



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT

NAIROBI

ELRC CASE NO. 1291 OF 2016

JOSEPH MAKAU MUTAVA.....CLAIMANTS

VERSUS

KENYA BUILDERS CO. LTD.....1ST RESPONDENT

JUDGMENT

1. The claimant brought this suit on 26.7.2015 seeking the following reliefs:

- (a) Unfair Termination
- (b) Notice
- (c) Leave Pay
- (d) Service Pay
- (e) Overtime

2. The respondent filed defence on 31.8.2016 contending that she employed the claimant on casual basis or piece work basis and his wages were paid at the end of the day or task given. She denied the alleged constructive dismissal and averred that employment relationship ended at the end of each day's work or task given and he never came back. As assign of good faith, she expressed her willingness to pay the claimant Kshs. 7650 as service pay for the aggregate period of one year.

3. The main issues arising from the pleadings are whether the claimant was a causal employee or not, and whether he was unfairly terminated. To answer the said questions, both parties tendered evidence and thereafter only the claimant field written submissions.

CLAIMANTS CASE

4. The claimant testified as CW1 and basically adopted his written statement dated 28.7.2015 in brief he stated that he was employed by the respondent in February 2013, as loader earning Kshs. 510 per day which translated to Kshs. 13770 per month. On 3.3.2015 he reported to work as usual but later on the day the Director called him to the office and accused him of suing the company and on the following day the personnel office dismissed him for the reason that he had sued the company after suffering injury while on duty in March, 2014. He contended that the reasons for the dismissal was not justifiable and as such he prayed for compensation of wrongful dismissal, salary in lieu of notice, leave, service pay and overtime.

5. He contended that he was never given any written contract, he was attending work from 6 a.m. to 6 p.m and there was no annual leave or off day.

6. In cross- examination, CW1 maintained that he joined the respondent in February 2013 and that he was paid at the end of the month. He however, admitted that the bank statement he filed as exhibit showed that he was being paid on weekly basis and the figure was not constant.

7. He further admitted that he signed the attendance records and also the Safety Rule. He contended that he was employed on daily basis except when the vehicle he was assigned to had a breakdown. He admitted that he had not produced as exhibit the pleadings of the alleged

injury claim. H stated that he filed the suit against the respondent in 2014 and he was dismissed on 3.3.2015. He contended that the termination was verbal and he stopped going to work.

DEFENCE CASE

8. Jeremiah Nzioka is the respondent's Human Resource and Administration Manager. He testified as RW1. He testified that the claimant was formerly employed by the respondent as a casual employee. He further testified that the claimant was only hired on need basis and he worked there for less than a year. That he was engaged on casual basis but paid on weekly basis. He further contended that the claimant never worked every day of the week and relied on the claimant's bank statement as evidence to prove that even the weekly pay was varying depending on the days worked per week.

9. RW1 further testified that the claimant joined the company in May 2014 and then signed contract of employment dated 9.5.2014. He denied the claimant's allegation that he was employed on 2013. He further contended that the claimant signed the Safety Rules on 30.5.2014 and he also signed the attendance register every day he was taken by the supervisor Mr. Boniface Kaleli.

10. He denied the claimant's allegation that he was injured while on duty. He further denied the allegation that he dismissed him as alleged. He maintained that the claimant was a casual employee earning Ksh. 510 per day but paid on weekly basis. He also denied that the claimant was entitled to annual leave. He therefore prayed for the suit to be dismissed because the claimant was paid for the work done.

11. In cross-examination, RW1 stated that he joined the respondent in 2010 as Personal and Administration Manager. He contended that it was only him and the supervisor who deals with personnel issues in the respondent company. He further contended that the claimant signed the contract of employment dated 9.5.2014 in his presence and the Safety Rules on 30.5.2014. He stated that in May 2013, the company was still paying salaries through bank.

12. RW1 confirmed that there was a Safety and Health Officer in the company who deals with injuries of employees. He further confirmed that there are days when a vehicle breakdown and employees lose work. He further explained that in transport, work is usually on piece work basis and as such it may start at 6 a.m. or 6.30 a.m. and end at 300 p.m. or even 6 p.m.

ISSUES FOR DETERMINATION

13. There is no dispute from the pleadings and evidence that the claimant was employed by the respondent as a loader and turnboy earning Kshs. 510 per day but paid on weekly intervals. The issues for determination are:

- (a) Whether the claimant's casual employment converted into permanent employment.
- (b) Whether his service were unfairly terminated
- (c) Whether the reliefs sought for be granted.

ANALYSIS AND DETERMINATION

(a) CONVERSION FROM CASUAL TO PERMANENT EMPLOYMENT

14. Under section 37 (1) of the Employment Act Casual employment converts to employment for payment of monthly salary where the employee;

“(a) works for a period or a number of continuous working day which amount in aggregate to the equivalent of not less than one month;

(b) performs work which cannot reasonably be expected to be complete within a period or a number of working days amounting to the aggregate to the equivalent of three months or more . . .”

15. In this case the claimant did not prove that he worked continuously for the number of days contemplated in the foregoing provision. In my view the respondent has rebutted his allegation that he was employed continuously from February 2013 to 3.3.2015. He personally admitted that he was earning a daily wage being paid weekly. He further readmitted that the pay was not a constant figure but varying due to what the RW1 explained as varying number of days worked per week. Consequently, I return that the claimant has failed to prove on a balance of probability that he worked continuously for over one month. It follows therefore that he was at all material time to this case, employed on casual basis and his employment never converted to permanent employment.

UNFAIR TERMINATION

16. In view of the foregoing, the casual employment between the parties herein was terminable at the end of each day. It was therefore not subject to the protection of the law availed under section 35(1)(c) and 45 of the Act. Section 35(i) (c) provides that termination of employment should be preceded by a notice of 28 days in writing while section 45 bars employer from terminating the employees services without reason and without according a fair hearing.

RELIEFS SOUGHT

17. In view of the finding that the claimant was a casual employee, the claim for compensation for unfair termination is not tenable and for the same reason, the claim for salary in lieu of notice and leave is dismissed. The claim for overtime has not been given particulars and no evidence was adduced and as such it is also dismissed. The claim for service pay was admitted by the respondent though the claimant never served continually for one year. I therefore enter judgment for the claimant in the sum of Kshs. 7650.00 as admitted by the respondent as an ex gratia payment. Each party bear own costs.

Dated, signed and delivered in open court at Nairobi this 20th December, 2019.

ONESMUS MAKAU

JUDGE