



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 388 OF 2017

(Before Hon. Justice Mathews N. Nduma)

EBRAHIM OCHIENG OTHUONCLAIMANT

VERSUS

SUKARI INDUSTRIES CO. LTDRESPONDENT

JUDGMENT

1. The suit was filed by the claimant on 13th September 2017, in which the claimant prays for the following reliefs:-
 - a. Payment of terminal dues.
 - b. Costs of the suit.
2. The nub of the case is that the claimant worked for the respondent as a general worker on fixed term contract starting from 4th October 2011 until 31st May 2017, when the last one-year contract expired and was not renewed. At the time the claimant earned Kshs. 21,811 per month and a house allowance at 20% of the basic salary.
3. Upon expiry of the last contract, the claimant was paid for 7 days worked up to 19th May 2017 and for 25 days untaken leave in the sum of Kshs. 10,000.
4. The claimant prays for payment of terminal benefits in the sum of Kshs. 532,434.10 tabulated as follows:-
 - a. Payment in lieu of two months' notice Kshs. 4,622
 - b. Severance pay Kshs. 53,992.50
 - c. Payment in lieu of leave days not taken Kshs. 75,581.50.
 - d. Off duty per year Kshs. 190,773.50
 - e. House allowance at 15% Kshs. 168,456.
5. CW1 testified under oath and adopted a written statement dated 28/8/2017 as his evidence in chief. He produced exhibits '1' to '15' in support of his case.
6. CW1 stated that he was senior mechanical supervisor at the time he left employment having been promoted in the year 2013. CW1 testified that he initially worked on 3 months contract. Then worked for a while without a written contract. The second contract was from February to April 2012, the 3rd contract between May to July 2012 and he last contract was from 1st June 2016 to 31st May 2017.
7. That he worked up to 31st May 2017 and the contract was not renewed. CW1 stated that he had no claim in respect of the last contract. CW1 stated that NSSF was paid for him by the respondent. Ms. Odek for the respondent subjected the claimant to close cross examination and called RW1 David Okoth who testified in support of the defence case. RW1 relied on a written statement dated 7/2/2019 as his evidence in chief. RW1 produced exhibits'1' to '13'.

8. RW1 testified that the claimant worked for the respondent on fixed term contracts which were renewed upon expiry. That the claimant was paid all dues with regard to the served contracts and was not entitled to any further payments from the respondent.

9. RW1 testified that CW1 was not eligible to leave days until he signed a one year contract in May 2016. That the claimant got an off day weekly. That he was paid house allowance at 15% his daily salary in terms of the general wage order. That the claimant was paid for NSSF and is not entitled to severance pay because he was not retrenched.

Determination

10. The issue for determination is whether the claimant has proved on a balance of probabilities that he is entitled to payment of further terminal benefits claimed or at all.

11. The court has considered the evidence adduced by the claimant vis a vis that adduced by RW1 and has come to the following conclusion of fact and law: -

i. The respondent has admitted that it did not give the claimant annual leave for the period 4th October 2011 up to 31st May 2016 because he was on short term, three month contracts and was considered a daily paid casual. This was a misconception on the part of the respondent and in violation of section 28 (1) of the Employment Act, 2007 which provides “ *An employee shall be entitled as after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay.*”

12. The claimant has demonstrated that he worked for the respondent continuously from 4th October 2011 up to 31st May 2016 without being granted annual leave days or being paid in lieu thereof.

13. Accordingly, the court awards the claimant the equivalent of three months’ salary in lieu of three years annual leave not taken in the sum of Kshs (21,811 X 3) Kshs. 65,433. The rest of the claim for leave days is time barred by dint of section 90 of the Employment Act 2007.

14. The Claims for payment in lieu of notice, severance pay and in lieu of house allowance have not been proved by the claimant on a balance of probabilities and are dismissed. Severance pay because the claimant was not declared redundant, house allowance because the wage paid to the claimant included 15% house allowance and notice pay because the contract of service of the claimant simply expired and was not renewed.

15. In the final analysis, Judgment is entered in favor of the claimant against the respondent in the sum of Kshs. 65,433 with interest at court rates from date of filing suit till payment in full. Costs of the suit.

Ruling Dated, Signed and Delivered at Nairobi this 16th day of July 2020.

Mathew N. Nduma

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 ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearance

Mr. Achure for claimant

M/s. Odek for Respondent

Chrispo: Court Clerk