



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 252 OF 2017

FRANCIS NDIRANGU WACHIRA.....CLAIMANT

VERSUS

BETTY WAIRIMU MAINA.....RESPONDENT

JUDGMENT

1. The Claimant was a casual employee of the Respondent and he has sued her for the alleged unlawful termination of employment and seeks to recover wages arrears, salary in lieu of notice and general damages for distress which he asserts was emotional pain, mental agony and anguish. The Claimant asserts that he was employed as a casual laborer at the Respondent's building site through a contract of employment entered on 15th July 2014 and that he worked until 23rd December 2014 when the construction works stopped. As a casual laborer he was being paid Kshs. 450/- per day alongside other casual laborers and masons. Following the stoppage of the construction, the Claimant avers that the Respondent instructed him to remain at the site as a caretaker. He agreed to do so and continued to watch over the property at the wage of Kshs. 450/- till the 23rd June 2017 when he was unexpectedly terminated. The Claimant asserts that, the termination emanated from a demand letter that he sent to the Respondent a week prior demanding for an outstanding balance of Kshs. 295,000/-. The Claimant avers that the Respondent's failure to clear the arrears and instead terminating his services is a clear violation of Article 41 of the Constitution, the Employment Act that it was proof the Respondent engaged in labour malpractices and subjected him to unfair labour practice. He sought a declaration that his dismissal was unlawful and thus he was entitled to the Kshs. 295,000/- he had claimed as arrears of his wages, half a year gross salary of Kshs. 81,000/-, 3 month's salary in lieu of notice of termination of Kshs 40,500/-, service for the years served – Kshs. 443,500/- and general damages for distress.

2. The Respondent did not file her response to the memorandum of claim nor did she participate in the proceedings despite being served with a hearing notice on several occasions. The matter proceeded *ex parte* on 7th March 2019 and the Claimant testified that that he was employed by the Respondent as a casual laborer earning Kshs. 450/- per day and that his dues were not fully paid. In support of his evidence he produced a bundle of documents to buttress his claim and prayed that the court grants the prayers sought. The Claimant chose not to file submissions.

3. From the pleadings and testimony adduced, the following issues fall for determination;

- a. Whether the claimant was a casual employee of the respondent
- b. Whether the claimant's termination was unlawful/unfair.
- c. Whether the claimant is entitled to the remedies as prayed for in the memorandum of claim.

4. As to whether the Claimant was a casual employee of the Respondent, in order to ascertain if there was unlawful termination as alleged by the Claimant we need to interrogate the relationship and confirm if indeed he was a casual labourer or his term of employment had already converted in terms of the Employment Act. Section 2 of the Employment Act defines a casual employee to mean 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. The Claimant herein states that he has been working for the Respondent since 23rd December 2014 when the construction work stopped until 23rd June 2017 when his services were unexpectedly and unlawfully terminated. By simple arithmetic, there is evidence that the Claimant had worked for the Respondent continuously for slightly over two years thereby bringing him within the ambit of Section 37 of the Employment Act. Section 37 of the Act provides as follows in *parre materia*:-

37. Conversion of casual employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act. (underline mine)

5. Having worked continuously for longer than one month, the Claimant's terms of employment converted by operation of the law to regular employment as provided in section 37. He was thus not a casual employee as he was initially. I place reliance on the case of **Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited [2013] eKLR** where Mbaru J. stated that "this kind of the employment where the casual employee is not terminated at the end of the day and continues to work continuously for over a month up to and until over three months, then the law converts the same into a contract term employment". Similarly, in the case of **Kesi Mohamed Salim v Kwale International Sugar Co. Ltd [2017] eKLR** Makau J. stated "The respondent has admitted that the claimant worked continuously for about 8 years on casual basis. She produced as exhibit schedule of the days worked by the claimant in 2015 which show that he worked over 36 weeks continuously which is way more than the minimum days required for casual employee to convert to regular term contract under Section 37(1) and (3) of the Act. Consequently it is my finding of fact and indeed my declaration that the claimant's casual employment had converted from casual to term contract under Section 37(1) and (3) of the Act and he was therefore subject to the provision of Section 35(1) (c) and 45 of the Act".

6. As to whether the Claimant's termination was unlawful or unfair, The Claimant told the court that he was unexpectedly and unlawfully terminated without notice as a result of the demand letter that he had earlier issued to the Respondent. The Claimant's evidence is uncontroverted. Section 45 of the Act makes provision that no employer shall terminate the employment of an employee unfairly. A termination of employment is unfair if the employer fails to prove that the reason for the termination is valid; that the reason for the termination is a fair reason and that the employment was terminated in accordance with fair procedure. According to his testimony, his services were unexpectedly terminated without him being issued with a notice. He also was not heard as envisaged by Sections 35 and 45 of the Act. The termination of the Claimant's employment was thus unfair and unlawful. The contract of service having converted to a term contract under Section 37 of the Act, the Respondent was barred by Sections 35 and 45 of the Act from terminating it without prior notice of at least 28 days in writing and or by giving a valid and fair reason for the termination. The Claimant did not prove how he was entitled to the salary arrears of Kshs. 295,000/-. The Mpesa statement produced showed he was paid various sums, at times quite substantial amounts. He did not however, establish precisely how much the Respondent actually owed him. In his demand letter he sought Kshs. 281,500/- whereas in court he sought Kshs. 295,000/-. Neither of these sums were proved. He was not entitled to notice beyond the 30 days and therefore the claim for notice of more than one month is not permissible. In the final analysis, having found his dismissal was not in keeping with the dictates of the law, he is entitled to:-

- a. One month's salary in lieu of notice – Kshs. 13,500/-
- b. 2 months gross salary as compensation – Kshs. 27,000/-
- c. Costs of the suit
- d. Interest on (a) and (b) above at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 21st day of March 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar