



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 534 OF 2016

MAGWAMA CHIZAMBO MKAHA.....CLAIMANT

VERSUS

STANDARD ROLLING MILLS LTD.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for unfair termination of employment and refusal to pay terminal dues. The Respondent denies liability for unfair termination and avers that it is the Claimant who voluntarily deserted his employment. The issues for determination are whether the Claimant was unfairly terminated or he voluntarily deserted employment; and whether the claimant is entitled to the reliefs sought.

2. The suit was heard on 23.10.2017 when the Claimant testified as CW1 and the respondent called her Personnel Officer Mr. Jason Laibuta as RW1. Thereafter the Claimant filed written submission.

Claimant's Case

3. The Claimant testified that he was employed by the Respondent on 15.10.2013 as a General Labourer earning Kshs.297 per day. He worked continuously from Monday to Saturday including public holidays until 21.11.2015 when at the day's work the Supervisor told him that the Manager had terminated his services until further notice. He was however never called back to work and he was never paid his terminal dues despite demand. He therefore prayed for the reliefs sought in the suit.

4. On cross-examination he contended that he was a permanent and not a casual employee. He denied alleged absconding and maintained that he was stopped from attending work by the management and told to wait until he was called back. He further maintained that he was never called back until he filed this suit. He admitted that he was not a member of a trade union.

Defence Case

5. RW1 admitted that the claimant was employed by Respondent as a Cleaner but denied that he was working on public holidays. He further denied the alleged unfair termination of the Claimant's employment and averred that it is the Claimant who voluntarily deserted his employment without any reason or prior notice and only heard again from him when he brought this suit. He contended that on 23.12.2016, he called the claimant and talked to him in the presence of the Shop Steward but he refused to resume work until the respondent refunds the lawyer costs of this suit. He maintained that there is a job for the claimant even now.

6. On cross-examination, RW1 admitted that he called the Claimant on 23.12.2016 after receiving demand letter and learning that the Claimant had deserted work. He further admitted that Mr. Hamid is an employee of the respondent but clarified that he works as the Time Clerk responsible for keying in records of the employees attendance. He contended that Mr. Hamid never told him that the Claimant had left employment.

Analysis and Determination

7. There is no dispute that the claimant was employed by the respondent as a General Labourer from 15.10.2015 and worked until 21.11.2015. The issues for determination are:

- (a) Whether the claimant was unfairly terminated or he voluntarily deserted his employment.

(b) Whether she is entitled to the reliefs sought.

Unfair Termination or Desertion

8. Under Section 47(5) of the Employment Act, the burden of proving unfair termination of employment is upon the employee who alleges that she was unfairly dismissed. In this case, the Claimant alleges that he was summarily dismissed by the respondent's Supervisor Mr. Hamid on 21.11.2015 when he told him to not to report to work again until he was called back. According to the Claimant, the employer never called back until he filed this suit. He contends that under section 37 of the Act, his casual employment had converted to permanent employment due to the continuous and uninterrupted service. He therefore submitted that his employment was unfairly terminated by the Respondent for no valid reason and without prior hearing as required under section 41 and 45 of the Act.

9. On the other hand, the Respondent alleges that it is the Claimant who voluntarily terminated his employment without prior notice. However, I find that allegation without merits because it is not supported by evidence. The Respondent has not called Mr. Hamid as a witness to deny the Claimant's allegation that he is the one who told him not to report to work the following Monday until he was called back. In my view if the Claimant was lying about Mr. Hamid, nothing was easier than calling him as witness to deny that he told the Claimant not to report back until further notice. The only reasonable presumption from the said default is that calling Mr. Hamid to testify could have prejudiced the defence case. Consequently, I find and hold that the Claimant has proved on a balance of probability that he never deserted work from 21.11.2015 but he was terminated by the Respondent through Supervisor Mr. Hamid on the said date.

10. The question that arises is whether the dismissal was unfair. Under Section 45(2) of the Act, termination of employment by the employer is unfair if he fails to prove that it was not done on valid and fair reason and that it was done after following a fair procedure. In this case, the respondent has not given any evidence herein or in any manner tried to prove and justify the reason for the termination as required by section 41, 43, 45 and 47 of the Act. She has also not proved that she followed a fair procedure before terminating the services of the claimant. Section 41 of the Act requires in mandatory terms that, before the employer terminated the services of his employee on ground of misconduct, physical incapacity or poor performance, the employer must first explain the reason for the intended termination to the employee in a language he understands and in the presence of fellow employee or shop floor union representative of his choice, and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided. Consequently, I find and hold that the termination of the Claimant's employment was unfairly terminated by the Respondent.

11. Although the Claimant started as a casual employee, there is no dispute that he served continuously for over 2 years and under section 37 of the Act his casual employment had converted to a term contract. Under section 37(1), (2) and (3) of the Act, casual employment converts to term contract if the employee is engaged on casual basis for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or is engaged on piece work basis to do a task which cannot reasonably be expected to end within a period or a number of working days amounting in the aggregate of three months or more. The said conversion puts the employee under the protection of the law from unfair termination and guarantees him of terminal benefits and compensation in case of an unfair termination.

Reliefs

12. In view of the finding herein above that the Respondent has not proved and justified the reason for the termination of the Claimant's contract of service and she has also not proved that she followed a fair procedure, I make a declaration that the termination was unfair and unjust as prayed. Under section 49 of the act I award him Kshs.7,722 being one month salary in lieu of notice plus Kshs.46,332 being 6 months' salary as compensation for the unfair termination. In awarding the said compensation, I have considered the fact that the Claimant served the respondent for only two years and that he did not contribute to his termination through proven misconduct.

13. The claim for leave is also awarded as prayed being $Kshs.297 \times 21 \text{ leave days} \times 2 \text{ years} = Kshs.12,474$. However, the claim for overtime and public holidays worked are dismissed for want particulars and evidence.

Disposition

14. For the reasons that the termination was unfair, I enter judgment for the Claimant in the sum of Kshs.54,054 plus costs and interest.

Dated and signed at Nairobi this 18th day of January, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 22nd day of February, 2018

LINNET NDOLO

JUDGE