

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 198 OF 2017

ISAAC KARIUKI NJUGUNA.....CLAIMANT

VERSUS

PAVAN PUTRA.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent his former employer seeking to recover for alleged unlawful termination of employment. He was employed as a building and construction worker in August 2013 at a basic salary of Kshs. 9,600/- and he averred that he was dismissed on 6th September 2015 by the site manager Mr. Shamji through a mobile telephone call. He averred that prior to the dismissal he was not served with a notice to show cause nor was he served with a reasonable notice to show cause before his services were terminated. He averred that the summary dismissal was unfair, unprocedural and illegal. The Claimant sought payment of his unpaid leave dues, one month's salary in lieu of notice, and underpayment of salary by 93/- a day. He therefore sought payment of general damages for the unlawful dismissal, underpayment of salary by 93/- per day for 26 months – Kshs. 72,540/-, one month's salary in lieu of notice – Kshs. 9,600/-, unpaid leave for 2 years – Kshs. 19,200/- and costs of the suit together with interest at court rates.

2. The Respondent denied that it had employed the Claimant or that the Claimant's contract was terminated at all or that he earned any money from the Respondent as a salary. In the alternative the Respondent averred that the Claimant's contract was an 'if and when needed' basis with no contract of employment in existence and there existed no binding terms thereof. The Claimant filed an amended claim in which he amended the prayer for general damages and replaced it with a prayer for maximum compensation.

3. The Claimant testified that he was employed by the Respondent on 13th August 2013 and worked with Mr. Harish as a mobile and handyman. His services were terminated on 6th September 2015 and that he was stopped by Samji the site foreman who called him on the cellphone and told him not to go to work. He was paid 400/- a day at the time of dismissal having risen from the initial Kshs. 300/- which sum was paid fortnightly. He was cross-examined and testified that he was paid fortnightly and not monthly. He stated that he signed for each payment and the period of salary payment was set by the Respondent. He denied signing the payment vouchers the Respondent had exhibited. He admitted that from the muster roll the Respondent had produced, the document showed that he did not work for 7 days but for 4 days in a week. He stated that he worked for 7 days which he corrected to 6 days and not 4 days. He denied signing the muster roll. He stated that there were vouchers that were signed when payment was received. He confirmed that the Respondent's muster roll was in accord with the payment voucher shown to him earlier indicating payment for 4 days. He testified that he worked for 7 days which he corrected to 6 days and not the 4 days the Respondent indicated. He did not understand how pay for the 2 days was denied. He stated that in his claim he was seeking pay for days worked. He testified that instructions on the work to be done would be given on Saturday and permission to be absent had to be sought from Samji who never issued any leave form. He denied he was the Claimant in cause 446 of 2017 and that he rejected the attempt to represent him and took his claim to the present advocate. In re-examination he testified that the muster rolls produced covered only 2 weeks and not the entire period he worked. He stated that the case was taken to the union and when the union was not forthcoming he went to the present advocate to represent him. He stated that he was only pursuing this claim.

4. The Respondent called Tom Mboya Sidika who testified that he was the site clerk and record keeper. He stated that he paid the staff and ensured safety of equipment at site. He testified that the Claimant would seek work when there was work available and at times he did not present himself for work. There were no restrictions on when the Claimant could come or go and the Claimant was paid for work done. He stated that the Claimant could not be asked why he did not report to work if he did not come to work on any day. He testified that payment was made on Saturday and there was a record on voucher and payroll. He stated that on the muster roll produced, the Claimant's attendance was denoted by a tick and a dash for the days he was absent and the record indicated the days worked which varied from 1 day to 4 days. He denied that the Claimant was dismissed and that on 5th September the Claimant left without completing his assigned tasks and he did not return on 6th September. He testified that this was construction work and there was no other work the Claimant could do as he was unskilled. In cross-examination he stated that the Claimant stopped coming to work on 6th September or thereabout. He denied that the Claimant worked for the Respondent for 2-3 years. He stated that the Claimant was an unskilled worker who used to come to work fairly punctually. He was unaware of any warnings issued to the Claimant and that the work performed was casual work. That marked the end of oral testimony as there was no re-examination.

5. The parties were to file written submissions and only the Claimant filed written submissions. In his submissions, he submitted that he served the Respondent for more than 2 years therefore qualifying as an employee to whom Section 2 of the Employment Act did not apply. He submitted that his contract converted to a monthly contract as he was not a casual worker. The cases of **Elijah Marube Oketch v Endmor Steel Millers Limited [2018] eKLR** and **Leonard Kahuthu Kibue v St. Hannah's Preparatory School & Philip K. Ndehi [2018] eKLR** the court held that the contract was of an indefinite duration. The Claimant submitted that the evidence adduced by the Respondent was not consistent on the separation with the Claimant. He thus urged the court to find in his favour.

6. The Claimant was undoubtedly an employee of the Respondent and worked for some period. His attendance was captured in 2 muster rolls

exhibited. One showed he worked for 6 out of 7 days and the other showed he worked for 4 days. Though the entry against his skills was 'unskilled' the Respondent, it would seem, kept the Claimant on its payroll for long. The Respondent chose to bring only two muster rolls and did not rebut the fact that the Claimant was its employee for 2 years. The Respondent therefore was entitled to give the Claimant notice before termination. He was not accorded the procedural safeguards in Section 41 if his performance was indeed not as required. The Claimant is therefore entitled to recover as follows:-

- a. One month's salary in lieu of notice Kshs. 9,600/-
- b. 3 months salary compensation Kshs. 28,800/-
- c. Costs of the suit
- d. Interest at Court rates on the sums in a) and b) above from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 15th day of November 2018

Nzioki wa Makau

JUDGE