



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 85 OF 2017

[Formerly Kisumu Cause No. 287 of 2015]

RUDOLF SHITANDI DARAJA.....CLAIMANT

VERSUS

JOHN BROWN SHILENJE T/A JB SHILENJE & COMPANY ADVOCATES...RESPONDENT

JUDGMENT

1. The suit is premised on amended statement of claim dated 30th November, 2016. The claimant seeks compensation for unlawful termination of employment and payment of terminal benefits to wit:-

(i). Payment in lieu of notice

(ii). Under payment

(iii). Gratuity

(iv). Payment in lieu of untaken leave

(v). Unpaid salary for December 2014 and

(vi). Provision of certificate of service

2. The claimant has attached documents to the statement of claim which he relies upon to substantiate his claim.

3. The Respondent filed a statement of response to the original memorandum of claim and a counter claim dated 6th November, 2015 on 9th November, 2015.

FACTS OF THE CLAIM

4. The claimant was employed by the Respondent as a court clerk on 21st August 2013 at a monthly salary of Kshs. 7,500/-. In December 2013, the monthly salary was increased to Kshs. 9,000/= and to Kshs. 10,000/- in February, 2014 until November, 2014

5. The claimant served the Respondent diligently, and faithfully until the employment was terminated by the Respondent on 20th December, 2014. The termination followed a meeting in which Mr. John Brown Shilenje, Advocate instructed the claimant to withdraw a pending suit by the claimant against his former employer and colleague of the Respondent

6. The claimant declined the invitation and his employment was promptly terminated without notice, decorum or payment of terminal benefits.

7. The claimant testified under oath in support of the particulars of claim and also denied the counter claim. The claimant prays for the reliefs sought.

8. The claimant relies on the decision of Hon. Maureen Onyango in *ELRC No. 196 of 2014, Rudolf Shitandi Daraja Vs. Zablon Juma Atulo va Z.J. Atulo & Co. advocate* in which the claimant had sued the colleague of the Respondent, delivered on 24th November, 2014. The claimant was awarded terminal benefits by that court.

RESPONSE

9. The Respondent in it's statement of response and counter claim denies ever having employed the claimant or dismissed him in paragraphs 3, 4 and 5 of the statement of response.

10. However under paragraph 7, the Respondent admits having employed the claimant as a clerk on temporary basis at a monthly salary of Kshs. 7,500/- and later Kshs. 10,000/- per month.

11. The Respondent admits that upon hearing that the claimant had sued his former employer and colleague Z.J. Atulo for unlawful dismissal, he told the claimant to go and sought out his disagreement with the firm of Z.J. Atulo and company advocates and report back to the Respondent, and if cleared by the former employer, the Respondent would offer the claimant permanent employment.

12. Respondent avers that the claimant thereafter vanished from office upon being told to clear his name with Z.J. Atulo and Company advocates. The Respondent therefore makes a counter claim against the claimant for payment of Kshs. 10,000/- in lieu of notice.

13. The claimant filed a response to the counter claim in which he denied having absconded work at the Respondent's place and prays the counter claim be dismissed.

DETERMINATION

14. The issues for determination are:-

(i). *Whether the claimant was a temporary employee or a protected employee under the Employment Act.*

(ii). *If the answer to (i) above is in the affirmative, whether claimant absconded work or the employment was wrongfully and unfairly terminated*

(iii). *Whether the claimant is entitled to the reliefs sought.*

ISSUE I

15. It is common cause that the claimant was employed by the Respondent at a monthly salary of Kshs. 7,500/- on 21st August, 2013 and the salary was increased to Kshs. 10,000/-.

16. The claimant testified under oath that he worked continuously until December, 2014. The Respondent did not rebut this evidence, having failed to appear for the hearing of the suit on 29th November, 2017 without any justification. That notwithstanding, even from the facts not disputed by the Respondent, the court finds conclusively that the claimant worked continuously for the Respondent from 21st August 2013, upto 20th December, 2014 a period of at least sixteen (16) months as a clerk. Furthermore, the claimant did not receive a daily wage but received a monthly wage.

17. In terms of Section 37 (1)

“Notwithstanding any provisions of the Act, where a casual employee:-

(a). Works for a period of a number of continuous working days which amount in the aggregate to the equivalent of not less than one month, or

(b). Performs work which cannot 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, the contract of service of the casual employee shall be deemed to be one whose wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.”

