



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 171 OF 2013

WILLIAM BASIL.....CLAIMANT

ARASA MAKORI.....CLAIMANT

BEDAN MUNYOKI.....CLAIMANT

GEOFFREY ATWORI.....CLAIMANT

VERSUS

COLOUR PRINT LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants' claim is contained in the Amended Memorandum of Claim filed on 11th July 2013 in which they alleged that the Respondent terminated their contract of service on account of redundancy in August 2012. They averred that the termination was wrongful and unfair because it was not done in accordance with section 40 of the Employment Act because the Respondent never served prior notice on them and the labour officer. They therefore prayed the following reliefs:

a) THAT the Claimants be reinstated to their previous employment.

b) In the alternative, they be paid damages as tabulated below:

William Basil

One months pay in lieu of notice –Kshs.430x 30days Kshs. 12,900.00

Severance pay @ 15 days x 8 years x 430 Kshs. 51,600.00

Unattended leave 42 days x 430 Kshs. 18,060.00

Unpaid House Allowance for (1,935x86months) Kshs. 166,410.00

Full compensation for loss of employment Kshs. 178,020.00

Certificate of Service

Grand Total

Kshs. 426,990.00

Arasa Makori

One months pay in lieu of notice-Kshs. 430x 30 days.Kshs. 12,900.00

Severance pay@ 15 days x 4 years x430 Kshs. 25,800.00

Unattended leave of 42 days x 430 Kshs. 18,060.00

Unpaid house allowance (15%x12,900x48months) Kshs. 92,880.00

Full compensation for loss of employment (14,835x12) Kshs. 178,020.00

Certificate of service

Grand Total:

Kshs. 324,660

Bernard Munyoki

One months pay in lieu of notice Kshs. 430 x 30 days Kshs. 12,900.00

Severance pay @ 15 days x 7 yearsx 430 Kshs. 45,150.00

Unattended leave of 42 days x 430 day Kshs. 18,090.00

Unpaid house allowance (15%x 12,900 x 81 months) Kshs. 156,735.00

Full compensation for loss of employment (14,835x12) Kshs. 178,020

Certificate of Service

Grand Total:

Kshs. 410,855

Geoffrey Atwori

One months pay in lieu of notice Kshs. 430 x 30 days Kshs. 12,900.00

Severance pay @ 15 days x 4 years x 430 Kshs. 32,250.00

Unattended leave of 42 days x 430 day Kshs. 18,090.00

Unpaid house allowance (15%x 12,900 x 86 months) Kshs. 166,410.00

Full compensation for loss of employment (14,835x12) Kshs. 178,020.00

Certificate of Service

Grand Total: Kshs.

407,640

2. The Respondent filed her Response to the initial Memorandum of Claim on 23rd March 2013 and a Supplementary Response in which it averred that the Claimants were casual employees and as such, they were not capable of being terminated through redundancy or being entitled to the reliefs sought in the amended claim. It therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 19.10.2018, 1.11.2018 and 14.11.2018 when the 3rd Claimant and the 2nd Claimant testified on behalf of the Claimants as Cw1 and Cw2 respectively, while the Respondent called Mr. Samuel Munyasya Maluki and Obadiah Munge who testified as Rw1 and Rw2 respectively. Thereafter, both parties filed written submissions.

Claimant's Case

4. Cw1, Bedan Munyoki Kiteme adopted his witness statement filed on 23rd February 2018 and those by the 1st and 2nd Claimants. He testified that he worked for the Respondent as a machine operator, lamination operator, packer and dispatch from May 2005, earning a salary of Kshs. 489 that was payable weekly every Saturday. He further testified that he worked for 7 years until August 2012 when the Respondent's supervisor told him not report to work again until further notice due to low activity at Respondent.

5. He stated that they sought assistance from the Kenya Union of Printing, Publishing, Paper Manufacturing and Allied Workers, but in vain. They then sought help from Kenya Shoe and Leather Workers Union to bring this suit. He contended that they were unfairly and wrongfully terminated through redundancy without complying with the provisions of section 40 of the Employment Act and they were therefore entitled to the benefits provided under the said section.

6. In cross-examination the Claimant testified that he joined the Respondent on 5th November 2005 earning a salary of Kshs. 430 per day which was payable weekly. He testified that he worked continuously from 5th November 2015 to August 2012 when he was terminated without any prior notice. He contended that their Shop steward colluded with the management after being threatened to abandon them which forced them to seek help from another union which guided them on how to proceed to Court. He further contended that they were no longer members of trade union after their rightful union abandoned them.

7. He maintained that they were dismissed on grounds that there was low activity in the Company. He testified that his colleagues were his evidence that he worked for the Respondent. He further testified that Appendix 1(a) of the Respondent's documents indicated that he worked for the Respondent and was paid. He admitted that he was not included in Appendix 1 (b) on 2nd December 2010 but the other Claimants were in the list. He however contended that the said list (Appendix 1b) was not complete because the employees of the Respondent were more than the number indicated for that day. He further admitted that on 7th June 2012 he was in as indicated in Appendix 1 (e) which shows that he was paid and signed.

8. He contended that he was no longer a casual employee but a regular employee working daily and paid weekly. He further contended that he signed all the attendance registers daily and stated that he was not the maker of the Payrolls produced by the respondent. He however admitted that he calculated his claims using the daily rate. He stated that he never went for annual leave for the 7 years but he never worked on Sundays and public holidays. That they were working for 8 hours per day but they were never paid house allowance.

9. Arasa Makori, Cw2 testified that he joined the Respondent in August 2008 at the Lamination Machine earning Kshs. 430 per day which was paid to him weekly. He further testified that in August 2012 their Supervisor Mr. Maluki told them that work had reduced and they were to be terminated. That thereafter they went to seek help from the Kenya Printing Union where they were members for 3 months but the Shop Steward, Mr Munge, shouted at them that the union was going to cause his dismissal by the Respondent.

10. Cw2 testified that they worked continuously for 4 years and they were never given any redundancy letters. He further stated that despite reporting to the labour officer the employer was never summoned to the labour office and as such they were not helped. He echoed Cw1's statement by stating that the company never housed them and no house allowance was paid. He however admitted that Appendix 1(Payroll) of the Defence showed that he worked for only 4 days but contended that it was not true and that he was not the maker of the roll.

11. In cross-examination Cw2 testified that prayer 11 of his witness statement had a typographical error by stating that he worked for 7 years but instead 4 years. He testified that he was earning a daily wage but was paid weekly in arrears through Co-op Bank. He admitted that he was not in the roll for permanent employees and that he was never given a letter of appointment. He further admitted that he neither remembered the date he joined the Respondent nor the date he was terminated.

12. He testified that they joined the union secretly but he did not have a copy of the membership receipts. He maintained that he never went on leave and prayed 42 leave days.

Respondent's case

13. Samuel Munyasya Maluki, Rw1 testified that he was a supervisor at the Respondent and his work included picking employees on casual basis, train them on the work and thereafter pay them at the end of day for the work done. He further testified that he was employed as a permanent employee and there were other 129 permanent employees. He stated that the casual employees were referred by their clients and that they were picked depending in the amount of work.

14. Rw1 further testified that the Claimants were not working daily and they were paid at the end of each day they worked. That whenever the job was done he used to tell the casual employees to try another day. He supported the foregoing contention by payrolls annexed to the defence. He stated that the 4 claimants were included in the casual Sheet 1 (a) for November 2012; that in Sheet 1 (b) for 2nd December 2010 only Basil, Atwori and Makori were included while in sheet 1 (c) for 21st October 2012 included Munywoki, Basil and Makori.

15. In cross-examination he testified that the Claimants were not paid through the bank and contended that the Respondent's Accountant paid the casuals daily. He denied that the Claimants had not worked continuously for many years as alleged but admitted that he did not produce the entire master Roll for casual employees for the years the Claimants worked. He however contended that he only produced the sheets where the Claimants appeared. He concluded by admitting that he told the Claimants that there was less work and they should go home.

16. Obadiah Munge, Rw2 testified that he is a Plate Maker at the Respondent having been employed on 16th October 1980. He testified that he worked up to June 2017 when he retired. He testified that he was a shop steward for the Union (Kenya Printing) which had a CBA covering only the permanent employees. He testified that the Claimants are not known to him and that they were not members of the Union by virtue of them being casual employees.

17. In cross-examination Rw2 testified that he was in employment when the case was filed. He further contended that the CBA prohibited casual employee from union membership.

Claimants' submissions

18. The Claimants submitted that the action of the Respondent in terminating the services of the Claimants for non-availability of materials amounted to redundancy pursuant to the provisions of Section 40 of the Employment Act. That the Respondent did not comply with the provisions of section 40 of the Employment Act as it failed to notify the Claimants and the area labour officer of the intended redundancy in writing as required by the law. They relied on **Margaret Mumbi Mwago v Intrahealth International and Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 Others [2014] eKLR** to fortify the foregoing submission.

19. They further submitted that, the termination was in breach of section 45 of the Employment Act and was therefore unlawful and unconstitutional for being unfair labour practice. They relied on **Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others** to support the foregoing submission.

20. They further submitted that they worked continuously for the Respondent for the periods ranging from 4 years to 8 years and that this evidence was not controverted. That due to the said length of service to the Respondent they converted permanent employees by dint of section 37 of the Employment Act and had expected to work until retirement. They therefore urged for the reliefs sought to be granted under section 31, 35, 49 and 51 of the Employment Act.

Respondent's submissions

21. The Respondent submitted that the Claimants evidence was contradictory in both the Claimant's written Statements and oral testimonies tendered in court. That William Basil in his Statement at paragraphs 2 and 3 stated that he worked for the Respondent for 4 years while at paragraph 11 he stated that he worked for 7 years. That the 1st Claimant stated in his written statement that he was earning the daily rate of KShs. 430 but paid weekly in arrears however he admitted that on 2/12/2010, 21/4/2012 and 31/1/2011 he was paid daily and signed to acknowledge receipt of his daily wages. That, he also claimed to have worked for 8 years but only tabulated his claim for house allowance for 7 years.

