



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 910 OF 2017

SAMIN JUMA PEKESHE.....CLAIMANT

VS

MOHAMED KARIM T/A ZAMZA ENTERPRISE.....RESPONDENT

JUDGMENT

Introduction

1. Before me is an employment dispute between Samin Juma Pekeshe and Mohamed Karim trading in the name of Zamza Enterprise. The Claimant's claim is documented by a Memorandum of Claim filed in court on 6th December 2017. The Respondent filed a Response on 27th February 2018.
2. When the matter came up for hearing, the parties testified on their own behalf. They subsequently filed written submissions.

The Claimant's Case

3. The Claimant pleads that he was employed by the Respondent as a Forklift Driver from 28th November 2015 until 30th October 2017, when his employment was terminated. At the time of termination, he earned a monthly salary of Kshs. 28,600.
4. The Claimant claims the following from the Respondent:

- a. Leave pay for 2 years.....Kshs. 57,200
- b. 1 month's salary in notice pay..... 28,600
- c. 12 months' salary in compensation.....343,200
- d. Gratuity for 2 years.....28,600
- e. Certificate of service
- f. Costs plus interest

The Respondent's Case

5. In his Response dated 23rd February 2018 and filed in court on 27th February 2018, the Respondent admits having employed the Claimant on 28th November 2015 but denies terminating his employment on 30th October 2017.
6. The Respondent states that he was subcontracted by Pwani Oil Products Ltd to supply them with Forklift Drivers which work was not available on a daily basis but on a need basis.
7. The Respondent avers and maintains that the Claimant was a casual employee earning a daily wage of Kshs. 1,100 as a Forklift Driver. He was called by the Respondent when work was available and was paid every Saturday according to the number of days worked.

8. The Respondent states that the 4 drivers he had employed used to take Sunday off on a rotational basis, depending on the volume and amount of work.

9. The Respondent further states and in August/September 2017, during the election period in Kenya, the volume of work reduced to such an extent that he had to request the 4 drivers to go home and wait until business picked up.

10. The Respondent asked the drivers to return at the end of October 2017.

Upon return, the Claimant approached the Respondent for a loan. The Respondent told the Claimant that he was unable to advance him any money as he had suffered financially due to lack of business. The Claimant became angry and left the premises.

11. The Respondent claims that he reached out to the Claimant with various requests to return to work but the Claimant refused to do so. Instead, he went to speak to the Human Resource Manager of Pwani Oil Products Ltd who referred him back to the Respondent. Again, the Respondent invited the Claimant back to work but he declined the offer.

12. The Respondent therefore denies the Claimant's claim for unfair termination, notice pay and gratuity. Regarding the claim for leave pay, the Respondent states that since the Claimant did not work throughout, he was not entitled to leave.

Findings and Determination

13. There are three (3) issues for determination in this case:

- a. The nature and status of the Claimant's employment;
- b. Whether the Claimant has made out a case of unfair termination;
- c. Whether the Claimant is entitled to the remedies sought.

Nature and Status of Claimant's Employment

14. The Respondent states that the Claimant was employed on casual basis earning a daily rate of Kshs. 1,100. Section 2 of the Employment Act defines a casual employee as:

“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”

15. On the face of it, this definition carries two related factors; one, payment of daily wage and two, engagement on a daily basis. In his testimony before the Court, the Respondent stated that the Claimant did not work for him throughout as he himself relied on availability of work from Pwani Oil Products Ltd.

16. To support this assertion, the Respondent produced copies of attendance register and payment vouchers. A perusal of these records reveals that although the Claimant's pay was calculated on the basis of a daily wage, he was paid weekly. More significantly, allowing one off day per week, it is evident that the Claimant worked for consecutive periods in excess of one month. That being the case, I must agree with the Claimant's submission that his employment automatically converted to term contract pursuant to Section 37 of the Employment Act.

Unlawful Termination?

17. The next issue for determination is whether the Claimant has made out a case of unlawful termination. Section 47(5) of the Employment Act provides as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

18. As held by this Court in *Omar Ndaro Zuma v Modern Coast Express [2019] eKLR* an employee alleging unfair termination of employment must lay before the Court the actual circumstances upon which they lay their claim.

19. The Respondent testified that sometime in November 2017, he decided to transfer the Claimant from Pwani Oil Products Ltd premises to town but the Claimant declined the transfer. The Claimant himself told the Court that the Respondent called him back to work in December 2017 but he declined because there was no agreement on the terms of employment.

20. An employee who declines to take up an employment offer cannot come to Court for relief for unfair termination. The Claimant's claims for compensation and notice pay are therefore without basis and are dismissed.

21. In the absence of leave records to the contrary, the claim thereon succeeds and is allowed. No basis was laid for the claim for gratuity which therefore fails and is dismissed.

22. In the end, I enter judgment in favour of the Claimant in the sum of **Kshs.46,200** being leave pay for two (2) years.

23. This amount will attract interest at court rates from the date of judgment until payment in full.

24. The Claimant is also entitled to a certificate of service plus costs of the case

DATED SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY 2019

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JUDGE

Appearance:

Mr. Kitonga for the Claimant

Mrs. Okata for the Respondent