware there are many reasons work may stop such as funds and weather. He testified that he worked on holidays because they were told work had to be done and they reported for duty. That he agreed to work because the Respondent asked them to. He did not fail to work at any time during the period which he worked which was daily.

The Claimant testified that when he was laid off the works were still on going, at which time, the work he was doing had not ended. He was paid as stated in his statement. He also testified that he worked with some persons whom he did not call as witnesses.

Upon inquiry by the Court as to when the said Kofia died, the Claimant testified that Kofia died while he was still working at which point, the Respondent brought different supervisors. He testified that the last one who laid him off was one Buluma, who was the same supervisor who would pay them after Kofia died.

On re-examination, Mr. Thuo referred the Claimant to the Respondent's documents which the Claimant testified was a receipt of payment of KES 12,925/= which was paid one week after he was laid off. He testified that the payment was made because he asked the Respondent why he was laid off while the works were still on-going and without notice or payment of terminal dues.

The Respondent closed its case without calling any witnesses.

The Claimant filed written submissions dated and filed on 7th November, 2019. Therein, the Claimant re-iterated the contents of the Memorandum of Claim, his witness statement and testimony. Further, he submitted on the various heads of claims as sought in the Memorandum of Claim. With regards to his claim for unfair termination, he relied on the case of **MARGARET LIHABI NGAIRA v WINFRIDA NGUMU CHARLES [2016] EKLR** where this Court held:-

“Termination or dismissal from Employment has to be carried out in accordance with the Employment Act. That is to say an employer must have valid and justifiable reason for dismissal, the reasons and or justification must be reasonably communicated to the employee and his or her representations heard. Where termination or dismissal does not comply with the Act the Court will declare such termination unfair and dismissal wrongful.

The Claimant submitted that the uncontroverted evidence is that he was not given an opportunity to be heard before his termination. He cited Section 41 of the Employment Act, 2007 which provides:-

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The Claimant further submitted that the burden of proof of fair termination is placed on the employer, which burden the Respondent has not discharged. He relied on the case of **KASSIM ALI KADENGE v KASSAM HAULIERS LIMITED [2016] eKLR** in support of this submission.

With respect to the claim for compensation for summary dismissal, the Claimant relied on the case of: **JARED O. OTETE V FACTORY GUARDS LIMITED [2014] eKLR** where it was held that:-

Section 49 of the Employment Act provides for the remedies available for unfair termination of employment. They include notice pay, accrued salary, leave and compensation for unfair termination of up to 12 months' gross salary among others.

The claimant has prayed for one month's salary in lieu of notice, salary for November 2011, accrued leave, severance pay for 9 years, maximum 12 months; salary for unfair dismissal, certificate of service and costs. The court awards him the prayer for notice pay, salary for November 2011, 12 months' salary for unfair dismissal, certificate of service and costs. In all respects, the termination was unfair, there was no hearing given or reasons for termination, the Claimant was unfairly terminated.”

The Court notes however that the emphasized portion of the cited case above was not contained in the authority which was in any event not part of the authorities attached to the Claimant's submissions and is accordingly disregarded by this Court.

The Respondent on the other hand, filed its written submissions dated 19th January, 2019 and filed on 3rd February, 2020. Therein, the Respondent submitted that the Claimant never filed a reply to the Response to the Memorandum of Claim and the averments therein are thus uncontested facts. It identified the issues for determination as:

- i. Whether the Claimant was a permanent employee and was unfairly terminated from employment
- ii. Whether a certificate of service should be issued to the Claimant
- iii. Whether between 4th January, 2013 and 14th March, 2015, the Claimant was underpaid for the period he was employed.
- iv. Whether the Claimant was paid his salary in lieu of notice.
- v. Whether the Claimant was entitled to payment for rest days, public holidays, annual leave severance pay and costs of the suit.