22. The Respondent submitted that the Claimant alleged having been declared redundant after working for the Respondent for 7 years but the only indication that he ever worked for the Respondent is a casual employee. The Respondent submitted that it is of interest that the Claimants alleged to have reported his dispute of unlawful redundancy to the wrong union of Shoe and Leather instead of KUPRIPURA which had Recognition Agreement and Collect Bargaining Agreement with the Respondent.

23. The Respondent submitted that the Claimants worked for the her as casual employees and urged for the suit to be dismissed. She further submitted that there was no proof of regular employment of Claimants and relied on **Samuel Ndungu Mukunya v Nation Media Group Ltd and another [2015] eKLR**, and **Rashid Mazuri Ramdhan & 10 Others v Doshi Co. (Hardwares) Ltd & another [2018] eKLR**.

Analysis and determination

24. There is no dispute that the Claimants were employed by the Respondent as casual employees between 2005 and August 2012 when they were terminated due to the Respondent's reduced operations. The issues for determination herein are:

- a) Whether the Claimants' casual employment converted to term contract of service under the Employment Act.
- b) If the answer to (a) above is in the affirmative, whether their contract of service was unfairly and wrongfully terminated on account of redundancy.
- c) Whether the Claimants are entitled to the reliefs sought.

Conversion from casual employment to term contract of service.

25. The Claimants contended that they continuously worked for the Respondent for diverse periods between 2005 and August 2012 when they terminated on ground of low activity at the company. They therefore contended that due to their continuous employment at the Respondent they converted to permanent employees. Section 37(1) of the Employment Act provides for conversion of casual employment in the following terms:

"37(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."

26. The Respondent has however produced Daily Casuals Registers for the period between 2010 and 2012 which proved that the Claimants worked for the Respondent as casuals, that they never worked continuously for at least one month, and that they were paid daily. The burden of proving continuous service lies with the employee who alleges that he so served. In this case however that burden was not discharged by the inconsistent evidence tendered by the witnesses. Consequently, I return that the claimant's casual employment never converted to term contract as alleged but it remained casual employment due to their intermittent service.

Unfair and wrongful termination on account of redundancy.

27. Under section 2 of the Employment Act a casual employee is defined as follows:

"... 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."

28. In view of the said definition it is obvious that a casual employee like the Claimants herein, is not protected from abrupt termination by the strict redundancy procedure provided by section 40 of the Employment Act. The foregoing view is fortified by section 35 (1) of the Act which provides that:

“35(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—

(a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;”

29. In *Nelson Onyango Othoo -v- Wilham Kenya Limited [2012] eKLR* the Court held that:

“In the said case, the Court found that because a casual employee is engaged for not more than twenty four hours at a time, such an employee is only entitled to a termination notice of one-day under Section 35(1) of the Employment Act. This means that in case of termination without notice, the employee is only entitled to one day’s pay and not the bigger amount contemplated for redundancy under Section 40(1) (f). I am, therefore, persuaded to agree with the respondent’s case that the claimant could not have been declared redundant as claimed. Indeed, the parliament could not have intended that a casual employee and permanent employees be dealt with similarly during termination of employment. If that was the intention, the legislators would not have taken the trouble of classifying the employees and defining them separately in the Act.”

30. Having found that the Claimants were casual employees who were terminable by a notice at the end of their day’s engagement, I agree with the Respondent’s contention that the provisions of section 40 of the Employment Act on redundancy are not applicable to casual employees and return that the termination of the claimants’ services for whatever reason was justified, fair and lawful.

Whether the Claimants are entitled to the prayers sought.

31. The Claimants sought to be reinstated to the employment but this prayer cannot be awarded to casual employees. Even if it was to be available, section 12 (3) of the Employment and Labour Relations Court Act provides that an order for reinstatement cannot be issued if 3 years have lapsed after the separation.

32. Likewise, the claims for one month’s pay in lieu of notice, compensation for unfair termination, annual leave and severance pay are dismissed for lack of merits because the claimants were casuals and as such not entitled to the same. The claim for unpaid house allowance is also dismissed because the claimants were paid a daily wage as per the gazetted General Wage Order which provides that the minimum daily wage thereunder includes housing allowance.

33. Finally, the Claim for Certificate of Service is dismissed because under section 51 (1) of the Employment Act, such a certificate cannot be issued unless the employee serves continuously for a period of not less than four consecutive weeks. In this case the Claimants served intermittently and not continuously.

Conclusion and disposition

34. I have found that the Claimants’ casual employment never converted to term contract under section 37 of the Employment Act and such their engagement lapsed at the end of each day and the mandatory redundancy process provided by section 40 of the Act was not applicable to them. Flowing from the foregoing view, I have further found that the Claimants are not entitled to the reliefs sought in their Amended Statement of Claim filed on 11.7.2013. Consequently, I proceed to dismiss the suit with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 5th day of April, 2019

ONESMUS N. MAKAU

JUDGE