



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.418 OF 2017

PETER WAMBANI.....CLAIMANT

VERSUS

BETHUEL NDUNG'U T/A MAJI PUMP VENTURES....RESPONDENT

JUDGEMENT

The claim is based on the facts that The claimant was employed by the respondent on 31st July, 2014 as a driver and crane operator at a wage of ksh.16,000 until 31st July, 2017 when his employment was terminated unlawfully and unfairly. Work hours were 7am to 6pm all 1 hours each day.

The claim is that on 28th July, 2017 the claimant called the respondent for work instructions but his phone call was not picked. He received a text message that he should return the vehicle keys to the office and await his terminal dues and his wages were paid on 8th August, 2017.

The claim is that there was no notice issued, there was no hearing and the due terminal payments owing were not paid and this resulted in unfair termination of employment. The claimant is seeking the payment of the following dues;

- a) Compensation at ksh.19,654.10 x 12 = Ksh.235,848.90;
- b) Notice pay Ksh.19,654.10;
- c) Underpayments ksh.112,654.10;
- d) Off days ksh.285,091.56;
- e) Overtime Ksh.444,938.27;
- f) Public holidays ksh.30,237.07;
- g) Annul leave Ksh.47,623.39;
- h) Severance/service pay Ksh.34,016.71;
- i) Certificate of service; and
- j) Costs.

The claimant testified that he is a driver and the respondent employed him to driver a canter lorry KAJ 266G which carried a crane as they were servicing bore holes. The crane was mounted on the vehicle and he would drive from point to point for work. He remained in the continuous service of the respondent and had no written contract of service and would be paid Ksh.16,000 per month and no benefit and housing or a house allowance. He worked without a break or rests for 7 days each week. His employment was terminated without notice when he was directed to take the motor vehicle keys to the office. He did not abscond duty as alleged by the respondent and was not a causal employee as he was paid his wages monthly.

On 4th May, 2017 he was paid Ksh.10,200;

On 6th April, 2017 he was paid ksh.10,100;

And these payments do not reflect a daily wage.

The claimant also testified that he is a licenced driver since the year 2004. He lost his vehicle licence and a new one was re-issued on 24th May, 2016.

The respondent would attend to different clients who needed the digging of bore holes or repair of breakages. The clients would call and the claimant would drive to the site. This required full day work using the machines.

The defence is that the claimant was never employed as a driver or a crane driver as alleged and there was no employment relationship.

The defence is also that the claim is full of contradictions and falsehoods. The claimant alleges that he was employed as a driver on 31st July, 2014 yet he received his driving licence on 24th May, 2016. The respondent could therefore not engage him as a driver or crane driver as alleged.

The defence is also that the claimant was engaged on a temporary basis from 31st July, 2014 as a crane hand man on and off working from 8am to 5pm and would leave earlier in most cases and working 3 days per week hence enjoyed off days.

The claims made for terminal dues should be dismissed.

The decision to terminate the claimant's employment was as a result of gross misconduct of absconding duty and would leave work early before the stipulated time, he would work for 3 days in a week instead of the agreed days. Termination of employment was for a justifiable cause and the claims made should be dismissed with costs to the respondent.

Bethuel Ndungu testified that he has worked as maji Ventures from time to time whenever he got work from Davis and Shirliff. He is a casual employee with Davis and Shirliff and uses his entity to secure work since the year 2016. He had started in the year 2008 as Bet Agencies and then he registered Maji Pump Ventures which does plumbing and tiles.

Mr Ndungu also testified that he is a plumber and has never been involved in the business of drilling water and he engaged the claimant on piecemeal basis on and off depending on availability of work. The claimant was a handy man and not a driver since he had no licence to drive which he got in May, 2016. The claimant was paid for his services and his standard work hours were 8am to 5pm which he failed to adhere to and would leave work early or not attend at all. The claimant had no access to the car keys since he was not required to use them but in July, 2016 he approached him stating that he had secured a driving licence and thus qualified should be employed as a driver but there was no opening for a driver and he continued to work as a handy man. There was no termination of employment as alleged, the claimant absconded duty and proceeded to file the instant claim.

The claimant had been employed as a casual helping in removing water pipes from bore holes by cranes and working in a team of 4 others with one Kevin Ngetich giving him instructions. He trained the claimant to use the crane as a casual. The crane was mounted on the canter vehicle but he was not a driver since he had no licence at the time. The claimant would be paid ksh.700 per day plus ksh.200 or lunch whenever he would be at work. When out of his station, the respondent paid for accommodation. There was no fixed wage and payment depended on availability of work;

To remove pipes from a bore holes the claimant was paid ksh.500;

Lunch ksh.200;

Upkeep Ksh.200.

He would be paid in cash at end of each day at work. This would be by mpesa but mostly in cash.

The work hours were not regulated and based on availability of work. Sometimes he got emergency calls to repair pipes and call the claimant to attend requiring half to 5 hours of work. In a given week the claimant would work for 2 days only. Bore hole work is not constant. Such piece rate work is not dependent on public holidays or leave since a specific service is required and undertaken once available.

Mr Ndungu also testified that the claimant was never his full time employee since the respondent work was casual and based on work allocation by different clients. When he was served with the pleadings herein he realised the claimant no longer wanted to work with him. he left work on his own accord and the claims made are not due.

At the close of the hearing both parties filed written submissions.

On the pleadings, the evidence and written submissions the issues which emerge for determination are whether there was unlawful and unfair termination of employment and whether the remedies sought should issue.

The claimant's case is that he was employed as a driver by the respondent in May, 2014 and his employment termination unfairly in July, 2017 and is seeking payment of terminal dues.

The defence is that the claimant was not employed as a driver since he only got his driver's licence on 24th May, 2016 and by which time there was no opening for a driver, he was employed as a casual on and off and based on availability of work and was paid for work done at

end of day and the claims made are without justification.

Section 47(5) of the Employment Act, 2007 places the burden of proving unfair termination of employment on the employee, and the burden of justifying the grounds of termination on the employer.

(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.

In this case the claimant asserts that he was employed as a driver by the respondent on 31st July, 2014. He produced his driving licence issued to him on 24th May, 2016. The evidence that he was licenced to drive since the year 2004 and that the licence got lost and was only re-issued on 24th May, 2016 is without evidence and the document produced to prove he was driver does not reflect *re-issue* but a first issuance.

This then negates the assertion that the claimant was employed as a driver as alleged.

The claimant also admitted that he would be paid different amounts in cash and through mpesa. He attached his phone cash transactions from March to July, 2017. On this record the court can discern the following;

On 7th March, 2017 the respondent paid the claimant ksh.1,500; On 8th March, 2017 the respondent paid the claimant Ksh.827; On 10th March, 2017 the respondent paid the claimant ksh.327; On 11th March, 2017 the respondent paid the claimant ksh.2,000; On 22nd March, 2017 the respondent paid the claimant ksh.1,500; On 30th March, 2017 the respondent paid the claimant ksh.527;

On 6th April, 2017 the respondent paid the claimant ksh.10,100 and Ksh.1,027;

On 12th April, 2017 the respondent paid the claimant ksh.3,550;

On 16th April, 2017 the respondent paid the claimant ksh.1,027;

On 20th April, 2017 the respondent paid the claimant ksh.2,030;

And following in this order, in July, 2017 the claimant was not paid by the respondent; in June, 2017 he was paid on 28th, 27th, 23rd, 21st, 16th, 15th, 10th, and all amounts ranging from Ksh.1,000 to Ksh.1,027 per day.

On these records, it is apparent to the court that the claimant was not at work daily, in a given month he worked and or was paid by the respondent different amounts for work of days not exceeding 10 days each month.

In this regard, the defence that the claimant was employed on and off and on availability of work is given credence. The nature of work the claimant was undertaking for the respondent, a casual employee of the Davis and Shirliff and finding own jobs in the plumbing business then stand true. The respondent sourced work and would source the claimant to undertake the same on and off and on piece rate or casual terms. See **Muthaiga Country Club versus Kudheiba Workers [2017] eKLR**

As set out above, under the provisions of section 47(5) the claimant has not proved he as a driver with the respondent to justify the claim that his employment as such was unfairly terminated. Equally, a casual employee is well defined under section 2 of the Employment Act, 2007 as one who is sourced per day and paid at end of each day when employment as a casual ends.

In the case of **Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR** the Court of Appeal held that;

.....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. The evidence by the respondents that they used to pay daily wages as per the petty cash analysis sheets that were produced in evidence for each of the appellant was also not challenged ...

Casual employment is therefore provided for in law and hence a legitimate mode of employment.

Equally, in the case of **Lucas O Keya versus Timbercraft (E.A.) Cause No.215 of 2015** and in the case of **Garama Karisa Masha versus Krystalline Salt Limited [2016] eKLR** it was held that piece rate employment is permissible in law and such allow an employer to allocate an employee with work as and when there is available work to be done.

Therefore in this case, the claimant being a casual employee was sourced for plumbing jobs and would work in a team with others as a handy man and not as a driver. His wages were paid per day and for the given task. Such work was not continuous and there is no evidence of payment of a wage of ksh.16,000 per month and the records filed by the claimant attest to this fact.

Accordingly, the claim that there was unlawful and unfair termination of employment has no legal foundation.

The remedies sought for underpayment of wages whereas the claimant was paid as a casual and for the work done is without good basis.

Notice pay is equally not due to a casual employee sourced every day as and when work is available.

Off day pay claimed, pay for work on public holidays, annual leave pay and severance/service pay claimed and issuance of a certificate of service are remedies not available to the claimant due to the nature of his casual employment with the respondent.

The claims made against the respondent are without justification and are hereby dismissed. Costs to the respondent.

Dated and delivered electronically this 4th June, 2020 at 0900 hours

M. MBARU

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 the Order herein shall be delivered to the parties via emails. this 4th June, 2020 at 0900 hours

M. MBARU

JUDGE