



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.214 OF 2015

(Before D. K. N. Marete)

YUSUF A. K BUSIENEL.....CLAIMANT

VERSUS

CANKEN INTERNATIONAL LIMITED.....RESPONDENT

JUDGEMENT

This matter was brought to court by way of a Memorandum of Claim dated 22nd July, 2015. The issues in dispute are therein cited as;

- a. Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the respondent;
- b. Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this memorandum of claim;
- c. Whether the claimant is entitled to an award of certificate of service;
- d. Who should pay costs and interest of the suit;

The respondent in a Reply to Memorandum of claim date 15th September, 2015 denies the claim and prays that it be dismissed with costs.

The claimant's case is that at all material times to this suit, he was employed as a general labourer of the respondent with effect from 1st January, 2008. He earned Kshs.9,024.00 at the time of his unfair termination from employment.

The claimant's further case is that he served with loyalty, diligence and full dedication until the 20th May, 2015 when he was wrongfully, unprocedurally, unfairly and without any legal lawful justification the respondent orally terminated his employment and refused to pay his terminal dues.

The claimants other case is that he was terminated on grounds of absenteeism from work on the dates of 15th and 16th May but alleges that then, he had attended the burial of his sister with permission and authority from Mark, a manager of the respondent. This is further expressed as follows;

6. The claimant further avers that his dismissal was illegal, unfair and/or unlawful and it violates the provisions of section 41(1), 44(4), 43 (20 and 45 (2) of the Employment Act No. 11 of 2007.

7. Section 41(c) of the Employment Act 2007 provides that when an employer intends to dismiss or terminate the employment of an employee from among other reasons misconduct, it must explain to the employee in a language he/she understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant contends that the respondent never explained to him the reasons for intended dismissal.

8. Section 43(1) of the Employment Act obligates the employer to proof reasons for termination of employment failure of which the termination shall be deemed unfair within the meaning of Section 45 of the Employment Act.

Section 45(2) of the Employment Act provides that an unfair termination occurs when the employer fails to proof:

- a. That the reason for the termination is valid;
- b. That the reason for the termination is a fair reason(s)
- c. That the employment was terminated in accordance with fair procedure.

The claimant's submits that the respondent failed to observe the requirements of the above mentioned Section of the Employment in terminating him and therefore his termination was unfair.

9. Section 44 (4) of the Employment Act lists grounds which amount to gross misconduct and which entitles the employer to summarily dismiss an employee; however the same provides that an employee should be given an opportunity to dispute the truthfulness of the accusations leveled against him.

10. The claimant avers that the termination was unfair because the respondent did not act in accordance with justice/Equity thus violated Sections 45 of the Employment Act.

13. It is the claimant's case that the termination was unfair and/or illegal on the following grounds:-

- a. The Respondent did not give the claimant termination notice as required under Section 35 (b) of the Employment Act.
- b. The respondent terminated claimant's employment without following the laid down procedures in the Employment act specifically the procedure laid down in Section 41(1), 43(1), 44(4) and 45 (2) of the Employment Act.
- c. The respondent terminated the claimant's employment without proving that the reason for the termination was valid.
- d. The respondent did not act in accordance with justice/equity in terminating employment contrary to section 45 of the Employment Act.
- e. The Respondent failed to pay the claimant his lawful leave dues to the claimant contrary to Section 28(1) of the Employment Act.
- f. The respondent failed to pay severance pay to the claimant contrary to Section 35 (5) of the Employment Act.
- g. The respondent failed to pay the claimant his 12 months wages for loss of employment as provided under section 15(c) of the Labour Institution Act.
- h. The Respondent failed/neglected to give the claimant certificate of service as required under section 51 of the employment Act.

He prays as follows;

- a. *A declaration that the dismissal was unlawful, unprocedural and unfair in the circumstance the claimant is entitled to compensation as prayed for in paragraph 12 above.*
- b. The sum of Kshs.311,316/- as set out at paragraph 12 above.
- c. Cost of this suit and Interests at court rates from time of filing the suit until payment in full and
- d. A certificate of service as per section 51 of the employment Act.
- e. Any other further and better relief the Honourable Court may deem just and fit to grant.

The respondent's case is one of denial of employment of the claimant. She only posits a case of casual employment on a first come, first serve basis either once or twice a month which would not cause a case of termination of employment. This was at Kshs.300.00 per day.

The matter came for hearing on 24th June, 2016 when the parties testified in favour of their respective cases.

The issues for determination therefore are;

1. Whether there was an employment of the claimant by the respondent.
2. Whether the employment of the claimant by the respondent was casual or permanent?
3. Was the termination of the employment of the claimant wrongful, unfair and unlawful?

4. Is the claimant entitled to the relief sought?

5. Who bears the costs of this claim?

The 1st issue for determination is whether there was an employment of the claimant by the respondent. The respective cases of the parties and their evidence are directive to a case of employment. The bone of contention therefore falls on the 2nd issue as hereunder.

The 2nd issue for determination is whether the employment of the claimant by the respondent was casual or permanent. At the hearing, the claimant testified in reiteration of his case. It was his evidence that his employment was terminated when he took leave to attend a burial for his cousin. He had there before sought permission from his manager, Mark, who allowed his absence.

When he came back from the burial, Mark instructed him to await instructions in two weeks. He went home and came back as instructed only to meet a Mr. Godwill who asked him to leave his gate pass. He further told him that he did not have a job with the respondent. A week later he came back and met the Director, Ahmed who confirmed what Godwill had said.

The claimant further testified that there was no hearing for his case. No notice or a show cause was issued. He produced all documents annexed to his claim – Page 6 – 22 as evidence in support of his case.

The claimant testified that it was not true that he was not an employee of the respondent. His employment is supported by his gate pass. These were annual and renewable in January. He was not a casual employee and this is evidenced by the gate pass. He earned Kshs.9,024.00 and was paid by voucher which he signed every month.

The claimant in evidence denied paragraph 7 – 18 of the defence and testified on their untruthfulness. The respondent did not call him or do any letter. He also denied receipt of the suspension letter dated 11th June, 2015 or even the letter of training. He did not either receive the payment of the annexures by the respondent. He also testified that there were two employees sharing the name Yusuf and further that payments would be made on full names and a signature of the recipient.

The claimant in his examination in chief further testified that he was not paid for notice and neither did he go for leave.

In cross-examination the claimant testified that his job was to arrange and remove loads in the store. A plane landed from Dubai every day.

He further testified that the gate pass is his evidence of employment. It does not indicate any employment status and is the property of Kenya Airports Authority. He further testified that he had no letter of appointment but was employed on a permanent basis from 2008. Again, the card did not indicate the date of issue but only had an expiry date as was the case with all these cards.

On re-examination the claimant testified that gate passes were issued in January and expired on 31st December every year. Casual employees were issued with temporary gate passes.

DW1 – Caroline Chepchumba J. Ngetich testified a case of adoption of the respondents responds dated 15th September 2015 and also a list of documents filed on 15th February, 2016. She prays that this be adopted as defence.

DW 1 further testifies that she knew the claimant as their casual labourer from February, 2008 when the respondents operations started. His duties included offloading cargo from the plane and loading it into lorries for transport to Nairobi. The respondent has one hundred (100) casuals who perform rotational duties. There are two flights a day and the work is not continuous but depended on flight arrivals. A casual labourer cannot therefore be there for a week.

It is her further testimony that the card is for access to the sterile areas of the air port – the air side. This is issued by the Kenya Airport Authority. It is open and issued to casuals and is not indicative of designation. The respondent has another card for her staff. Payment is made per flight.

DW 1 further testified that the claimant was dismissed for failure to attend a training on his work. Attempts to reach and avail him fell on deaf ears. A show cause letter was made and issued to the chairman of casual workers. He refused to accept the same. The claimant did not meet the seven (7) days notice and knew why he was being suspended.

She further testified that casual labourers are not entitled to leave and that the claimant did not have a fixed salary. In circumstances of pay, one casual labourer would receive this and share it with the other nine employees in their shift.

On cross-examination DW 1 testified that the claimant was employed in February, 2008 and terminated on June, 2015. The only documents available for entry is the card which acts as a security pass and was applicable to the claimant. The claimant did not do any other work at the airport.

She also testified knowing Mark who was the Director of the respondent but added that he was not and is not an active director. She did not know what transpired between the two. She further testified that letters dated 15th May, 2015 and 11th June 2015 were issued to George Dalut, chairman, casuals but added that she has no evidence that these were handed over to the claimant who refused to receive them. She further reiterated her evidence that no notice was issued and neither was it necessary. The claimant did not show up for a show cause.

In all, she testified that the reason for termination was failure to attend training.

The claimant submits that he was a permanent employee having worked for the respondent from 1st January, 2008 to 20th May, 2015, a period of over eight continuous years. He cites the following as undisputed facts of this case;

- a. That the claimant worked for the respondent continuously for over 8 years from January, 2008 to 20th May, 2015.
- b. That casual labourer are given letters of less than three months while permanent employees are issued with gate passes which were renewable every year.
- c. That the claimant was paid using vouchers on monthly basis which vouchers are in the custody of the respondent.
- d. That there are no written contracts of employment evidence and issued by the respondent to any of its employees.
- e. It is not in dispute that the claimant was orally employed.
- f. That with casual labourers contracts were terminable after offloading a flight and that a new engagement would come upon arrival of the next flight. This was not the case with the claimant. The claimant was paid on monthly basis and not per flight. Evidence of proving otherwise lies with respondent.
- g. That if the claimant was casual labourer and contract terminable on offloading a flight then the respondent would need not issue suspension letters (Though not received by the claimant) dated 11/6/2015 and 15/5/2015.

