

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 316 'B' OF 2017

SHADRACK WAMBUA KIVUVA.....CLAIMANT

VERSUS

DICKWAYS CONSTRUCTION COMPANY LTD.....RESPONDENT

JUDGMENT

The Claimant's suit filed on 24th August 2017 seeks to recover from the Respondent for non-payment of terminal dues and compensatory damages. He averred that he was employed by the Respondent as a machine operator commencing October 2013 until April 2017. He pleaded that his salary was Kshs. 12,000/- a month and that he worked diligently for the Respondent until he was denied access into the premises. He thus sought payment of his outstanding benefits which he enumerated as payment in lieu of untaken leave for all the complete years of service, one month in lieu of notice Kshs. 12,000/-, overtime and public holidays worked, 12 months salary as compensation Kshs. 144,000/- as well as costs of the suit plus interest thereon.

2. The Respondent was opposed to the suit and filed a defence 8th November 2017. In it, the Respondent averred that the Claimant was not its employee and that if he was denied access into the premises it was because the Claimant was a trespasser into the Respondent's premises. The Respondent denied that it terminated the Claimant's employment or that the Claimant is entitled to any terminal benefits from the Respondent. The Respondent averred further and/or in the alternative that if at all the Respondent owed the Claimant any benefits or dues, which is denied, then the same was fully paid and the Claimant put to strict proof of all other allegations to the contrary. The Respondent denied the Claimant served a notice of intention to sue as well as jurisdiction of the court. The Respondent thus sought the dismissal of the Claimant's suit with costs to the Respondent.

3. The Claimant testified on 22nd January 2018 and he stated that he was employed by the Respondent as a machine operator. He said that he used to mix concrete for the construction of culverts and roads and that he worked for the Respondent. He testified that he was working along the Kenol-Sagana Road and was at the site when he was informed that there was no work. He stated that he was not given any reason and that the payments were made weekly being Kshs. 3,000/- a week making a monthly total of 12,000/-. He testified that he never went on leave and would wake up at 3.00am to mix bitumen and work till 7.00pm, Monday to Friday. He stated that he worked on some public holidays and that a demand letter was issued to the Respondent by his lawyer.

4. In cross-examination he testified that he was informed by the supervisor that his services were no longer needed. He stated that his supervisors were Mburu and Wycliffe and that his pay was Kshs. 500/- per day making 3,000/- per week. He said they could not determine what time they would up to and at times would work until 8.00pm. He confirmed that he had not specified all the public holidays worked or the hours worked. He stated that he worked in Githurai, Upper Hill, Chiromo and then Kenol-Sagana. He testified that he was transferred from Githurai to Sagana in 2016 in May or thereabout and was not issued with documents by the Respondent. He stated that he was asked for ID and they would key in his details in a computer and at the time he left the Sagana site they left other people marking the road as the other work was complete.

5. In re-exam he testified that he left the Sagana site in April and that road construction was still ongoing. The Respondent called Silas Mwangi Githinji an accountant working with the Respondent. He stated that he had worked with the Respondent for 6 years as a fulltime accountant and that the Respondent deals with construction of roads, buildings and renovations. He testified that the Respondent employs casuals at the various sites the Respondent operates. He was aware of the Kenol-Sagana Road and that the Claimant was employed as a casual in late 2016. He stated that the casuals are hired as and when needed and it is not often that people from Nairobi go all the way to Kenol to work. He said the Respondent hires from the locality and one was free to come and go as they please since it was casual work. He testified that the casuals were paid through Equity Bank as the Respondent no longer transported cash to sites to pay workers. He stated that overtime would be factored in if payable and that the sum of Kshs. 500/- was without any overtime. He testified that the dues were paid weekly and if there was any late payment of wages it would be on Saturday. He said that the Claimant was paid all that he was owed.

6. In cross-examination, he testified that the Respondent was not a very large company and it had accounts staff, HR and that the MD is Joseph Kariuki. He stated that he used to prepare weekly wages for the staff and ensure the payments are effected. He testified that there were records of payment but none were before court and that the site manager at Sagana was Mburu. He stated that he was not the one who told the Claimant that his services were no longer required. He specified that the staff worked from 8.00am to 5.00pm with a tea break and a lunch break and that only the watchman worked at night. He stated that the site manager maintained records on site and the records would be of those who reported at the site each morning. He was referred to a document that had been produced by the Claimant being a letter of recommendation and testified that it was not from Joseph Kamau as the signature was not the one of the managing director of the Respondent. He however did not have a letter from the office to contrast with the one displayed.

7. In re-exam he testified that the foreman at Sagana was Mburu and that the staff could report and work for some days, go and return after some days. He stated that he was conversant with Joseph Kariuki's signature and had worked with him for 7 years full time and 6 years part time and that the signature on the document was not that of Mr. Kariuki. That marked the end of oral testimony.

8. The parties consented to file written submissions and the only submissions on record at time of writing the judgment are the Respondent's submissions filed on 22nd February 2018. The Claimant did not file any per the court record. The Respondent submitted that the Claimant had not been employed as a permanent employee and that he had no contract of service with the Respondent. It was submitted that the Claimant confirmed in his testimony that he was employed on casual basis and that the Claimant's engagement at the Kenol-Sagana road ended after the road was completed. The Respondent was of the view that the Claimant's services automatically terminated after the road works were completed and that the Respondent did not terminate the services of the Claimant. The Respondent cited Section 44 and 45(2) of the Employment Act 2007 in support of the position that the Claimant was not terminated as the Respondent asserts the Claimant was not terminated and that his services automatically came to an end when the job at Kenol-Sagana came to an end. It cited the case of **Everlyne Musimbi Enonda v Jerida Anyonga [2017] eKLR** where the court dismissed a case where the Claimant had not proved her dismissal. The Respondent argued that the Claimant was not entitled to any of the remedies under Section 49 of the Employment Act as no wrongful or unfair termination had been proved. The Respondent cited the case of **Vincent Osoro Onsongo v Lwala Community Alliance [2017] eKLR** where the court found the Claimant in that case had not proved his case. The Respondent thus urged the court to dismiss the Claimant's case with costs.

9. In a claim such as this one, it is incumbent for the Claimant to prove the dismissal was unfair and for the employer to prove that grounds existed for the dismissal. The Claimant testified that he was dismissed by the supervisor, one Mr. Mburu yet on cross-examination he stated that the road project came to an end and he left some staff marking the road. He was a casual employee earning Kshs. 500/- a day making a total of 3,000/- a week and a monthly total of Kshs. 12,000/-. It is clear from the testimony adduced that he was not employed on a contract of service but offered his services on site when there was work. The Claimant also came across as untruthful having presented a document that the Respondent disowned. The Respondent's witness was clear that the signature appearing on the document that was impugned was not that of Joseph Kariuki the MD of the Respondent whom he had worked with for 7 or so years. He was categorical in that and maintained this in examination in chief, in cross-examination and re-examination. The upshot of the foregoing is that the Claimant woefully failed to prove his case on a balance of probabilities. He did not prove a dismissal took place or that there was unfairness in the termination of his contract which ended on the completion of the road. The suit is therefore dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 13th day of March 2018

Nzioki wa Makau

JUDGE