



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 132 OF 2013

ISSACK MOHAMED HASSAN.....CLAIMANT

VERSUS

BGP KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for unfair termination of the claimant's employment by the respondent after being involved in a road traffic accident while in the course of his employment, and which accident left him with severe bodily harm. The respondent has denied the alleged unfair termination and averred that the claimant was employed under a fixed term contract of 3 months, which lapsed automatically while the claimant was undergoing treatment of the injuries suffered from the said accident. She therefore prayed for the suit to be dismissed with costs and the claimant directed to file accident claim against the owners of the vehicles, which caused the injuries to him.

2. The suit was heard on 24.10.2018, 25.10.2018 and 28.11.2018 when the claimant testified as Cw1 and the respondent's HR Manager Mr. William Oliech testified as Rw1. Thereafter both parties filed written submissions, which I have carefully considered herein alongside the evidence tendered.

Claimant's Case

3. Cw1 testified that he was employed by the respondent as a puncture man on 10.3.2012 earning Kshs.18,000, House Allowance of Kshs.6,000 and overtime of Kshs.4000 totaling to Kshs.28,000 per month. He was however not given any written contract.

4. He further testified that while on duty on 19.3.2012, he was involved in a road traffic accident, which involved a vehicle hired by the respondent for her employees. The accident was not serious and as such, he resumed work after one day and continued until 23.7.2012 when he was involved in yet another accident while on duty. That the vehicle he was travelling, also hired by the respondent, collided with another vehicle as result of which, he suffered serious fractures of the right hip and he was admitted in Wargadud Hospital and later transferred to Wajir Hospital.

5. Cw1 further testified that the Wajir Hospital referred him to Kenyatta National Hospital but the respondent returned him to her camp, took away his employment card and send him away to his home. That his brother took him to KNH but he could not afford the medical charges demanded being Kshs.500,000 and as such stayed like that since then he has since not found any other job. He therefore prayed for the reliefs set out in his claim.

6. On cross examination, Cw1 stated that he started working for the respondent on 10.3.2012 at Kharof Harar Camp for construction of a Road and denied knowledge that the respondent was searching for oil there. Cw1 further stated that after some time he moved with the employer to Baambo Camp. He further stated that the respondent's camps were temporary, the main ones lasted for 5 or so months, while other were for shorter periods.

7. Cw1 further testified that the employees were transferable within certain local limits but some who were skilled like himself were transferable everywhere. He contended that some camps were closed but others were relocated to Baringo.

8. He admitted that the vehicles involved in the said accident were not owned by the respondent and the accident never occurred within her camp but far away. He contended that he was picked from Wajir Hospital by the respondents Mobile Ambulance and taken to the camp where his Chinese boss took away his employment Card and send him away. He maintained that he worked for 4 months and his monthly salary was Kshs.18,000 exclusive of overtime pay.

Defence case

9. Rw1 testified that the claimant was employed by the respondent as a Puncture Man on casual basis from 27.3.2012 at Khorof Harar, earning Kshs.485 per day payable monthly in arrears as Kshs.18,770. Rw1 further stated that the project was for oil exploration for a short period as a subcontractor for AFREN and as such, the claimant was engaged under a 3 months contract from 27.3.2012 to 2012. He further stated that due to logistical issues, the claimant was housed at the respondent's camp and provided with food.

10. Rw1 further testified that in April 2012, the claimant was involved in an accident and stayed away from work until June 2012 when he resumed work and he was paid the full salary inclusive of the days he was absent. Rw1 further stated that on 23.7.2012, the claimant was involved in yet another road accident and he was treated at the Wajir Hospital and all his medical expenses paid by the respondent, but the claimant left the hospital without notice to the respondent and disappeared until December 2012 when he resurfaced with threat to take legal action against the respondent.

11. Rw1 denied that the services of the claimant was unfairly terminated and contended that after the accident the claimant never reported back until the contract lapsed automatically after effluxion of time and the handing over of the camp to the community around 26.7.2012 while the claimant was still away. He admitted that the claimant had an employment number and a tag but contended that it was for purposes of identification and security of all the employees living in the camp. He denied the reliefs sought by the claimant and prayed for the suit to be dismissed.

12. On cross-examination, Rw1 stated that he joined the respondent in 2008 but admitted that he was not present when the claimant was injured and clarified that his evidence is based on documents presented to him from the camp. He admitted the respondent had kept the claimant's employment records but the same were not produced as exhibits herein.

13. Rw1 further admitted that although the claimant's contract was to end on 27.6.2012, he continued working upto 23.7.2012 when he was involved in another accident. He further admitted that the claimant was discharged from the hospital after the respondent paid the medical bill. He contended that the project was closed in August 2012 but admitted that he had no evidence on the said closure.

14. Rw1 admitted that the claimant was working from 6 a.m. to 6 p.m. He further contended that the claimant was paid for the leave earned but produced no proof on such payment. He further admitted that the claimant was injured while on duty for respondent and that is why his medical expense were paid by the company.

Analysis and Determination

15. There is no dispute that the claimant was employed by the respondent from March to July 2012. The issues for determination are:

- (a) Whether the claimant's contract was unfairly terminated by the respondent or it lapsed automatically by effluxion of time.
- (b) Whether the reliefs sought to be granted.

Unfair termination of automatic lapse

16. Rw1 alleged that the respondent had a short term subcontract from AFREN to do oil exploration in Wajir County and therefore hired seasonal labour for their contract period between June and July 2012 before handing over the camp to the Community. That she employed the claimant as a Puncture Man to work for 3 months starting 27.3.2012. That she was paying him Kshs.485 per day but monthly in arrears. That on 23.7.2012 the claimant was injured in a road accident while on duty and he was hospitalized. That before he returned to work the contract lapsed. It is the defence case that, the claimant was not dismissed but it was the contract, which expired, and later the camp handed over to the Community.

17. The claimant has however contended that he started working for respondent on 10.3.2012 earning a monthly salary and continued till 23.7.2012. That he was not given a written contract but an employment number and card. He therefore denied that he was employed under a fixed term contract of 3 months and contended that as at the time of his last accident on 23.7.2012, he had worked for 4 months continuously except for one day when he was involved in an accident on 19.3.2012.

18. I have carefully considered all the material presented to the court. It is common knowledge that Rw1 did not produce the employment contract for the claimant or any other employment records for him to prove that he claimant was employed under a fixed terms contract of service from 27.3.2012 to 27.6.2012 as alleged. In fact, he admitted that one month after alleged expiring date, the claimant was still working and that is why he was involved in an accident while on duty.

19. Rw1 has also not disproved by records the allegation that the claimant started working for the respondent at Khorof Harar Camp on 10.3.2012. I therefore find that the claimant has proved on a balance of probability that he was employed by the respondent for a monthly salary from 10.3.2012 and worked continuously until 23.7.2012 when he was involved in serious road accident while in the course of his employment by the respondent, and suffered severe bodily injuries his he have to date kept him away from employment.

20. I further find that, the allegation that the respondent's project in Wajir was for a short time, that did not necessary mean that the claimant's contract of service was for a fixed term equal or less than the project term in Wajir. From the evidence by Rw1, the respondent had an office elsewhere a fact supported by the claimant when he stated that after closing the project in Wajir, the respondent went to do the same work in Baringo.

21. The claimant contended that as a skilled employee he was allowed to move with the respondent from one camp to another and contended

that his contract of service was not seasonal. That unlike other unskilled employees, the claimant moved from one camp site to another after they were closed. I therefore find the claimant's contract did not lapse automatically by effluxions of time because there is no evidence adduced to prove that it was fixed term contract.

22. There is evidence to support the view that the contract was terminated by the respondent when the Chinese Manager took away the claimants employment card and send away due to the road accident suffered while on duty. The court appreciates that physical incapacity is a fair reason for terminating the services of an employee. However, the termination should be done in accordance with justice and equity. Under section 45(2) of the Employment Act, termination is unfair if the employer fails to prove that it was done for a valid and fair reason and that a fair procedure was followed.

23. Valid and fair reason relates to the employees conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure on the other hand refers to the aspect of according the employee a hearing on the reason cited for the termination. In this case, the respondent did not give any evidence to discharge the burden of proving substantive and procedural fairness. I therefore return that the claimant was unfairly terminated by the respondent within the meaning of section 45 of the Employment Act.

Reliefs

24. In view of the foregoing finding, I make declaration that the dismissal of the claimant was unlawful and unfair and he is entitled to compensatory damages. Under section 49 of the Employment Act, I award him Kshs.18,770 being one month salary in lieu of notice plus Kshs.37,540, being 2 months' salary compensation for the unfair termination. In awarding the foregoing compensation, I have considered the short period of service, the reasonable expectation of continued service and the fact that he did not contribute to the termination through misconduct.

25. The claim for House Allowance is dismissed because the claimant was provided with housing at the respondent's camp.

26. The claim for medical expenses lacks particulars and was not proved in evidence and as such, it is dismissed.

27. The claim for General damages is dismissed for lack of merits and legal basis.

Conclusion and Disposition

28. I have found that the claimant's contract of service was not for a fixed term and it was unfairly terminated by the respondent after he suffered severe bodily injuries in a road accident. I therefore enter judgment for him in the sum of Kshs.56,310 plus costs and interest from the date hereof. The decreed sum shall be paid less statutory deductions.

(a) Notice18,770

(b) Compensation.....37,540

56,310

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The said sum will be paid less statutory deductions. I also award the claimant costs and interest at court rates from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019

ONESMUS N. MAKAU

JUDGE