



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1927 OF 2011

FRANCIS MURANJA MAINA..... CLAIMANT

VERSUS

BENORI GUARD SERVICES LIMITED..... RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 17.11.2011 alleging that he was employed by the respondent as a casual employee from 5.8.2006 and worked continuously until 15.7.2010 when his services were unfairly terminated by the respondent. His duties were that of guarding and he was being paid Kshs.100 which according to him was an underpayment because his rightful salary ought to have been Ksh.4,291 per month. He prayed for Kshs.207,134 made up of one month salary in lieu of notice, Accrued leave for 4 years, House Allowance arrears, public holidays worked, weekly rest days, service gratuity, underpayment and Damages for unfair termination.

2. The respondent admitted that she employed the claimant on casual basis but denied that there was any intention to retain the claimant on permanent basis. She denied that the claimant was paid a monthly salary and contended that the claimant was being paid on weekly basis due to his casual status. She denied the alleged unfair termination and maintained that the claimant is not entitled to the reliefs sought because he was paid for all the days he worked including public holidays.

3. The main issue for determination is whether the claimant worked continuously on casual basis from 5.8.2006 till 15.7.2010 and whether he was unfairly terminated. The suit was heard on 2.5.2018 when the claimant testified as Cw1 and Ms Faisy Kerubo, the respondent's Manager testified as Rw1. Thereafter both parties filed written submissions which I have carefully considered herein.

Claimant's Case

4. Cw1 testified that he was employed by the respondent as a Security Guard at Gikui Kagema, Murang'a from 5.8.2006. He was issued with an Appointment letter dated 5.8.2006 (Exh.1) stating that he was hired on casual basis from the said date until further notice. Cw1 further testified that he was being paid Kshs.3,000 at the end of each month and he worked continuously for 4 years without going for leave or holidays upto 15.7.2010 when he was verbally told that his job was over.

5. After the termination he was not paid any terminal dues but he was given a Recommendation letter dated 12.5.2010 confirming that he had worked for her as a Security Guard and recommending him to perspective employers.

Defence Case

6. Rw1 confirmed that the Cw1 was employed by the respondent as a casual employee earning Kshs.100 per day payable fortnightly but contended that he was only hired as and when there was work to do. She produced paysheet for May 2008(Exh.01) to show that Cw1 worked for only 4 days and he was paid Kh.100 per day. She however confirmed that Cw1 never signed on the paysheet (exh.D.1). She admitted that Cw1 worked from 2006 to 2010 but not on daily basis because the company had her own security officer.

Analysis and Determination

7. There is no dispute that the claimant worked for the respondent as a Security Guard based at Kagema Murang'a between 5.8.2006 and 15.7.2010 on casual basis. The issue for determination are:

- (a) Whether the claimant worked continuously and converted to permanent employee.

(b) If (a) above is the affirmative, whether the termination of the claimant's services was unfair.

(c) If (b) is affirmed whether the reliefs sought should be granted.

Continuous Service and Conversion

8. The claimant has maintained that he worked continuously even on public holidays and never went for any leave. He produced appointment letter to confirm that he was working continuously and not, as and when required. Rw1 has on the other hand contended that her company had her own security and only engaged Cw1 as and when the need arose. He produced paysheet (Exh.D1) to show that Cw1 worked for only 4 days in May 2008.

9. After careful consideration of the evidence, it is clear that the claimant was given an Appointment letter to serve continuously from 5.8.2006 until further notice. No notice was ever served on the claimant to stop his continuous service. If there was any such notice, Rw1 did not produce it in court. Instead, she produced the paysheet (Exh.D.1) which had been filed by the claimant to prove that he worked 4 days in May 2008. With due respect to Rw1 the said document was not a paysheet for May 2008 but rather paysheet for public holidays worked in 2008 being 1.5.2008, 1.6.2008, 20.10.2008 and 12.12.2008. The agreement to pay for such holidays corroborates the claimant's contention that he used to work continuously even on public holidays. Consequently, I find that the claimant has proved on a balance of probability that he worked for the respondent continuously from 5.8.2006 to 15.7.2010 and by dint of section 37(1)(a) and (3) of the Employment Act and his casual service converted to term contract.

10. The said section provides that where a casual employee:

“(a) Works for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month; the contract of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) of the Act shall apply to the contract of service;

(3) An employee whose contract of service has been converted in accordance with subsection (1), and works continuously for two months or more from the date of he 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.”

Unfair termination

11. The terms and conditions of service contemplated by the foregoing provision includes protection of the law from unfair termination of employment through summary dismissals and unprocedural redundancies in addition to the rightful salary under the law, annual leave, rest days, public holidays and service gratuities or service pay. In this case, the claimant was not served with any prior notice but he was fallaciously treated as a casual yet his services had converted to term contract and placed under protection from abrupt and unfair termination. He was no longer to be discharged without a just cause and without following fair procedure. I therefore make a finding of the fact that the termination of the claimant's service was unfair within the meaning of section 45 of the Employment Act.

Reliefs

12. Under section 49 of the Act, the claimant is awarded one month salary in lieu of notice plus 12 months' salary as compensation for unfair termination of employment contract. The award is grounded on the reason that the claimant served for 4 years without any warning and he never contributed to the termination through misconduct. The award is assessed based on the minimum pay under General Wage Order gazetted in 2010 being Kshs.3597 + 15% house allowance equalling to Kshs.4,136.55.

Disposition

13. For the reason that the claimant's services were unfairly terminated, I enter judgment for him in the sum of Kshs.53,775.15 made up of one month salary in lieu of notice plus 12 months salary compensation for unfair termination. The claimant will also have costs plus interest at court rates from the date hereof. The sum will be paid less statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018

ONESMUS N. MAKAU

JUDGE