On whether the Claimant was a permanent employee and was unfairly terminated, the Respondent submitted that the Claimant alleges to have been employed by the Respondent but did not provide any document to prove the same. Further, the Claimant alleged to have been unfairly terminated but did not provide a termination letter to that effect. It was the Respondent's submission that it did not have any employment contract with the Claimant. It refuted the Claimant's claim of unfair termination. It was the Respondent's submission that if at all the Claimant was in the Respondent's employment, the claimant was a casual labourer as defined by Section 2 of the Employment Act. Further that Section 35(1) of the Act provides that “Where the contract is to pay wages daily, a contract is terminable by either party at the close of any day without notice”. The Respondent submitted that the Claimant confirmed he was paid on a daily basis and that on 14th March, 2015, the alleged date he was terminated, he was informed there was little work to be done at the site thus his services were no longer required.

In support of its submission, the Respondent relied on the case of **RASHID MAZURI RAMADHAN & 10 OTHERS v DOSHI & COMPANY (HARDWARE) LIMITED & ANOTHER [2018] eKLR** wherein the Court of Appeal upheld the High Court's decision that the Appellants were casual workers who worked intermittently and were paid a daily rate. That the same would not be converted into term contracts hence, they were not entitled to notice, leave or certificate of employment.

The Respondent submitted that the Claimant, during cross-examination, stated that he knew one Onesmus Nzioka alias Makovia who

introduced him to the job and was the one paying his daily rate which would clearly highlight that the Claimant had no relation with the Respondent.

It was the Respondent's submission that since the Claimant was not a permanent employee of the Respondent, he was not entitled to a certificate of service. Further, that it would be of great prejudice to the Respondent to be obligated to issue a certificate of service to the Claimant who was not even known to the Respondent but was under Onesmus Nzioka alias Makovia.

The Respondent submitted that the Claimant only worked intermittently; as such it disputed the claim for underpayment. Further, that if at all the Respondent advanced any payment to the Claimant, the Respondent paid the daily rate as agreed by both parties, the same being binding upon them. The claimant was clearly content with his pay and thus should not now plead being indolent of his rights.

The Respondent also submitted that the Claimant has not provided the Court with any document to show that he was unfairly terminated and as such his claim for salary in lieu of notice is not due.

The Claimant did not provide any proof that he worked on rest days or public holidays. The Respondent submitted that in any event, the Claimant never worked for more than 6 days continuously and if he indeed worked on public holidays, did so of his own volition without being coerced.

With respect to the claim for leave, the Respondent submitted that the Claimant was not entitled to leave days as he was never an employee. The Claimant never worked for the Respondent for a complete year in order to accrue leave days.

It was the Respondent's submission that the claim for severance pay should also fail as the relationship between the Respondent and the Claimant if at all one existed, was not converted a permanent contract as stipulated in Section 37 of the Employment Act. That the claim is therefore statute barred.

Determination

The issues for determination arising out of the pleadings, evidence and written submissions herein are first, whether or not the Claimant was an employee of the Respondent and if so, whether his employment converted to regular employment. Secondly, whether the Claimant was unfairly terminated and finally, whether he is entitled to the prayers sought.

Section 2 of the Employment Act defines an employee and employer as follows:-

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service

The Employment Act also defines at **Section 2** a contract of service as:-

“means an agreement, whether oral or in writing and whether expressed or implied, to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service for which Part XI of this Act applies.”

From the above definitions an employment relationship is not based on the duration or nature of employment, that is whether casual, permanent or fixed-term. Its basis is whether there is a contract of service which by definition could either be written or oral, expressed or implied. Indeed, Section 2 of the 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 24 hours at a time.

The Claimant contends that he was employed as a general labourer by the Respondent in January, 2013 until his termination in March 2015. The Respondent denies the existence of an employment relationship but contends that on a without prejudice basis, if at all there was an employment relationship, the same was casual. The Claimant in his pleadings and testimony stated that he never entered into a written contract with the Respondent and was paid weekly in cash by one Onesmus Nzioka alias Makovia (Deceased) and later by a Mr. Buluma a fact that is not contested by the Respondent.

