



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 246 OF 2017

HARRISON OMUSASHI SICHENYI.....CLAIMANT

VERSUS

CHINA NATIONAL AERO-TECHNOLOGY

INTERNATIONAL ENGINEERING CORPORATION....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 9.2.2017 alleging that his employment was unfairly terminated by the respondent in April 2014 and prayed for the following reliefs:

(a) A declaration that the respondent’s dismissal of the claimant from his employment was unlawful, unfair and hence null and avoid.

(b) The respondent be ordered to pay the claimant the following:-

(i) Payment in lieu of notice..... Kshs.15,810/=

(ii) Severance pay..... Kshs.15,810/=

(iii) Payment in lieu of leave days not taken..... Kshs.31,620/=

(iv) Damages for unfair dismissal, equivalent of twelve

(12) months’ gross salary.....Kshs.189,720/=

Total Kshs.252,960/=

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(c) An order that the Respondent issues the claimant with a certificate of service

(d) Interest at court rates on (b) above from the date of filing the claim

(e) Costs of this suit.

(f) Such other or further relief as this Honourable Court may deem just to grant

2. The respondent never entered appearance despite being served with summons and statement of claim by the claimant consequently the suit proceeded by formal proof on 4.10.2018, when the claimant testified as Cw1 and thereafter filed written submission.

Summary of Evidence

3. Cw1 testified that he was employed by the respondent in March 2014 as a casual labourer earning Kshs.527 per day which was paid through his bank account. That he worked continuously as such for a period of 2 years and one month as a result of which his casual employment converted to permanent employment under section 37(1) of the Employment Act. That despite the said conversion he was never given any written contract by the respondent. He however produced bank account statements for 22.3.2014 to 16.4.2016 to prove the employment relationship.

4. He further testified that in April 2006 he was dismissed from work without any prior notice or any reason at all. He therefore contended that the termination was unfair and unlawful for violating section 36, 40, 41, 44, 45 and 46 of the Employment Act. He further contended that after the termination he was never issued with a certificate of service.

5. In addition to the violation alluded to above, the claimant testified that he never went for any annual leave during his employment period or paid cash in lieu. He therefore prayed for the reliefs set out in his statement of claim.

Analysis and determination

6. After careful consideration of the pleadings, evidence and submissions, there is no dispute that the claimant was employed by the respondent as pleaded. Although there is no written contract produced as exhibit, I am persuaded by the Bank Account Statement produced by the claimant as exhibit, that the claimant was indeed employed by the respondent for a monthly salary. Even if the relationship started as a casual employment, the continued of service made it convert to a term contract, terminable only by notice or for cause by dint of section 37(1) of the Act.

7. The issues for determination are therefore:-

- (a) Whether the claimant's employment contract was unfairly terminated by the respondent.
- (b) Whether the reliefs sought should issue.

Unfair termination

8. The claimant's pleadings on evidence have not been contested or rebutted by the respondent. I therefore find that the claimant has proved on a balance of probability that he was terminated by the respondent as alleged. Under section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed.

9. In this case I do not hesitate to find that the said burden of prove on the part of employer herein has not been discharged because the respondent neither filed defence nor tendered any evidence. Consequently, I return that the claimant has further proved on a balance of probability that his services were unfairly terminated by the respondent as alleged.

Reliefs

10. In view of the foregoing finding, I make a declaration that the dismissal of the claimant from employment by the respondent was unlawful and unfair. Flowing from the said declaration I award the claimant one month salary in lieu of notice plus 2 months salary compensation for the unfair termination.

11. In addition I award the claimant service pay for 2 years served at the rate of 15 days pay per year of service. I further grant him cash for the leave earned but not taken for 2 years being 42 days.

Disposition

12. I enter judgment for the claimant against the respondent in the following terms:-

- (a) Notice Kshs.15,810.00
- (b) Compensation..... Kshs.31,620.00
- (c) Service pay..... Kshs.15,810.00
- (d) Leave pay..... Kshs.25,539.25

Total **Kshs.88,770.25**

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He will also have costs and interest at court rates from the date hereof.

The award of damages is subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 15th day of March, 2019.

ONESMUS MAKAU

JUDGE