



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 49 OF 2017

[As consolidated with Cause No. 51 of 2017 and 52 of 2017]

(Before Hon. Justice Mathews N. Nduma)

COLLINS OLANDE.....CLAIMANT

VERSUS

EQUATOR BOTTLERS LIMITED.....RESPONDENT

JUDGMENT

1. The claimants in cause number 49 of 2017, Collins L. Adede; Number 51 of 2017, Steve Okumu Ochieng and Number 52 of 2017 Gilbert O. Nyawiri filed separate suits against the respondent but same were heard together.
2. The three claimants testified in their separate cases. Collins Adede was employed by the respondent in the year 2001 as a sorter and worked continuously until 6th October 2016, when upon reporting for duty as usual was informed that his employment with the respondent had been terminated. At the time Collins earned Kshs. 34,501.35.
3. Steve Okumu Ochieng testified that he was employed by the respondent in January 2008 in the finance department. He worked continuously until sometime in April 2016, when he reported to work as usual and was informed that his employment had been terminated. Steve was paid a daily rate of Kshs. 249 but was paid weekly. In 2014 he was employed on a three months contract renewable. The claimant was not given another contract but continued to work until the date of termination. Steve worked 8 hours daily shifts six days a week. He worked continuously until his employment was terminated. At the time of termination the daily wage was Kshs. 510 per day.
4. Steve and Gilbert were accused of having drunk soda because some empty bottles were found where they were. They were not given a chance to explain. They were summarily dismissed on the spot. Steve never went on leave. Steve stated that he was paid Kshs. 30,000 upon termination. Steve said his monthly gross salary was Kshs. 13,702. He seeks compensation for unlawful dismissal, payment in lieu of 9 years leave, NSSF was paid for the year 2012. Steve stated that he owed the SACCO Kshs. 15,000 and same was deducted from his dues in the year 2015.
5. Collins on the other hand stated that at the time of termination he was earning Kshs. 17,000 per month. That he was paid Kshs. 68,489.43 upon termination. That the pay slip which shows Kshs. 34,501.35, included overtime. That he claims terminal benefits due and owing and compensation for unlawful dismissal. Collins was accused of loading excess products than he was supposed to in a lorry. He was not given show cause letter and was not given a hearing. He testified that he had a clean record. Collins stated that he got a three months contract dated 24th May 2013. The same was to end on 31st August 2013. He did not get another contract but continued to work till date of termination. That he did not go on leave at all. The claimant stated that he filed a clearance form when his contract was not renewed and he was paid Kshs. 68,489.43. This payment was for service pay. Collins said he applied for leave but same was not given. He did not have a written contract from 31st August 2013 till the year 2016. His work was continuous.
6. Gilbert Otieno Nyawiri testified that he was employed in May 2009. That he was employed as a casual. That he was paid weekly. That at the time he left employment on 5th April 2016 he earned Kshs. 520 per day. That they would not be on duty at times for one week and then they would be recalled.
7. Gilbert was dismissed together with Steve on 4th April 2016 because they were loading a truck and all of a sudden, a security officer came and picked empty soda plastic bottles and they were accused of drinking soda unlawfully. Gilbert denied that they had drunk any soda. That they were not given show cause letter and were also not given any opportunity to explain. They were summarily dismissed.
8. Gilbert said he had a weekly pay slip and earned Kshs. 3,162.72 per week. That NSSF dues were made in the year 2012 only. Gilbert stated that he was not paid any terminal dues. He claims Kshs. 13,702 in lieu of notice; 7 years unpaid leave and compensation for unlawful

dismissal. Gilbert insisted that he was not on a fixed term contract but worked continuously.

9. RW1 Benjamin Omondi Olando testified in defence of the three claims. He relied on a witness statements filed on 5th March 2018. He said he was a Human Resource Assistant. He also relies on a bundle of documents filed on 5th March 2018. He testified that Collins was employed on 3rd June 2013 on contract basis but before he had worked as a casual. RW1 was not sure when Collins started working. He testified that casuals worked as and when there was work but did not work continuously. RW1 did not have any records of Collins before the year 2013. RW1 testified that the employment of Collins was simply not renewed upon expiry.

