



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1612 OF 2014

DAVID MUTUA MATHUKU

CLAIMANT

v

PEMBE FLOUR MILLS LIMITED

RESPONDENT

JUDGMENT

1. David Mutua Mathuku (Claimant) instituted legal proceedings against Pembe Flour Mills Ltd (Respondent) on 12 September 2014 and he stated the Issues in Dispute as

(i) Non-payment of employee's dues

(ii) Wrongful, unfair and unlawful dismissal.

2. The Respondent filed a *Memorandum of Defence* on 15 October 2014 contending that the termination of employment was on account of unsatisfactory performance during the probationary period, and was therefore fair and that terminal dues were paid.

3. The Claimant joined Issue with the Response on 27 October 2014, and the Cause was heard on 26 March 2019 when the Claimant and the Respondent's Human Resources Officer testified.

4. The Claimant filed his submissions on 26 April 2019.

5. The Respondent was directed to file and serve its submissions on or before 26 May 2019 but the submissions, if filed were not on file by that date or by time of delivery of this judgment.

6. The Court has considered the pleadings, evidence and submissions on record.

Nature of employment pre-May 2014

7. The Claimant testified that he was employed by the Respondent in December 2012, was paid monthly and worked continuously.

8. The Respondent's witness however asserted that from 2012 to May 2014 the Claimant was engaged on casual employment and was paid on a daily basis.

9. When challenged to produce evidence that the Claimant was paid on a daily basis prior to May 2014, the witness stated that he had not carried the Claimant's employment records to Court.

10. And when shown a copy of the Claimant's March 2014 pay slip showing payment of a monthly salary, the witness changed tune and stated that the Claimant was on 3 month fixed term contract at the material time.

11. A *casual employee*, in terms of section 2 of the Employment Act, 2007 means an employee paid at the end of each day and who is not engaged for a period longer than 24 hours.

12. The Respondent, as the custodian of employment records did not produce the records to corroborate its contention that the Claimant was paid at the end of each day or that the Claimant had agreed that the daily wages be accumulated and be paid weekly.

13. The Claimant served the Respondent for over 3 months, from December 2012 to May 2014. If it is true that he was on contract, the Respondent was under an obligation to issue him with a *written contract* in terms of sections 9(1)(b) and 10 of the Employment Act, 2007.

14. The Court therefore finds that from December 2012 to May 2014, the Claimant was on term contract as envisaged by section 37 of the Employment Act, 2007, and the finding is fortified by the Claimant's March 2014 pay slip.

Unfair termination of employment

15. It is not in dispute that the Respondent only issued to the Claimant a formal contract on 29 April 2014 and which contract provided for a 3 months' probation period.

16. Despite being put on probation, the Claimant was still carrying out the duties he had been performing for the previous 2 years or so.

17. In the view of the Court, placing the Claimant on probation under such circumstances was an unfair labour practice which cannot be used by the Respondent to escape scrutiny under the unfair termination of employment challenge.

18. The Respondent contended that it terminated the Claimant's employment on account of unsatisfactory performance. However, there was no evidence whether there were agreed targets which were not met. Equally, there was no evidence on the nature of performance which did not meet expectations.

19. The Court finds that the Respondent did not discharge the burden placed upon employers by sections 43 and 45 of the Employment Act, 2007 of proving the reasons, and that the reasons were valid and fair, to terminate the Claimant's employment.

Pay in lieu of notice

20. The Claimant was paid 1 month salary in lieu of notice and nothing turns on this head of claim.

Compensation

21. The Claimant served the Respondent for about 2 years and in consideration of the length of service, the Court will assess compensation equivalent to 3 months gross wages (gross wage was Kshs 17,222/-).

Breach of contract

22. The Claimant sought a total of Kshs 44,088/- on account of terminal dues and the Court will address the same under the item heads as particularised by the Claimant.

Leave

23. The Claimant sought Kshs 9,644/- on account of 14 accrued leave days.

24. The terminal dues schedule produced in Court show that the Claimant was paid accrued leave for 2012/2013, and pro-rata leave for 7 months in 2014.

Certificate of Service

25. A *certificate of service* is a statutory entitlement and the Respondent should issue one to the Claimant within 15 days.

Conclusion and Orders

26. The Court finds and declares that the Claimant was on term contract up to May 2014, and that the termination of contract was unfair.

27. The Claimant is awarded

(a) Compensation **Kshs 51,666/-**

28. Respondent to issue Certificate of Service within 15 days.

29. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 5th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Naututu instructed by Waiganjo Wachira & Co. Advocates

For Respondent Ms. Kanyiri, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Lindsey