In this regard, Section 35 (1) (c) provide:-

“Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of period of twenty eight days next following the giving of notice in writing.”

19. The effect of these provisions was to convert the employment of the claimant from a temporary (read casual) employment, to that of a permanent employee, protected under the provisions of the Employment Act.

20. The court therefore finds that the claimant was no longer a temporary employee but was a protected employee at the time of his separation with the Respondent.

ISSUE II

21. The question that follows, is whether the claimant being a protected employee, absconded work, or his employment was unlawfully and unfairly terminated.

22. The claimant adduced evidence under oath, that his employment was unlawfully and unfairly terminated by the Respondent upon hearing that the claimant had a pending suit against his former employer who was a colleague of the Respondent.

23. The averments by the Respondent in the statement of response agrees with this testimony by the claimant except the Respondent purports to say that the claimant was a temporary employee and when he was asked to go and clear his name with the former employer, he never came back.

24. The evidence by the claimant is not rebutted the Respondent having failed to appear for the hearing. Nonetheless, it is particularly wrong for an employer to send an employee away for having filed a suit against a former employer, to vindicate his rights.

25. The preponderance of evidence favours the version by the claimant that he was told to either withdraw the suit against his former employer or his employment would be terminated by the Respondent.

26. The court finds that this was not a valid reason to terminate the employment of the claimant. The termination was summary in nature, and without notice or payment in lieu. The claimant was also not paid salary for the days worked nor was he paid terminal benefits due and owing to him at the time.

27. The court finds that the claimant was summarily dismissed unlawfully and unfairly by the Respondent in violation of Section 36, 41, 43 and 45 of the Employment Act, 2007.

ISSUE III.

28. The third issue for determination is whether the claimant is entitled to the reliefs sought.

COMPENSATION

29. Having found that the claimant was summarily dismissed from work unlawfully and unfairly, the court finds that the claimant is entitled to compensation in terms of Section 49 (1) (c) as read with Sub-Section (4) of the Act.

30. In this respect, the claimant had served the Respondent for only sixteen (16) months. His employment was unceremoniously dismissed for having dared to sue the former employer. This is ironical coming from a firm of advocates whose core function is to render legal service to clients.

31. The claimant received no arrear salary, nor payment in lieu of notice and suffered loss and damage.

32. The court awards the claimant five (5) months salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. 50,000/-.

NOTICE PAY

33. Having been summarily dismissed with no notice, the claimant is entitled to payment of Kshs. 10,000/- in lieu of one month notice.

GRATUITY

34. The Respondent regarded claimant as a temporary employee and so did not make NSSF and NHIF payments on his behalf. The claimant is entitled to payment of gratuity for the (16) months months served in terms of Section 35 (5) as read with Section 35 (6) of the Act calculated at 15 days salary for each completed year of service in the sum of Kshs. 15,000/- and is awarded accordingly.

LEAVE PAY

35. The claimant is entitled to and is awarded leave pay for the (16) months months period served in the sum of Kshs. 16,000/-.

NHIF CONTRIBUTIONS

36. The Respondent did not make NHIF contributions for the claimant for 16 months at Kshs. 160/- per month. The court awards the claimant Kshs. 2,560/- in respect thereof.

HOUSE ALLOWANCE

37. The claim for house allowance has not been proved and is dismissed. Similarly the claims for alleged under payments are also dismissed.

38. In the final analysis judgment is entered in favour of the claimant as against the Respondent as follows:-

(i). Kshs. 50,000/- compensation

(ii). Kshs. 10,000/- Notice pay

(iii). Kshs. 16,000/- in lieu of leave

(iv). Kshs. 15,000/- gratuity.

(v). Kshs. 2,560/- NHIF contributions.

Total award Kshs. 93,560/-

(vi). The award is payable with interest at court rates from date of judgment till payment in full in respect of compensation in (i) above and from date of filing suit in respect of the rest of the award.

(vii). The Respondent to provide the claimant with a certificate of service within 30 days of this judgment.

(viii). Costs to follow the result.

Dated at Bungoma this 26th day of January, 2018

HON. MATHEWS NDERI NDUMA , JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA.

In the presence of:-

Claimant in person

Mr. Shovoka for Respondent

Mr. Chrispo Aura – Court clerk.