10. The contract was for three months. RW1 did not have any contracts for Collins after the year 2013 until the year 2016. He however produced a copy of a contract for six months that expired in the year 2016. That Collins was paid basic salary of Kshs. 15,219 per month which was calculated on a daily rate basis. That Collins contract was not renewed and there was no need to give him any notice. RW1 stated that Collins was entitled to 21 days leave. That he was paid gratuity calculated at 15 days salary for each year worked. RW1 also produced leave forms for Collins for the years 2015 and 2016.

11. With respect to Gilbert Nyawiri, RW1 testified that Gilbert was a casual and was not placed on fixed term contract. That he was only called upon to work from time to time when there was work. He did not work continuously. That Gilbert stopped working for the respondent in the year 2016. RW1 could not confirm that the claimant started working for the respondent in the year 2009.

12. With regard to Steve Okumu RW1 testified that Steve was issued a formal contract in the year 2014. That he initially worked as a casual. RW1 did not know when Steve started working for the respondent. That upon expiry of the short term contract, Steve continued to work as a casual as and when he was required and was paid a daily rate of Kshs. 507. That Steve was entitled to prorated leave but was not entitled to service gratuity because the respondent paid NSSF dues on his behalf. He was however paid gratuity calculated at 15 days salary for the only complete year served. He was not issued any notice. When Steve left he had no contract of employment. He was simply not called for more work.

Determination

13. The issues for determination with respect to Steve and Gilbert are:

- (a) Whether they were employed as casuals up to the time of termination and were only called to work on a daily rate from time to time and therefore their employment was never terminated as alleged or at all.
- (b) With regard to Collins, the issue is whether he had a fixed term contract until the year 2016 which expired by effluxion of time and so he was not summarily dismissed as alleged or at all.
- (c) Whether the three (3) claimants are entitled to the reliefs sought.

Issue (a)

14. Steve and Gilbert were employed as casuals on diverse dates in June 2008 and May 2009 respectively. They both worked for the respondent until they separated with the respondent on 4th April 2016 which date the two claimants state that they were summarily dismissed by a security officer on allegations that they had drunk some soda, whilst loading crates of soda in a truck. The claimants deny that they had drunk any soda as alleged or at all. That they were both not given show cause letters nor were they given any chance to explain themselves.

15. RW1 on the other hand states that the respondent did not terminate the employment of Steve and Gilbert as alleged or at all. That the two worked for the respondent as sorter and loaders from time to time when called upon to do so. That they were never in continuous employment of the respondent. That they were employed on a daily rate that was paid weekly. That they would go away for a while and would be called upon as and when there was work. That Steve was in 2014, issued a fixed term contract of three months but the same was not renewed. That in 2016, he had no formal contract but was called upon as and when there was work.

16. From the testimony of the two claimants, they had served the respondent for several years from the year 2008 and 2009 respectively. It is not in dispute that they were sorter and loaders of soda trucks. That they served the respondent up to 4th April 2016 when they were both sent home. Whether or not the two claimants were sent home for a week off and then recalled the fact remains that they were doing a job for the respondent that could not 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 in terms of the definition of a casual employee under *Section 37(1) (b) of the Employment Act, 2007*. It is also a non-refutable fact that the claimants worked for the respondent "for a period or a number of continuous working day and which amounted in the aggregate to the equivalent of not less than one month" in terms of *Section 37(1) (b) of the Act*.

17. The testimony by the two claimants and that by RW1 disqualify the two employees to be termed as casuals. Their employment was one "deemed to be one where wages were paid monthly and *Section 35(1) (c) applied to their contract of employment*".

18. In this respect, the two claimants are deemed to have rendered continuous service to the respondent from the date of their employment in January 2008 and May 2009 respectively until the date of their termination on 4th April 2016.

19. The testimony by the two claimants was not dented by the evidence of RW1 who did not produce their records and could not remember the dates the two started working for the respondent. RW1 could however recall that the two claimants had started working for the respondent as 'casuals' from earlier dates. The two employees in the least are entitled to service pay calculated at 15 days salary for each completed year of service from January 2008 and May 2009 respectively. The court awards them accordingly.

20. Furthermore, the employment of the two could not be terminated without giving them at least one month's notice or one month salary in lieu of notice. The court grants the two accordingly.