He buttresses this position by relying on the authority of section 37 (1) (a) (b) and 3 of the Employment Act, 2007 as follows;

37. (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 with 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.*

(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.

The claimant seeks to rely on sections 8, 9 and 10 of the Employment Act, 2007 in his submission on the oral contract between himself and the respondent as follows;

8 The provisions of this Act shall apply to oral and written contracts

9(2) “An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance to section (3)”

10(7) “If any legal proceeding, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disapproving an alleged term of employment stipulated in the contract shall be on the employer”

The claimant further sought to rely on the authority of **Edward Isedia Mukasia vs. Eldo Supermaket Limited**

Section 10(7) of the Employment Act 2007 binds employers to proof terms of Employment in the event non-production of a written contract of Employment in all legal proceedings.

It is his case that permanent employment ensued by operation of the provisions of section 37 (1) of the Employment Act, 2007 in that the claimant had a stint of eight (8) continuous years of service.

The respondent disputes permanent employment. It is her position that the claimant was a casual employee who was hired in shifts and on a need basis. She further denies the validity of the gate pass or card as indicators of permanent employment and avers that these were documents issued by the Kenya Airports Authority and not herself. She had a set of documentation for her permanent employees.

The claimant in his submission casts a shadow on the respondent’s denial of permanent employment in that she had purportedly issued a suspension and show cause letter to the claimant. This to him was an indicator of the permanent nature of the employment. Tempered with a disputed gate pass, this becomes utterly confusing. Why would the respondent choose to pursue disciplinary proceedings on a casual employee? This also remains unanswered.

The claimant takes the benefit of doubt. He scores substantially and on a balance of probabilities takes a case of permanent employment. This is based on an interrogation and analysis of the cases of the two parties. Section 37 (1) of the Employment Act, 2007 applies. I therefore find a case of casual employment and hold as such.

The 3rd issued for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant's case and submission is that his employment was terminated for reasons of absenteeism when he had permission to attend his sister's burial.

45 (4) (b)... that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in termination an employee.

He further sought to rely on the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.
- (b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- (c) That the employer has heard and considered any explanations by the employee or their representative.
- (d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

In the case of **KABENGI MUGO V SYNGENTA EAST AFRICA LIMITED INDUSTRIAL CAUSE NUMBER 1476 OF 2011** where the court held that:-

“The Kenyan employment law no longer accepts the ‘at will doctrine’ whereby an employer can fire employees at will, for any reason or no reason.”

And lastly in the case of **DONALD ODEKE V FIDELITY SECURITY LIMITED INDUSTRIAL CAUSE NUMBER 1998 OF 2011; [2011] LLR 277** the honourable court held that:

“It does not matter what offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair.”

The claimant faults the reason for termination in that DW 1 – the respondents witness testified that she could not confirm what transpired between Mr. Ahmed, Mark and the claimant. In the absence of any evidence to the contrary, the testimony of the claimant remains raw, undisputed and truthful.

Further, it is not disputed that the claimant's employment was terminated on 20th May, 2015 for missing the aviation training course. With the training having taken place on 22nd May instant (see defendants list of documents, dated 8th February, 2016 at No. 3 and 4), the reason that he was terminated for failing to attend this course does not add up. On this date, he had left employment. This adds credence to the fact that the claimant never received the letter dated 11th June, 2015. The termination of the claimant was therefore unfair for want of substantive justification.

The claimant further faults and submits a case of procedural unfairness in that the respondent disregarded all disciplinary process in his case. There was no notice to show cause, invitation to disciplinary hearing or even a hearing. This was not disputed even in the evidence of DW1 – the respondent's witness. Overall, this was an affront to section 41 of the Employment Act, 2007 which provides for substantive and procedural fairness in cases of termination of employment. I therefore find a case of unlawful termination of employment and hold as such.

The 4th issue for determination is whether the claimant entitled to the relief sought. He is. Having won on a case of unlawful termination of employment.

I am therefore inclined to allow the claim and order relief as follows;

- i. A declaration that the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful.
- ii. One (1) months salary in lieu of noticeKshs.9,024.00
- iii. Six (6) months salary as compensation for unlawful termination of employment = Kshs.9,024.00 x 6 months =Kshs.54,144.00
- Total of claimKshs.63,168.00**
- iv. The costs of this claim shall be borne by the respondent.
- v. The costs of the claim be and are hereby assessed at Kshs.60,000.00

Delivered, dated and signed this 12th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.
2. Mr. Akenga instructed by Akenga Kimutai & Associates Advocates for the respondent.