



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER 603 OF 2015

BETWEEN

BONIFACE KYALO MUTUA.....CLAIMANT

VERSUS

KENYA BUILDERS AND CONCRETE LIMITED.....RESPONDENT

Rika J

Court Assistant: Lawrence Osotsi

Njogu & Associates, Advocates for the Claimant

Federation of Kenya Employers for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 16th April 2015. He avers that he worked for the Respondent as a Casual Labourer, between September 2013 and 10th January 2015. He alleges that his contract was unfairly terminated by the Respondent on 16th January 2015. He prays for Judgment against the Respondent in the following words:

- a. Unfair termination – Kshs. 352,800.
- b. Notice – Kshs. 29,400.
- c. Overtime – Kshs. 264,600.
- d. Leave pay – Kshs. 58,800.
- e. Service pay – Kshs. 29,400.
- TotalKshs. 735,000.
- f. Costs.
- g. Interest.
- h. Any other suitable relief.

2. The Respondent filed its Statement of Response on 31st October 2016. Its position is that it routinely engaged Casual Employees, owing to the nature of its business. The Claimant was a Casual Employee. He did not come to work daily. He was paid in accordance with the days worked. He left employment of his own volition. The Respondent offered to pay to the Claimant pro-rata leave and notice of 7 days at Kshs. 30,870. It is still willing to pay this amount. The Respondent prays that the rest of the Claim is dismissed with costs.

3. The Claim was heard during the Court's Service Week at Nairobi, on 5th April 2019. The Claimant gave evidence, as did Respondent's Human Resource Manager Jeremiah Kimuyu Nzioka.

4. The Claimant told the Court he was engaged as Casual Employee by the Respondent, on 18th September 2013. He was a Driver. He was involved in a road accident on 10th January 2015. He was hospitalized. He was discharged and returned to work on 16th January 2015. He was advised by the Respondent to leave, there was no more work for him. Cross-examined, he told the Court that he was a Casual Employee. He was paid after 2 weeks, through his Bank. Payment was inconsistent. He was not paid when the vehicle assigned to him was in the garage. He did not recall knocking and damaging Respondent's Customer's gate while driving. He was paid nothing on leaving employment. It is not true that he left of his own volition.

5. Jeremiah Kimuyu Nzioka confirmed that the Claimant was engaged by the Respondent as a Driver. He was a Casual Employee. The Respondent is involved in the business of quarry mining and building. Claimant's engagement depended on contracts the Respondent was able to procure. He worked when work was available. He was paid weekly. He just disappeared claiming to have been sick. He was not a regular Employee to claim the benefits sought. His Claim has no merit. Cross-examined, Nzioka told the Court that the Claimant was aware he was a Casual Employee, assigned work only when work was available. The Respondent did not follow him up after he disappeared.

The Court Finds:-

6. At paragraph 3 of his Statement of Claim, the Claimant avers that he was engaged by the Respondent as a Casual Labourer. In his evidence, he told the Court the same thing. This is similarly the position of the Respondent. There is no dispute as to whether the Claimant was engaged on regular basis, or on casual terms. The Parties are in agreement on the status of the Claimant. The Court has not been called upon to determine, if the Parties' relationship was anything else, but casual. There is express admission by the Claimant that he was employed by the Respondent as a Driver, on casual terms. The Claimant was a Casual Employee, as defined under Section 2 of the Employment Act 2007.

7. The nature of Respondent's business- quarry mining and building- required the Respondent to engage mostly, casual labour.

8. Having conceded that he was in casual engagement, the Claimant cannot bring a Claim for unfair termination and seek remedies ordinarily due to a regular Employee under the Employment Act 2007. His pursuit of remedies under the Employment Act has no foundation.

9. Even had the Claimant established that he was in regular employment, it is highly likely that the Claim would fail, for want of details. His Statement of Claim is disjointed and garbled. He does not disclose what his monthly salary was, in his Statement of Claim, Witness Statement and Evidence. He prays for 'unfair termination.' What is this remedy he calls 'unfair termination?' There is a figure of Kshs. 352,800 pleaded. What does this figure represent and what is it made up of? The Verifying Affidavit and the Witness Statement are indicated in their heading, to have been filed in the Chief Magistrate's Court at Nairobi. The Statement of Claim was filed at the Employment and Labour Relations Court, Nairobi. Without establishing the rate of his monthly salary if any, how does the Court consider the prayers for 'unfair termination,' notice, overtime, leave and service? The Claim is poorly pleaded, and unsupported through evidence.

10. The Claimant was offered Kshs. 30,870 by the Respondent on pro-rata leave and 7 days' notice. Considering the terms of his engagement, this was a reasonable offer of settlement. He is at liberty to collect what was offered.

11. ***The Court finds no merit in the Claim. It is dismissed, with no order on the costs.***

Dated and signed at Mombasa this 4th day of July 2019.

James Rika

Judge

Dated, signed and delivered at Nairobi this 12th day of July 2019.

Byram Ongaya

Judge