



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 54 OF 2016
KIMILU MUNYWOKI.....CLAIMANT
VS
ELEPHANT STEEL INDUSTRIES LTD.....RESPONDENT
JUDGMENT

Introduction

1. The claimant brought this suit on 4.2.2016 claiming for terminal benefits plus compensation for unfair termination of his employment by the respondent on 7.11.2015. It is the claimant's case that he was terminated for no lawful cause and without following a fair procedure.
2. The respondent has denied the claim for the dues and compensation sought and avers that the claimant was employed on casual basis as and only when the need arose. It is also the defence case that the claimant cannot invoke the provisions of the Employment Act for the period he was not in employment.
3. The suit came up for hearing on 5.10.2016 when the parties agreed to adopt their respective pleadings, witness statements and documentary evidence and proceeded to file written submissions to dispose of the suit.

Claimant's case

4. The claimant filed his witness statement together with his suit on 4.2.2016. He stated that he was employed by the respondent as Chain Link Machine Operator on 1.1.2015. His salary was Kshs.500 per day which according to him was below the minimum wage prescribed by the law. He nevertheless worked continuously until 7.11.2015 when at the end of the days work he and other workers were told by their supervisor, one Mr. Anthony, not to report back to work until they were called back. That he complied with the directions from the supervisor but no call came from the employer and he concluded that he had been terminated.
5. He then served a letter through his lawyer demanding payment of his terminal compensation for unfair termination but no response was given and instead the respondent send some employees to ask him to report back to work.

Respondent's case

6. The respondent filed a witness statement from her supervisor Mr. Anthony Kimanthi Muoka. The

witness stated that the respondent engages casual employees from time to time depending on the workload. That the casuals recruited are picked from the group of people who camp outside the respondent's premises. That once a casual employee is hired, he works for 5 days and the wages are paid at the end of the week at the rate of Kshs.500 per day.

7. He denied that the claimant was employed on 1.1.2015 and contended that the claimant was employed from July 2015. He produced copies of work attendance register and payroll for the period July 2015 to 24.12.2015 to support the defence case.

Analysis and determination

8. There is no dispute that the claimant was employed by the respondent as a casual employee in the year 2015 on daily wage of Kshs.500.

9. The issues for determination are:

- a. **Whether the claimant worked for the respondent between 1.1.2015 and 7.11.2015 or between July 2015 and 24.12.2015.**
- b. **Whether the claimant's employees converted from casual to regular terms contract.**
- c. **Whether the claimant's employment contract was unfair terminated by the respondent.**
- d. **Whether the reliefs sought should be granted.**

Employment period

10. The claimant produced no documentary evidence or called any witness to support his contention that he joined the respondent on 1.1.2015 and left on 7.11.2015. The respondent has on the other hand not produced the Attendance Registers and Payroll or any other employment register to dispose the claimant's overall allegation that he was employed from 1.1.2015. Instead the respondent produced the said Register and payroll for July to December 2015. Although the defence alleges that the claimant joined her in July 2015, his name is nowhere in the said register and payroll for July 2015.

11. After careful consideration of the evidence presented to the court, I find on a balance of probability that the claimant joined the respondent from January 2015. The reason for the foregoing view is that the respondent has not discharged her burden under section 10(7) of the Employment Act which require that all proceeding like this, the employer must disprove by employment records, the verbal allegations made by his employee about the terms of his employment contract.

12. The issue of commencement date could easily be proved by employment records. The records produced by the respondent are not covering the whole period which the claimant alleged to have worked for her. Instead he brought documents covering the only period she alleged that the claimant worked for her. That, even the documents she produced did not support her case that the commencement date was July 2015. Consequently find and hold that the claimant was employed by the respondent from January 2015 and not July 2015.

13. As regards the termination date, the claimant alleged verbally that he worked until 7.11.2015 when at the end of the day, the Supervisor told him not to report to work again until further notice. The Supervisor (defence witness herein) has not denied that he told the claimant not to report back to work until further notice. His witness statement has also not explained how and when the claimant stopped working for the respondent.

14. After considering all the material before the court, I find in favour of the claimant that his service was terminated from 7.11.2015 by the Supervisor Mr. Antony Muoka. The foregoing finding is supported by not only the fact that Supervisor did not deny the alleged termination on 7.11.2015, but also by the payroll

and the attendance register for November 2015 which show that the claimant was absent from work from 8.11.2015.

Conversion from Casual to Regular terms contract

15. In view of the finding above that the claimant worked for the respondent continuously from January to November 2015, which is over ten months, I find and hold that his employment contract had converted to regular terms contract within the meaning of Section 37 of the Employment Act Sub section (1) of the said provision stated that a casual employee who works for a period or a number of continuous days amounting to one month and above, his contract shall convert to a regular term contract, only terminable with notice of 28 days in writing or payment of salary in lieu of the said notice.

Unfair termination

16. In view of the foregoing finding that the claimant's contract had converted from casual to regular terms contract, under Section 35 of the Act, his contract could not be terminated without a notice in writing for at least 28 days. In addition the termination could not be done without a valid and fair reason and without following a fair procedure.

17. In this case the claimant has discharged his burden under Section 45(5) of the Act by providing that the termination of his employment was done without prior notice, for no good cause and without any prior fair hearing as required under Section 41 read with Section 45(2) of the said Act.

18. On the other hand, I find that the respondent has not discharged his burden of proving and justifying the reason for terminating the claimant's contract as required by Section 43,45(2) (a) and (b) and Section 47(5) of the Act. Additionally, the respondent has also failed to prove that he followed a fair procedure before terminating the claimant's employment contract. Consequently, I find and hold that the termination of the claimant's employment contract by the respondent on 7.11.2015 was unfair.

Reliefs

19. Under section 49(1) and (4) of the Employment Act, I award the claimant Kshs.13,000 being one month salary in lieu of notice plus Kshs.39,000 being 3 months compensation for unfair termination. In awarding the said compensation, I have considered the short period served by the claimant and the probability of not getting an alternative employment within that period of 3 months.

Leave and Public holidays

20. The claimant worked for 10 months which translates to 17.5 leave days earned on pro rata basis equaling to kshs.8,750. The claim for Public holidays worked is dismissed for want of particulars and evidence.

Salary underpayment

21. This claim is also dismissed for want of particulars and evidence. The witness statement by the claimant has said nothing about that prayer. He has annexed to his claim, a copy of the General Wage Order for 1.5.2015 to support the allegation of underpayment of his salary. There is however no particulars of the period of the underpayment and the amount of the underpayment either per day or month.

Disposition

22. For the reasons stated above I enter judgment to the claimant declaring the termination of his employment contract unfair and awarding him **kshs.60,750** plus costs and interest.

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

O.N. MAKAU

JUDGE