



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.6 OF 2018

FRANCIS MWEMA KAMAUCLAIMANT

VERSUS

CHINA RAILWAY NO.10 GROUP CO. LTD.....RESPONDENT

JUDGEMENT

1. On 19th January, 2018 the claimant filed the Memorandum of Claim and served the respondent company with the same on 25th January, 2018. The respondent accepted service by acknowledging the same and the Process Server, James Gitau has filed returns to this effect.
2. There was no appearance by the respondent; there is no defence or attendance herein. The hearing proceeded by formal proof in accordance with Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.
3. The claimant was in September, 2016 employed by the respondent as a casual labourer and held the same position until his dismissal on 30th March, 2017. The claimant reported to work and was directed to the office to collect his dues. The claimant took it that he was due to be allocated more work at a different site but was shocked to be dismissed from his employment. He protested the move as he had not been issued with notice or given reasons for termination of employment. The termination of employment was not procedural and was unfair.
5. The claimant was earning Kshs.411.00 per day for the entire duration of his employment with the respondent.
5. The claim is for;
 - b. Service pay at Kshs.6,165.00;
 - b. Notice pay Kshs.12,330.00;
 - c. Compensation Kshs.147,960.00; and
 - d. Leave allowance Kshs.2, 466.00.
6. The claimant is also seeking for his costs.
7. The claimant also testified in support to his claim and has also filed his statement. Upon employment he was allocated work and which he performed diligently from September, 2016 to March, 2017 when he was dismissed without notice or being given reasons. When he followed for his terminal dues, these were not paid to him. despite demand and notice being issued to the respondents, they have failed to oblige. The matter was reported to the County Labour Officer who summoned the respondent but the respondent has failed to attend.
8. The failure by an employer to attend proceedings of this nature once served with pleadings, the failure to respond herein and file the required work records has left the court with only the claimant's case. From the returns filed herein, it is evident that on 25th January, 2018 the respondent was served with the pleadings herein, but has opted not to attend and participate in the proceedings.
9. Section 9 of the Employment Act, 2007 requires an employer to issue an employee with a written contract of employment even where the same is commenced orally. Upon such employment, a written contract of employment must be issued latest within two months of employment as required under section 10 of the Act.

10. Where the employer chooses not to issue an employment contract, the employee remains on casual terms for a long period, and then by application of section 37 of the Employment Act, 2007 such an employee converts to a full time employee. The law provides that;

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.

11. By application of the law such an employee who enjoys casual employment for a period in the aggregate is equivalent to not less than one month and the employee continues to perform work which is continuous and not expected to be completed within the period, then the rights in the Act, apply to the employee as set out under section 37 (4) as follows;

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.

12. Where the claimant remained in the employment of the respondent from September, 2016 to March, 2017 a period of 6 months in continuous service, the rights and benefits applicable to an employee under the Act, applied to him. without any challenge to the claims made, the circumstances set out in the claim that there was no notice or reasons given by the respondent as the employer when the claimant was terminated in his employment; such amounted to unfairness in accordance with section 45 of the Employment Act, 2007.

13. Notice pay is due to the claimant on the basis that his employment was terminated without notice. Such is awarded in accordance with section 35 of the Act, at Kshs.12, 330.00.

14. Leave allowance is also due in accordance with section 28 of the Act for the 6 months in service and this is computed and awarded at Kshs.2, 466.00.

15. The claimant testified that upon his dismissal from employment he was called to the office and paid his wages. This was not clarified as to the nature of payments made. Putting this into account, compensation for unfair termination of employment is awarded at one (1) months' pay all at Kshs.12, 330.00.

16. Service pay in this regard is not due as service was interrupted before one year lapsed.

Accordingly, judgement is entered for the claimant with an award of compunction at Kshs.12, 366.00; notice pay Kshs.12, 366.00; leave pay due Kshs.2, 466.00 all inclusive of costs.

Delivered in open court at Nakuru this 31st day of July, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant.....

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