



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 258 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 20th June, 2018)

KENNEDY KHO KASUU.....CLAIMANT

VERSUS

STEELMAKERS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 3rd February 2015 through the firm of Njogu & Associates Advocates seeking damages for unfair termination, service pay, salary in lieu of notice and certificate of service.
2. He avers that at all material time he was employed by the Respondent Company from the year 2006 to the year 2013 earning Kshs. 545 per day translating to Kshs. 16,350 per month and in or about 2013 his services were terminated without notice and without payment of his terminal dues. He states that during all the time he was employed, he discharged his duties effectively, diligently and satisfactorily.
3. He further avers that the termination was unfair and the Respondent did not follow the laid down procedure and as a result demands damages due to unfair termination equal to 12 months.
4. The Respondent filed their Memorandum of Defence where they denied each and every allegation contained in the Memorandum of Claim and admit that the Claimant was their employee.
5. They further aver that the Claimant was engaged on and off as is characteristic of casual employee and thus deny that the Claimant was unfairly terminated nor that he is entitled to the wages claimed, service pay and salary in lieu of notice. They also deny that they have subjected the claimant to loss and harm as the Claimant has no valid claim in view of this Memorandum of Defence.
6. The Claimant filed a Reply to Respondent's Memorandum of Defence where he denied all averments. He states that the Employment Act is clear on the transition process from the Casual status to Permanent Employment and as such he claims that he has reasonable cause of action and further states that the Respondent's defence does not disclose any defence at all and is mere negation and sham.

Submissions

7. The Claimant filed his submissions where he submits that the statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in Section 47(5) of the Employment Act. He avers that the Respondent did not adhere to the law and as such they unlawfully terminated his services.
8. He also submitted that the Respondents did not justify their grounds of dismissal and no communication was made to him. He contends that Section 43 demands that the employer proves the reasons for the termination, while section 45(2)(a) and (b) require an employer to prove that the reasons for termination were valid and fair. He relied on the case of **George Onyango Akuti Vs G4s Security Services Kenya Ltd [2013] eKLR.**
9. The Respondent filed their submissions where they submit that the Claimant was a casual labourer who was engaged on a daily basis earning Kshs. 545 per day and according to Section 35(1)(a) of the Employment Act it is clear that... *where the contract of service is to pay wages daily, it shall be deemed to be a contract terminable by either party at the close of any day without notice.* It is clear that the claimant's employment was subject to Section 35(1)(a) above and therefore their prayer must fail.

10. They aver that the Claimant did not provide evidence to prove the claim of overtime either in his pleadings or at the hearing. He has not shown any documents to show on which days he worked over the statutory time limits or for what period of time per day.

11. They further aver that this is a claim that where the Claimant has failed the test of Standard of proof and the evidence tendered in support of the claim if any is insufficient to satisfactorily prove the claim. They therefore submit that the Court has no option but to dismiss this claim with costs to the Respondent.

12. I have examined all the evidence and submissions of both parties. The issues for determination are as follows:-

1. Whether the Claimant was a casual or permanent employee of the Respondent.

2. Whether the Claimant was lawfully terminated by the Respondent.

3. What remedies to grant in the circumstances.

13. On the 1st issue, the Claimant told Court that he worked for the Respondent from 2006 to 2013 earning 545/= per day translating to Kshs.16,350/= per month. The Claimant did not exhibit any documents except the demand notice dated 9.12.2014.

14. The Respondents on their part stated that the Claimant was a casual earning Kshs.645/= per day. The Respondents also failed to produce any documents to prove the causal nature of the employment.

15. Section 74 of the Employment Act states that an employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act.

16. Section 79 of Employment Act also provides that:-

“An employer shall keep a register in which the employer shall enter the full name, age, sex, occupation, date of employment, nationality and educational level of each of his employees and a return of employees for each calendar year, ending on 31st December containing such information shall be sent to the Director not later than 31st January of the following year”.

17. The essence of the above provisions is that the employer is bound to keep records of all employees whether casual or permanent. The Respondent indicated that the Claimant was a casual employee. In this respect, the Respondent should have proceeded to provide the employment record indicating the casual nature of this engagement. This was never done. The burden of proving the nature of this engagement rests on the Respondent. The Respondent did not deny engaging the Claimant from 2006. They only said that he was a casual employee.

18. Section 37(1) of Employment Act states as follows:-

“(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”.

19. In this respect if an employee has worked for a period of over 3 months, he ceases to be a casual worker and as such the contention by the Respondent that the Claimant remained a casual worker for 7 years cannot be sustained. I therefore find that the Claimant was a permanent and pensionable employee.

20. In this respect the Claimant was entitled to be issued with an employment letter and also at dismissal or termination, to be informed of the reasons thereto and be accorded a fair hearing process. This was never done.

21. In the circumstances, I find the termination of the Claimant unfair and unjustified as envisaged under Section 45 (2) of the Employment Act.

22. In terms of remedies, I find for the Claimant and award him as follows:-

1. 1 month salary in lieu of notice = 16,350/=.

2. Service pay of 7 years = $1/2 \times 16,350 \times 7 = 57,225/=$.

3. 6 months salary as damages for unfair termination = $6 \times 16,350 = 98,100/=$.

TOTAL = 171,675/=

4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 20th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kimetto holding brief for Okullo for Respondent

Claimant – Absent