



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE. NO. 671 OF 2015

GEOFFREY WAMBUA KING'OO.....CLAIMANT

-VERSUS-

DINESH CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 23.4.2015 alleging that he was employed by the respondent from February 2014 to 30th January 2015 when he was dismissed for no valid reason, without prior notice and without according him a hearing. He therefore prayed for:

- (a) Damages for unfair termination.....Kshs.234,000
- (b) NoticeKshs. 19,500
- (c) LeaveKshs.19,500
- (d) Overtime.....Kshs.86,400

Total Kshs.359,400

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2. The respondent filed defence on 15.6.2015 denying any employment relationship with the claimant and contended that the claimant was a stranger to him. She further denied the alleged unfair termination of the claimant's employment and prayed for the suit to be dismissed with costs for being an abuse of the court process.

3. Both parties tendered evidence and thereafter filed written submissions. The main issues arising from the pleadings are whether the claimant was employed by the respondent as alleged, and if so whether the claimant was unfairly terminated.

Claimant's Case

4. The claimant testified that he was employed by the respondent as a Welder earning Kshs.650 per day equalling to Kshs.19,500 per month. He further testified that he worked until 30.1.2015 when he was unlawfully dismissed without prior notice by his supervisor Mr. Njau. He contended that he was receiving instructions from the said supervisor who was also paying him on weekly basis. He therefore prayed for the reliefs sought in his suit.

5. In cross examination, he admitted that he had nothing to prove that he was employed by the respondent from February 2014 to January 2015. He further admitted that he had nothing to prove that the respondent was paying him Kshs.650 per day or at all during the said period. He contended that he was signing a paper to acknowledge receipt of his pay, which was retained by the employer.

6. He further contended that he used to work from 7.30 am to 8pm but admitted that he had nothing to prove the said overtime worked. He further admitted that he had nothing to prove that he was entitled to the claim for leave. He however maintained that it is not normal for one to sue a stranger if there was no employment relationship.

Defence case

7. The Respondent's Head of Administration and Outfield staff, Mr. Joshua Musyoki Mutua testified as Rw1. He denied the existence of any employment relationship between the claimant and the respondent. He further denied the alleged unfair termination of the claimant's employment and maintained that there was no employment relationship between the parties herein. He therefore prayed for the suit to be dismissed with costs.

8. In cross examination, he stated that he has worked for the respondent since April 2006. He admitted that he did not know the persons who worked at the sites but maintained that the claimant was not one of the persons whose names were given to him. He however did not produce the list of workers as evidence as exhibits.

Claimant's submissions

9. The claimant submitted that he was employed by the respondent and that his employment was unfairly terminated without complying with section 41 of the Employment Act, which entitled him to a hearing before dismissal. He further submitted that his dismissal was without a valid and fair reason as required under section 43 and 45 of the Act. He therefore prayed for the reliefs set out in his suit.

Respondent's Submission

10. The respondent submitted that the claimant was not her employee as he alleged. She further submitted that the claimant did not specially plead the date when he was employed and when he was dismissed. That it also only in his evidence where he alleged that the dismissal was done on 30.1.2015. She contended that he who alleges must prove and urged the court to find that the onus of proof lay with the claimant to prove the alleged employment relationship by documents.

11. She further submitted that the claim for unfair termination must fail because the claimant has failed to prove any employment relationship between him and her. Accordingly, she submitted that the claimant is not entitled to the reliefs sought.

Analysis and determination

12. All the facts in the suit are disputed and as such I proceed to determine the following issues:-

- (a) Whether there was any employment relationship between the parties herein.
- (b) If the answer is in the affirmative, whether the claimant was unfairly dismissed.
- (c) Whether the claimant is entitled to the reliefs sought.

Employment Relationship

13. After considering the evidence and the submissions presented by the parties, the court finds that the claimant has not proved on a balance of probability that he was employed by the respondent. All what he said was that he was employed but tendered no documentary evidence or called any person as a witness to corroborate his oral testimony. It is trite law that he who alleges must prove his allegations and cannot ride on the other party's default to produce documents to succeed in his case.

14. The upshot of this case is that the claimant only made unsubstantiated allegations that he was employed by the respondent from February 2004 to 30.1.2015 without any evidence to support his allegations and as such, the court returns that the alleged employment relationship has not been proved to the required standards. In view of the foregoing, the court further finds that the respondent cannot have unfairly terminated the claimant's employment that never was.

15. In the end, the court finds that the claimant is not entitled to the reliefs sought and the suit is dismissed for lack of merits. No order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 25th day of October, 2019.

ONESMUS N. MAKAU

JUDGE