The Respondent as part of its documents produced a payment list containing the name of the claimant and other persons that it submitted were casuals with the Respondent as well as payment voucher issued after payment of the sum of KES 12,935 being full and final settlement of any dues owed to the Claimant.

This in itself is an admission of the existence of the employment relationship between the Claimant and the Respondent. The consequent issue for this Court's determination is whether the employment was on a casual basis or permanent.

According to **Sections 10 and 74** of the Employment Act it is the duty of the employer to keep records of all its employees including the period for which employment is expected to continue where employment is not intended to be for an indefinite period as provided in **Section 10(3)(c)**. It was therefore incumbent on the Respondent to produce such records to prove that the Claimant was indeed a casual employee as the same ought to be in the custody of the Respondent. This would clarify whether the same was intermittent or continuous and the aggregate number of days worked by the Claimant. Failure of the Respondent to produce such records shifts the burden of disproving allegations of the Claimant as provided in **Section 10(6) and (7)** which state that -

6. The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

7. If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

Section 37(1) (a) of the Employment Act provides that a casual employee who works for a period or a number of continuous working days which amount in the aggregate to the equivalent of **not less than 1 month**, is deemed to be one where wages are paid monthly and is terminable by a 28 days' notice in writing. By dint of **Section 37(2)**, the converted employee becomes entitled to paid rest days and holidays. In addition to the foregoing **Section 37(3)** of the Act provides that where employee whose contract has been converted under Subsection (1) as above continues to work for two or more months from the date of engagement as casual employee, he shall be entitled to the same terms and conditions of service as regular employees.

Section 37(4) of the Act then empowers this court to declare terms and conditions of casual employees to be consistent with the provisions of the Employment Act.

Having considered the evidence and circumstances of this case, including the uncontroverted evidence of the Claimant that he worked every day for 26 months, I am satisfied that his employment converted to a monthly contract under **Section 35(1) (c)** and **Section 37(2)** of the Employment Act.

The next issue for this Court's determination is whether the Claimant was unfairly terminated. The Claimant's evidence is that he was unfairly terminated. The Claimant testified that on 14th March, 2015, when reporting to work, he and other workers were verbally informed by Mr. Buluma that the work was finished and they no longer required his services. He did not receive any notice of the termination and was only paid a sum of **KES 12,935/=** as full and final payment of any dues owed to him by the Respondent.

It is clear based on these uncontroverted facts in the sworn testimony of the Claimant that his termination was unfair pursuant to the provisions of Section 45 of the Employment Act as he was verbally terminated without being subjected to a hearing. Further, there was no proof provided by the Respondent for the reasons the Claimant was terminated as required by **Section 43** of the Employment Act. Having found so, I will now proceed to consider the relief sought.

Underpayment

With respect to the claim for underpayment, the Claimant's uncontroverted evidence was that he was a general labourer at the Respondent's construction site at Makongeni. He was paid KES 350 per day between 1st January, 2013 and 1st January 2014, later, his pay was increased to KES 370/= per day until his termination of employment on 14th March, 2015. Pursuant to Section 26 of the Employment Act and Section 48(1) of the Labour Institutions Act, this Court is prohibited from making determinations on terms below the minimum rate set by the law.

Section 26 provides as follows –

26. Basic minimum conditions of employment

- (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.**
- (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.**

Section 48(1) of the Labour Institutions Act provides as follows:-

48. Wages Order to constitute minimum terms of conditions of employment

(1) Notwithstanding anything contained in this Act or any other written law—

- (a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;**
- (b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.**

Guided by these Sections, the applicable provisions are from the **Regulation of Wages (General) (Amendment) Order, 2012** for the period between 1st January, 2013 and 30th April, 2013 and the **Regulation of Wages (General) (Amendment) Order, 2013** for the period between 1st May 2013 and 14th March, 2015, when the Claimant's employment was terminated.

viii). The Respondent shall pay the Claimant's costs of this suit.

ix) The decretal sum shall attract interest at court rates from date of judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JUNE 2020

MAUREEN ONYANGO

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 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, the 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 the 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