



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2025 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PATRICK AFWANDE MALOBA.....CLAIMANT

-VERSUS-

METAL EQUIPMENT ENGINEERING COMPANY LIMITED.....RESPONDENT

JUDGMENT

By a claim dated and filed on 17th December 2013 the claimant avers that his employment was unfairly and unlawfully terminated by the respondent who also failed to pay his terminal benefits including one month's pay in lieu of notice, leave allowance, service and unpaid salaries. He seeks the following remedies:-

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| (i) One month's salary in lieu of notice | Kshs.16,894/= |
| (ii) Leave allowance | Kshs.16,894/= |
| (iii) Severance pay | Kshs.33,788/= |
| (iv) Service gratuity | Kshs.25,039.50/= |
| (v) One year salary pay for unfair termination | Kshs.197,076/= |
| (vi) Cost of the claim | |
| (vii) Interest on (b), (c), and (d) from the date of filing the claim to its conclusion. | |

The respondent filed a statement of defence denying the averments in the claim. According to the respondent, the claimant was not on regular employment but was engaged on specific welding and metal works as and when the need arose on month to month basis. The respondent attached copies monthly contracts from September 2012 to July 2013.

The respondent avers that the claimant's employment terminated upon the lapse of his contract for the month of July 2013 and that it entered into separate monthly contracts with the claimant from 6th August 2012 to July 2013. It prays for dismissal of the claim with costs on grounds that it is mischievous.

The claimant's case was heard on 7th May 2015 between before Nderi Nduma J and adjourned to 16th July 2015 for defence case when the case was adjourned, as the Judge was unwell. The defence evidence was taken before me on 29th November 2017 after several adjournments. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The claimant testified that he was living in Huruma and doing casual work. He was employed by the respondent in engineering company in February 2012 as a welder on permanent terms and was paid salary monthly at the rate of Kshs.16,900. He was registered as both NSSF and NHIF member. He was dismissed on 31st July 2013. He was called at 12.30 p.m. and told to pack and go. He prayed for remedies as sought in the claim.

Under cross-examination, the claimant testified that he worked continuously. He admitted signing the contracts but denied that he was on a

month to month contract. He stated he worked 6 days every week Monday to Saturday. He did not go on leave for the period he worked.

Respondent's Case

RW1 Eric Odhiambo Ojuang' who testified on behalf of the respondent stated that he is an accountant by profession and works for the respondent as Chief Accountant. He testified that the claimant worked for the respondent in 2013, as a welder on monthly contracts whenever need arose. The claimant was paid leave and house allowance with salary. The claimant was not terminated but his contract came to an end and he was paid all that was due to him including basic pay, house allowance, service pay and leave pay.

Claimant's Submissions

In the written submissions filed on behalf of the claimant it is submitted that the respondent violated Section 44 (2) of the Employment Act as the claimant was terminated without notice and is therefore entitled to the same. It is further submitted that contrary to Section 10 (3) (a) to (e) the claimant was never given an opportunity to be heard and he is entitled to 12 months' salary as compensation for unfair termination. It is further submitted that the claimant is entitled to severance pay and gratuity as prayed. The claimant relied on the case of **Abisalom Ajusa Magomere -Vs- Kenya Nut Company Limited [2014] eKLR**.

Respondent's Submissions

For the respondent it is submitted that the claimant's contract clearly set out the terms, that it was consented to by the claimant in compliance with section 7 and 9 (3) of the Employment Act.

Determination

I have considered the pleadings, evidence adduced in court and submissions. I have further considered the single authority cited by the claimant, which he did not make any reference to and in the submissions.

The issues for determination in my opinion are the following:-

- (i) The date of employment of the claimant.
- (ii) Whether the claimant was on regular or temporary employment was unfairly terminated.
- (iii) Whether the claimant is entitled to the remedies sought.

(i) Date of employment

In both the claim and defence, it is pleaded that the claimant was employed from August 2012 to July 2013. However, in his testimony the claimant stated that he was employed.

Parties are bound by their pleadings and having pleaded that he was employed in August 2012: the court finds and declares August 2012 to be the date of employment of the claimant.

(ii) Nature of Claimant's Employment.

The claimant's position is that he was employed on permanent terms and worked continuously while the respondent states that the claimant was employed on monthly contracts as and when required.

The evidence on record being payslips of the claimant filed by both parties reveal that the claimant worked continuously from August 2012 to July 2013. The respondent's position that the claimant was employed as and when necessary is not supported by its own and the claimant's documents on record.

Section 37 of the Employment Act provides as follows:-

37. Conversion of casual employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee?

(a) works 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

(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 where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 88 of this Act shall apply.

Having worked continuously from August 2012 to July 2013, the claimant's contract was automatically converted to a regular monthly contract and he is entitled to all benefits of a regular employee as provided in section 37.

(iii) Whether the claimant was unfairly terminated.

The claimant testified that he was called at 12.30 p.m. on 31st July 2013 and asked to pack and go. His testimony was not controverted by the testimony of RW1. Under Section 41 and 43 of the Employment Act, an employee is entitled to a hearing before termination and the employer must prove the grounds for termination. The Sections provide as follows:-

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 (2) provides that where either or both Sections 41 and 43 are not complied with the termination of employment is unfair.

Having found that the claimant was by virtue of Section 37 a regular employee and entitled to terms and conditions of service for regular employees, the failure of the respondent to comply with the requirements of sections 41 and 43 made the termination of his employment unfair and I find and declare accordingly.

Remedies

The claimant prayed for notice, leave allowance, severance pay, service gratuity and full compensation of 12 months' salary.

Having found the termination of his employment contracts unfair, the claimant is entitled to one month's salary in lieu of notice in terms of Section 49 (1) (b) as read with section 35 and 36 of the Employment Act. I award him Shs.16,895 being his gross salary as pay in lieu of notice.

The claimant is not entitled to leave allowance (pay in lieu of leave) as the same was paid together with his salary. The claimant is further not entitled to severance pay, as the same is only payable to employees declared redundant which is not the case herein.

The claimant's contract provided for service pay at the rate of 1¹/₄ days per month, which is the same as service gratuity. The same was paid together with his salary and he is therefore not entitled to payment of the same.

Having found that the claimant's employment was unfairly terminated he is entitled to compensation as provided in Section 49 (1) (c). Taking into account the length of his service and the manner in which his employment was terminated as well as all the other factors set out

under section 49 (4) of the Act I award him 3 months' salary as compensation which in my opinion is reasonable in his circumstances. This amounts to Kshs.50,685.

The claimant further prayed for costs and interests from time of termination. I award him costs on the lower scale taking into account the total sum claimed and awarded. The decretal sum in respect of notice shall attract interest from date of filing suit while compensation will attract interest from date of judgment.

DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 13TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE