

The claimant testified that when he started working his salary was paid monthly but later he was paid weekly. He prayed for notice, salary for January and compensation.

Under cross-examination, the claimant stated that he worked as a casual and whenever the respondent had no raw materials he did not work. He was paid for days worked only. He was paid for all days worked in 2015. He could not recall the days he did not work. He was paid shs.21,109 wherever he worked for the whole month. Overtime was not uniform every month. He did not take leave in 2015 and was not paid in lieu.

The claimant stated he was paid some final dues but it was less than he expected. He was paid shs.14,232 on 23rd December 2015 when the company closed for Christmas.

The claimant stated that he worked continuously for 13 months. In January all employees in cutting department where he worked were laid off because of automation. Employees were called in a meeting in December 2015 and told of the lay-off but were not issued with any letters.

For the respondent ELSA ATIENO OKUMU testified that the claimant was employed on 1st December 2014 when he signed a contract for one month ending 31st December 2014. In 2015 the claimant and his colleagues declined to sign contracts and became casuals. He worked to the end of December 2015 when he was paid leave, service and salary. She testified that the respondent clears with all employees at the end of every year so that at the beginning of the year the employees are engaged as new employees.

Elsa testified that the claimant was a member of NSSF. He was paid leave from January to October and had only a leave balance of 2 days. That the claimant took a break in November 2015. She did not have records for leave but stated that the claimant was paid 2 days for 2 months leave being November and December 2015. He was paid Kshs.555 per day. Elsa testified that the claimant did not work in January 2016.

She testified that the claimant was paid all his dues and has no further claim against the respondent.

Under cross examination Elsa stated she was not sure if the claimant was paid leave up to September/October 2015 but her records show that the balance of leave was paid in December 2015. She did not have documents to show any previous payments made to the claimant. She did not have any documents to show that the claimant did not work for 23 days in January 2016. She stated that she is the one who responded to the demand letter from the claimant's advocate in which she stated that the claimant was declared redundant but she had changed the position in her statement. She stated she is not aware about redundancy process.

Claimant's Submissions

In the written submissions filed on behalf of the claimant it is submitted that the respondent's witness had no records to support her averments, that she admitted the claimant was declared redundant and that the procedure under Section 40 of the Employment Act was not complied with.

The claimant relied on the cases of **KENYA AIRWAYS LIMITED -V- AVIATION AND ALLIED WORKERS UNION & 3 OTHERS** in which the court held that before an employer declares employees redundant it must comply with the provisions of Section 40 of the Employment Act. The claimant further relied on the case of **KUDHEIHA -V- THE AGA KHAN UNIVERSITY HOSPITAL NAIROBI** in which the court stated that the provisions of Section 40 are not mechanical and notices must be issued to affected employees.

The claimant further relied on the case of **BANKING INSURANCE AND FINANCE UNION (KENYA) -V- MURATA SACCO SOCIETY LIMITED** in which the court stated that the provisions of Section 40 of the Employment Act are mandatory and omission of any element that is disadvantageous to the employees is inherently unprocedural and unfair.

It is submitted that based on the admission by the respondent's witness the redundancy carried out by the respondent was unlawful, lacked consultation and was therefore invalid. The claimant relied on the case of **HEZBON NGARUIYA WAIGI -V- EQUATORIAL COMMERCIAL BANK LIMITED** in which the court held that consultation is not a one day process and on the case of **GEOFFREY NYABUTI ONGUKO -V- BLOW PANT LIMITED** in which the claimant was awarded compensation and unpaid benefits due to redundancy pleaded by the employer.

Respondent's Submissions

In the respondent's submission it is admitted that the claimant was employed by the respondent but what is in dispute is the duration and terms of employment. That the claimant was employed on a fixed term contract of one month which expired on 31st December 2014 after which he became a casual employee engaged from time to time as confirmed by the claimant. That the claimant was given oral notice of termination and paid terminal dues in December 2015 and did not work in January 2016, that the claimant did not deny receiving Kshs.14,232 as reflected in respondent's appendix R1. The respondent urges the court to find that there was no leave due to the claimant.

