



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 644 OF 2015
CONSOLIDATED WITH
CAUSE NO 645 OF 2016

JILANI SANGA NYAMAWI1ST CLAIMANT

HAMISI RAMADHAN MWISHIMA.....2ND CLAIMANT

VERSUS

STEELMAKERS LTD..... RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the claimants employment contract by the respondent. The respondent has however denied liability for the alleged termination of the claimants employment and prayed for the suit to be dismissed because the claimants were casual employees were lawfully terminated following the shortage of material and after concluding the agreed tasks.

2. The suit was heard on 28.7.2016 when the claimants testified as CW1 and CW2 respectively while the respondent secured the consent of the claimant to dispense with the oral testimony of Mr. Charles Mutinda and instead adopt his written statement dated 19.1.2016. Thereafter both parties filed written submissions.

Claimants' case

3. CW1 (Mr. Jilani Sanga Nyamawi) stated that he was employed by the respondent from May 2008 as a labourer in her Rolling Mill at Mazeras town. That his starting daily wage was Kshs.199 but in February 2013 it was reviewed to Kshs.264. That he was employed as a casual employee but he worked continuous until 23.6.2015 when the Head of Department of the respondent's Rolling Mill dismissed him together with others on ground that the work had become little due to lack of materials.

4. According to CW1, the said termination was unfair because he was not served with a prior notice of

one month, it was without any valid reason and the claimant was not given any hearing before the termination. He therefore prayed for award of the dues and compensation sought in the suit.

5. Cw2 (Mr. Hamisi Ramadhan Mwishina) stated that he was employed by the respondent as a Grinding Machine Operator from July 2004 for daily wage of Kshs.174. that he was employed on casual basis but he worked continuously until September 2013 when the respondent's Personnel Manager Mr. Peter Mani, demanded that he withdraws the case he had sued the respondent for damages arising from work injury and when he refused to head the demand, Mr. Mani dismissed him and ordered him out of the work place.

6. CW2 contended that the termination his employment was unfair because it was done without service of one month notice, it was also done for no valid reason and without first giving him a hearing. He therefore prayed terminal dues and compensation as computed in the suit papers.

Defence case.

7. Mr. Charles Mutinda admitted that the claimants were employed by the respondent as casual employees but he denied that they worked continuously. According to him the claimants were hired on day to day basis depending on the availability of work and as such it was hard to give them any formal contract of employment. Mr. Mutinda further stated that the termination of the claimants was lawful and as such no compensation is warranted because the claimants were given the requisite notice following the shortage of material and after they concluded the agreed duties. He contended that the claimants were not entitled to the claim for one month notice before termination or to any annual leave because they never worked continuously for 12 consecutive months. He further contended that the claimants were not entitled to payment of any gratuity as prayed.

Analysis and Determination

8. There is no dispute that the first claimant worked as casual employee for the respondent between May 2008 and June 2013 while the second claimant worked for the respondent also as a casual employee from July 2004 to September 2013. The issues for determination are:-

(a) Whether the claimants contract of service was terminable without notice.

(b) Whether the termination of the claimants contracts of employment by the respondent was unfair.

(c) Whether claimants are entitled to the reliefs sought.

Protection from sudden termination

9. The claimants have contended that although they were casual employees, they worked continuously and without any interruption and as such they were entitled to protection of the Law from termination without notice. The respondent has on the other hand contended that the claimants were just casual employees on hire as when the need arose and as such no notice was required before terminating their services. She relied on Section 35(1) (a) of the Employment Act which provides that a contract of casual employment is terminable by either party at the close of any day without notice.

10. I have carefully considered the evidence placed before the court and observed that the respondent has not denied the fact that the claimants worked for her over a long period of time. That although she alleged that the claimants never worked continuously as they alleged, she never produced any evidence in the form of Payrolls, Attendance registers or even Biometric data or any other form of evidence to support her case.

11. Under Section 10 (7) of the Employment Act, in proceedings like this, the employer has the burden of disproving, using employment records, any term of the contract of employment alleged verbally by his

employee. In this case the claimants have contended that they had converted to regular term contract by dint Section 35(1) (a) of the Act after working continuously for many days. The employer is therefore enjoined to produce employment records of the claimants to disprove the allegation of continuous service. Failure to do so can only be interpreted to mean that the said records contains evidence that is favourable to the claimants and prejudicial to her.

12. For the foregoing reason, I find and hold that the claimants worked for the respondent continuously for over a one month and as such their casual employment converted to regular terms contracts as provided under Section 35(1) (c) of the Act. The effect of the said conversion was that the claimants contract of services became protected from any termination without prior notice of 28 days in writing.

Unfair termination

13. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if the employer fails to prove that it was grounded on valid and fair reason(s) and that it was done after following a fair reason. In this case the reason was redundancy of the claimants positions due to lack of material according to the evidence from both sides. In addition the second claimant contended he was dismissed because he refused to withdraw a case he had sued the respondent. The procedure followed was summary termination on the respondent's mistaken belief that the claimants were casual employees who were terminable without notice.

14. After considering the evidence and the submissions, I find, that the dismissal of the claimants on account of redundancy due to lack of materials was a fair reason by dint of Section 45(2) (b) (ii) of the Act because it related to the operational requirement of the respondent. It is however out rightly unfair under Section 46(h) of the Act to dismiss the second claimant on ground that he had sued the respondent to recover compensation for injuries suffered while on duty. In addition it was unfair for terminating the claimants service on account of redundancy without following the procedure provided under Section 40 of the Act which require in mandatory terms that before terminating the employee's employment on account of redundancy, the employer shall serve the employee and the Labour Officer with one month prior notice in writing, followed by a fair selection of the affected employees and thereafter pay them one month salary in lieu of notice, accrued employment benefits plus severance pay.

15. The default to comply with the mandatory procedure provided under Section 40 of the Act, the termination of the claimants employment on account of redundancy due to lack of material was unfair.

Reliefs

16. Under Section 49(1) of the Act, the claimants are entitled to one month salary in lieu of notice. In addition the claimants are each awarded six months gross pay as compensation for unfair termination. In awarding the said compensation, I have considered the fact that the claimants had worked for fairly long period and also the fact that they did not contribute to their termination through misconduct.

17. The claimants are further awarded service pay at rate of 15 days pay for each completed year of service. The reason for this award being that the claimants were not beneficiaries of NSSF or any other Pension or Gratuity Scheme.

18. The claim for salary under payment and accrued leave are dismissed for lack of particulars and evidence. There is no particulars provided to show the amount payable for different years worked because the pleadings show that the salary was not static. In addition, no evidence and submissions were led to show that the daily wages paid were below the minimum gazette by the Government.

19. Finally the prayer for Certificate of Service is granted because it is a right given to every employee under Section 51 of the Employment Act.

20. The financial awards to the claimants is summarized as follows based on their daily wages multiplied by 30 days.

Jilan Sanga Nyamawi (1st claimant)

Notice.....kshs. 7,920.00

Compensation.....kshs.47,520.00

Service Pay (5 years).....kshs.22,846.15

78,286.15

Hamisi Ramadhan Mwishima (2nd claimant)

Notice.....kshs.13,740.00

Compensation..... kshs.84,440.00

Service Pay (9 years).....kshs.71,342.30

169,522.30

Disposition

21. For the reasons stated above, I enter judgment for the claimants in the aggregate sum of **kshs.247,808.45** plus costs and interest. They will also have Certificate of Service.

Signed, dated and delivered at Mombasa this 20th day of January, 2017.

O.N. MAKAU

JUDGE