Compensation

21. The undented testimony of the two claimants Steve and Gilbert is that a security officer approached them on 4th April 2016 while they were loading a truck with crates of soda. The security officer saw some empty bottles of soda on the ground and accused the two of drinking soda without authority and summarily dismissed them without notice, notice to show cause or giving them any hearing.

22. RW1 had no personal knowledge of this matter and did not provide credible evidence to rebut this testimony. The court finds that Steve and Gilbert have proved on a balance of probabilities that they were summarily dismissed unlawfully and unfairly and are both entitled to compensation in terms of *Sections 49(1) (c) and (4) of the Employment Act*. The conduct by the respondent had violated *Sections 36, 41, 43, 44 and 45 of the Employment Act, 2007*. It had no valid reason to summarily dismiss the two employees.

23. In this regard, Steve had served the claimant for a period of five years and 3 months whereas Gilbert had served the respondent for a period of four (4) years. They did the same job. They were wrongfully dismissed without notice. They lost their source of income unfairly. They were not paid terminal benefits upon dismissal. The two did not contribute to the dismissal. They both suffered loss and damage and the court awards them equivalent of five (5) months salary in compensation for the unlawful and unfair summary dismissal.

Issue (b) Collins

24. With respect to Collins, the issue is whether he had a fixed term contract that was not renewed on 16th October 2016 when he stopped working for the respondent as RW1 testified or Collins' employment was summarily dismissed for loading excess crates on a truck without notice, show cause letter and or a disciplinary hearing.

25. The fact of the matter is that RW1 produced contracts signed by Collins dated 24/5/2013 for a 3 month period and another dated 2nd July 2016 which commenced on 1st July 2016 and was to expire on 30th September 2016. Collins testified that his employment came to an end on 6th October 2016 whereas RW1 testified that the fixed term of contract ended on 30th September 2016 and was not renewed.

26. It is not in dispute that he signed a payment clearance certificate on 11th November 2016 which indicates that the claimant was paid last salary of Kshs. 17,035 for the month of September 2016 and was paid severance allowance for 90 days calculated at Kshs. 62,898.46. The payment also included salary for six days worked in the month of October 2016. The claimant was also paid prorata leave days not taken to the date of Separation.

27. Collins received the terminal benefits less deductions in respect of a SACCO loan in the sum of Kshs. 34,351. Kshs 19,659 was the net payment received. Collins signed the discharge voucher and acknowledged that the amount constituted his full and final dues upon contract non-renewal and that he did not have further claim against the respondent.

28. It is the court's considered view that the claimant has not proved on a balance of probabilities that his employment was curtailed unlawfully or unfairly as alleged or at all. To the contrary, RW1 discharged the burden of rebuttal in terms of Section 43, 45 and 47(5) of the Employment Act and demonstrated that the contract of employment of Collins expired by effluxion of time and the claimant was paid all his terminal benefits upon separation.

29. The claim by Collins therefore lacks merit and is dismissed in its entirety.

Leave days not taken

30. The claims by Steve and Gilbert for leave days not taken were sufficiently proved and are awarded in respect of the last three years only.

31. In the final analysis judgment is entered in favour of Steve Okumu Ochieng and Gilbert O. Nyawiri as follows against the respondents.

Steve Okumu Ochieng

(a) One month salary in lieu of Notice Kshs. 13,702.

(b) Five months salary in compensation for unlawful dismissal Kshs. 68,510.

(c) Leave days not taken for 3 years Kshs. 41,106.

Total Kshs. 123,318.

Gilbert Otieno Nyawiri

(a) One month salary in lieu of notice Kshs. 13,702.

(b) Five months salary in compensation for unlawful and unfair dismissal Kshs. 68,510.

(c) Payment in lieu of three years leave not taken KShs. 41,106.

Total KShs. 123,318.

(d) Interest at court rates from date of judgment till payment in full in respect of both claimants.

(e) Costs of the suit by Steve Ochieng and Gilbert Nyawiri.

32. For the avoidance of doubt, the claim by Collins Adede is dismissed in its entirety.

Judgment Dated, Signed and delivered this 18th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Ouma for claimants

Mr. Abira for respondent

Chrispo – Court Clerk