It is submitted that the claimant has not discharged the burden placed upon him under Section 47(5) of the Employment Act of proving that this employment was unfair.

On compensation the respondent relied on the case of **GEORGE ONYANGO AKUTI -V- G4S SECURITY SERVICES KENYA LIMITED** in which the court held that awards under Section 49(c) of the Employment Act are discretionary and declined to grant the same. The respondent further relied on the case of **SARAH WANYAGA MUCIRI -V- RT. REV. BISHOP HENRY KATHII & ANOTHER** where the claimant was awarded 6 months' compensation even though she had worked for 22 years.

The respondent prayed that should the court award compensation it should take into account the fact that the claimant had received his final dues including pay in lieu of notice. The respondent urged the court to dismiss the claim.

Determination

I have considered the pleadings, viva voce evidence and submissions by the parties. I have also considered the authorities and the law cited. The issues for determination are in my view the following –

- i. Whether or not the claimant was a casual employee
- ii. Whether or not the claimant was declared redundant.
- iii. Whether the claimant is entitled to the remedies sought.

1. Was the claimant a casual employee or not?

Casual employee is defined in section 2 of the Employment Act as follows –

“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;

Section 37(1) of the Employment Act provides for automatic conversion of casual employment by operation of the law as follows –

37. Conversion of causal 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 87 of this Act shall apply.

There are a lot of inconsistencies on the continuity of the claimant’s employment after 31st December 2014 but both the claimant and Elsa agreed that the claimant worked continuously for more than one month with the claimant stating he worked up to January 2016 while Elsa at one point stated the claimant worked up to October and took a break in November 2015 and again that the claimant worked up to December 2015.

Taking into account the NSSF statement filed by the respondent which reflects payments of NSSF up to December 2015, I am persuaded that the claimant was in continuous employment from 1st December 2014 to 31st December 2015, a period of 13 months. He was therefore not a casual employee at any time, having started off with a one month fixed term contract and thereafter having been paid on weekly basis as admitted by the respondent.

2. Whether the claimant was declared redundant

Both the claimant and the respondent were in agreement that the claimant’s employment ceased because the respondent automated the machines in the cutting department in which the claimant was engaged. The respondent’s response to the demand letter by the claimant’s counsel confirmed the redundancy. The attempt by RW1 Elsa to retract this position is clearly an afterthought that is not borne by the facts as stated by both herself and the claimant in their testimony.

I therefore find that the claimant was declared redundant. The redundancy however did not comply with the provisions of Section 40(1) of the Employment Act which require notification of the employee and the Labour Officer at least a month before the redundancy and payment of termination notice in addition. Refer to Section 40(1)(a), (b) and(f).

40. Termination on account of redundancy

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c)

(d)

(e)

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

The redundancy was therefore unlawful and thus constituted unlawful termination of employment.

Remedies

The claimant did not work in the month of January 2016 and is not entitled to salary for January 2016 as prayed. He is entitled to one month's salary in lieu of notice. He is also entitled to pay in lieu of leave for the 13 months that he worked for the respondent. Having found that he was declared redundant without compliance with the provisions of both Section 40 (1) and (f), he is entitled to one month's salary as compensation for the one month notification period that he was not paid. The duration of his employment being only 13 months and taking into account that I have awarded him both notice and pay the notification period of one month under Section 40(1)(a) as read with 4(1)(b) it would not be justifiable to award the claimant any compensation in addition. I therefore decline to award the same.

Orders

In the final analysis I find that the claimant was declared redundant without compliance with the statutory provisions for redundancy and award him the following –

1. One month's salary in lieu of notice Kshs.15,540 based on 28 days salary as provided under Section 35(1)(c) of Employment Act and daily wage of Kshs.555 per day as submitted by the respondent.
2. 22.75 days leave for 13 months worked shs.12,626.25.
3. One month's salary in lieu of notification under Section 40(1) and (2) Kshs.15,540.
4. The claimant is entitled to a certification of service and the respondent is directed to issue the same to him
5. The respondent shall pay the claimant's costs for this suit.
6. The decretal sum shall attract interest at court rates.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE