



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 579 OF 2016

BETWEEN

CHARLES ODHIAMBO ODUOR.....CLAIMANT

VERSUS

JOHN ROBERT SCOT CHATWIN.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munyao, Muthama & Kashindi Advocates for the Claimant

Cootow & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 4th August 2016. He states he was employed by the Respondent as a Home Guard between April 2007 and December 2014. He guarded Respondent's house at Nyali, Mombasa. He worked for 7 days in a week. He worked excess hours without compensation. In December 2014, the Claimant was informed by the Respondent, through word of mouth, that there was no more work for him. He earned a salary of Kshs. 8,000 as of the date of termination. He worked for 7 years and asks the Court to find that his contract had been converted to regular employment under Section 37 of the Employment Act, as of time of termination. He urges the Court to find termination was unfair, and grant him Judgment against the Respondent in the following terms:-

a) Declaration that due to long and continuous service, the Claimant's position at the Respondent's workplace had been converted to that of term contract by virtue of Section 37[1] of the Employment Act 2007.

b) Declaration that termination was unfair and unlawful.

c) 12 months' salary in compensation for unfair termination at Kshs. 96,000.

d) N.S.S.F contributions for the months of May 2010, August, September and October 2013 at Kshs. 1,600.

Total...Kshs. 115,600.

e) Certificate of Service to issue.

f) Costs.

g) Interest.

h) Any other suitable relief.

2. The Respondent filed his Statement of Response on 9th September 2016. He concedes to have employed the Claimant as a Home Guard, on the date, and at the premises indicated in the Claim. The Respondent's Daughter took over her Father's residence in December 2014. She took over all the Domestic Employees including the Claimant. The Respondent did not terminate Claimant's contract of employment. The Respondent had notified all Employees about the changes. In January 2015, the Claimant left the residence without notice, taking away with him Respondent's furniture. All statutory contributions to N.S.S.F were remitted.

3. The Claimant filed Reply to the Statement of Response on 25th January 2016. He contests the assertion that the Respondent's Daughter took over the residence in December 2014. A document titled 'Final Payment' shows the Respondent was still paying Claimant's salary as of 31st December 2014. The Claimant states he left employment after the Respondent unlawfully declared Claimant's position redundant. N.S.S.F Statement of Accounts shows the Respondent failed to remit contributions as pleaded by the Claimant.

4. The Claimant gave evidence, and rested his case on 28th September 2017. Respondent's Son-in-Law, Craig Edgar Michael Cleave, Respondent's former Gardener Maziya Kalama Lewa, Guard Jacob Garama Kazungu and Welder Handerson Maghanga Mwaita, all gave evidence for the Respondent on 19th February 2018, bringing the hearing to a close.

5. The Claimant adopted his Witness Statement in his oral evidence, which is a replica of his Statement of Claim, whose contents are highlighted at paragraph 1 above. Cross-examined, he disagreed that he performed other chores other than guarding. He was told by the Respondent that there was no more work. The Claimant worked at Night. There was no Day Guard. He did not work from 31st December 2014. He was made to sign acknowledgment for payment of a sum of Kshs. 27,000. His salary was Kshs. 8,000. He was paid bonus of Kshs. 8,000. Other Employees were also affected by the diminished work. He testified on redirection that he was paid salary for December 2014. He was paid leaving loyalty bonus. This was not notice pay. The contributions said to have been paid to N.S.S.F did not reflect in the Statement of Accounts.

6. Cleave told the Court he moved to his Father-in-Law's premises, in 2014. The Claimant was employed by the Cleave's Father-in-Law, the Respondent herein, as a Guard. He was to continue working as a Gardener from January 2015. He worked for 3 days and left. Cleave offered the Claimant a written contract. The Claimant did not take it. Cross-examined, Cleave told the Court that the Claimant was employed by the Respondent as a Guard. He was offered the role of a Gardener by Cleave after the Respondent moved out of the residence. It was agreed the Claimant would become a Gardener. The agreement was reached in the presence of other Employees. The draft contract of employment offered by Cleave to the Claimant was not availed to the Court. The change in Claimant's job description was not communicated to the Labour Office. Cleave's Wife was stated at paragraph 3 of the Statement of Response, to have taken over the premises. Cleave was involved by virtue of his being Son-in-Law to the Respondent. The Cleaves came with another Guard from their previous residence. Other Employees who included Nancy and Charles were present when Cleave offered the Claimant the position of a Gardener.

7. Lewa confirmed that the Claimant was a Guard, and Nancy a Househelp at the Respondent's residence. He left both at work when he retired after working for 8 years. The Employees were to continue working for Respondent's Son-in-Law Cleave. Lewa told the Court there was a meeting in September 2014, involving him, the Respondent, Nancy and Charles. It was agreed the Claimant would continue serving as a Gardener.

8. Kazungu confirmed that Cleave moved to his Father-in-Law's premises in Nyali. Kazungu worked for Cleave. The Claimant was a Guard at the Respondent's residence. Kazungu was to take over guarding. It was agreed the Claimant would become a Gardener. The Claimant told Kazungu that the Claimant wished to live outside the residence. The Claimant later came to the premises with a rickshaw and carted away his household goods. He did not return to the premises.

9. Mwaita testified that the Respondent has a Workshop, in which Mwaita worked as a Welder. The Claimant told Mwaita that the Claimant could not work with Cleave. Mwaita later found the Claimant working as a Caretaker at Our Lady of Fatimah, Kongowea Mombasa. Cross-examined, he testified that he was employed by Cleave, not by the Respondent. Cleave moved to the Respondent's residence around December 2014. The Claimant was to work for Cleave as a Gardener.

The Court Finds:-

10. The Claimant was employed by the Respondent as a Guard in the year 2007. He worked at the Respondent's residence in Nyali Mombasa.

11. Evidence presented by both Parties before the Court shows there was a change at the Respondent's residence, at the end of the year 2014. His residence was to be taken over by his Daughter, Mrs. Cleave.

12. The Cleaves had their own Guard, who would continue to discharge guarding role at their new home. Employees, who served under the Respondent, would continue to work for the Cleaves. The Claimant could not however continue working in the same role, as there was another Guard who came in with the Cleaves. He was offered gardening role.

13. He did not accept this role as can be read in the evidence of Kazungu and Mwaita. The Claimant told Kazungu he wished to live outside the residence. He returned to the residence and carted away his household goods. He did not return to the residence. The Claimant expressly told Mwaita he did not wish to work for Cleave. Mwaita later found the Claimant working as a Caretaker for another Employer. In the view of the Court, the Claimant did not accept the position of a Gardener which was on offer from the Cleaves. He declined to continue working at the residence and left.

14. His contract was not terminated by the Respondent. Termination cannot therefore be declared to have been unfair. It was self-induced. The Court has not seen any evidence to suggest that the Claimant was a Casual Employee. It is pointless to declare that conversion took place to regular terms under Section 37 of the Employment Act 2007. The prayers for notice pay and compensation for unfair termination are not merited. The Claimant furthermore signed the document titled 'Final Payment,' acknowledging the sum of Kshs. 24,800 as his full and final

settlement.

15. The Provisional Member Statement of Accounts exhibited by the Claimant from N.S.S.F indicates the Respondent did not remit contributions for the 4 months in question. These are statutory payments due to the N.S.S.F which should be forwarded to the N.S.S.F. The deductions were lawfully made, and should not revert to the Employee if unremitted. Refund to the Claimant would be justified if it was shown deductions were unlawfully made. The Respondent shall ensure these contributions are remitted. The Claimant is at liberty to follow up payment under the N.S.S.F enforcement regime.

16. ***Certificate of Service to issue under Section 51 of the Employment Act.***

17. No order on the costs.

IN SUM, IT IS ORDERED:-

a) Prayers 19 [a] [b] and [c] of the Statement of Claim are rejected.

b) Certificate of Service to issue.

c) No order on the costs.

Dated and delivered at Mombasa this 28th day of September, 2018.

James Rika

Judge