



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 107 OF 2016

EDSON FREDRICK KATUNDA.....CLAIMANT

VS

DOSHI & COMPANY (HARDWARES) LIMITED.....1ST RESPONDENT

DOSHI ENTERPRISES LIMITED.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim brought by a Memorandum of Claim dated 11th February 2016 and filed in court on 15th February 2016, is for compensation for unlawful termination of employment and payment of terminal dues. The Respondents filed a Response on 14th April 2016.

2. When the matter came up for trial, the Claimant testified on his own behalf and the Respondents called their Human Resource Manager, Masila Ngungu.

The Claimant's Case

3. The Claimant states that he was employed by the 2nd Respondent as a helper from 4th February 2014 until 16th June 2015, when his employment was terminated.

4. The Claimant claims that in the course of his employment, the posters and banners at the factory premises were changed to read the name of the 1st Respondent, which the Claimant describes as a sister company to the 2nd Respondent, under the Doshi Group of Companies.

5. The Claimant avers that his employment was unlawfully terminated on 16th June 2015, by his immediate supervisor, Felix Adede, on account of reduction in business. At the time of termination of employment, the Claimant earned a daily rate of Kshs. 513.

6. The Claimant's case is that there was no valid reason for the termination and he was not given prior opportunity to be heard. He therefore claims compensation for unlawful termination of employment.

7. The Claimant further claims service pay since he was not registered under a Pension Scheme or Provident Fund nor was he a member of the National Social Security Fund (NSSF).

8. The Claimant's cumulative claim is as follows:

- a. One month's salary in notice pay.....Kshs. 13,338.00
- b. Leave pay for 1 year & 2.5 months.....13,013.78
- c. 12 months' salary in compensation.....160,056.00
- d. Service pay @ 15 days' pay per year.....7,695.00

e. Certificate of service

f. Costs plus interest

The Respondent's Case

9. In their Response dated 4th April 2016 and filed in court On 14th April 2016, the Respondents admit that the Claimant worked for them but aver that he was a casual labourer employed on need basis.

10. The Respondents state that the Claimant did not work continuously and uninterruptedly from 4th February 2014 to 16th June 2015.

11. The Respondents further state that the Claimant deserted work on 25th July 2014, after collecting his wages of KShs. 634.85 and did not return to the Respondents' premises.

12. The Respondents therefore deny the Claimant's claim that his employment was unlawfully terminated.

13. The Respondents claim that they reported the Claimant's desertion to the Mombasa County Labour Officer. They add that the Claimant was offered an employment contract on 25th July 2014, which he declined to sign.

14. Regarding the claim for service pay, the Respondents state that the Claimant was registered with NSSF as a casual labourer, where special contributions were remitted on his behalf.

15. The Respondents deny the Claimant's entire claim and aver that the Claimant was paid all his terminal dues.

Findings and Determination

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

- a. The Nature and status of the Claimant's employment with the Respondents;
- b. Whether the Claimant has made out 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

17. The Respondents state that the Claimant was a casual employee employed intermittently and paid a daily wage.

18. 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.”

19. On his part, the Claimant states that he worked continuously and uninterruptedly from 4th February 2014 to 16th June 2015.

20. In his testimony before the Court, the Respondents' Human Resource Manager, Masila Ngungu sought to produce a summary of days the Claimant had worked in the year 2014.

21. Ngungu however did not produce the source document from which he had drawn his summary. This was a crucial piece of evidence, especially in light of his admission that he was not present at the time the Claimant worked for the Respondents.

22. The assertion that the Claimant was a casual employee was not supported by any evidence and is rejected.

Unlawful Termination?

23. In response to the Claimant's claim that his employment was unlawfully terminated, the Respondents state that on 25th July 2014, the Claimant was offered a fixed term contract running from 1st August 2014 to 31st December 2014, which he declined.

24. There was no evidence that the said contract was issued to the Claimant who himself denied having received any contract from the Respondents.

25. The Respondents failed to produce any employment records, either in the form of attendance register or payment vouchers, to show the period and status of the Claimant's employment.

26. Under Sections 10 and 74 of the Employment Act, the employer is obligated to maintain employment records. It was therefore incumbent upon the Respondents to avail the Claimant's employment records. Having failed to do so, I invoke Section 10(7) of the Employment Act, thus shifting the burden of proof with regard to the terms of the Claimant's employment, to the Respondents.

27. In the absence of any evidence to the contrary, I adopt the Claimant's account as to the terms of his employment with the Respondents and termination thereof.

28. In the result, I find and hold that the Respondents terminated the Claimant's employment without valid reason as required by Section 43 of the Employment Act and in violation of the procedural fairness requirements of Section 41 of the Act.

Remedies

29. I therefore award the Claimant four (4) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service plus the Respondents' failure to follow the law in terminating the Claimant's employment.

30. I further award the Claimant one (1) month's salary in lieu of notice.

31. The Respondents did not adduce any evidence to prove remittance of the Claimant's NSSF dues. I therefore allow the claim for service pay.

32. The Claimant told the Court that for the entire period of his employment with the Respondents, he was not allowed to take annual leave. In the absence of leave records to debunk the Claimant's assertion, the claim for leave pay succeeds and is allowed.

33. Finally, I enter judgment in favour of the Claimant as follows;

a. 4 months' salary in compensation.....	Kshs. 61,560
b. 1 month's salary in lieu of notice.....	15,390
c. Service pay for 1 year (15,390/30*15).....	7,695
d. Leave pay for 1 year (15,390/30*21).....	10,773
e. Prorata leave for 4 months (15,390/30*1.75*4).....	<u>3,591</u>
Total.....	99,009

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

35. The Claimant is also entitled to a certificate of service plus costs of the case

36. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY JULY 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Mboku h/b Mr. Mbuya for the Claimant

Mr. Adede h/b Mr. C.B Gor for the Respondent