



REPUBLIC OF KENYA
 IN THE EMPLOYMENT AND LABOUR
 RELATIONS COURT AT MOMBASA
 CAUSE NUMBER 162 OF 2015

BETWEEN

SHANGA KITSAO MUMBA CLAIMANT

VERSUS

MABATI ROLLING MILLS RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

Njeru & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 25th March 2015. He states he was employed by the Respondent as a Machine Operator on 6th April 2010, on a daily wage of Kshs. 432. He worked until 20th June 2014 when the Respondent terminated his contract of employment. He feels termination was unfair and unlawful, and prays for the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 11, 232.
 - b) Annual leave pay for the 4 years worked at Kshs. 36,288.
 - c) 11 Public Holidays worked at Kshs. 38,016.
 - d) House allowance at Kshs. 80,870.
 - e) Service pay at Kshs. 25,920.
 - f) 12 months' salary in compensation for unfair termination at Kshs. 134,784.
- Total..... Kshs. 327,110.

- g) A declaration that termination was unfair.
- h) Certificate of Service to issue.
- i) Costs and Interest.
- j) Any other suitable relief.

2. The Respondent filed its Statement of Reply on 19th May 2015. Its position is that the Claimant was employed on short term contracts whenever the opportunity presented itself. He was paid Kshs. 432 per day. His last contract expired, and was not renewed. It was not terminated by the Respondent as alleged in the Claim. He did not work for 4 years. He was not entitled to terminal benefits as he was on short term contracts. The Respondent calls upon the Court to dismiss the Claim, with costs to the Respondent.

3. Parties recorded a consent order on 11th July 2016, to have the dispute considered and determined on the strength of the record. They confirmed filing of Closing Submissions on 20th September 2016.

Claimant's Case

4. The Claimant submits he reported to work on 20th June 2014. He was paid his dues for the week and asked not to report to work again by the Company Secretary. He was dismissed on account of unavailability of his Kenya Certificate of Secondary Education [KCSE]. He had informed the Respondent on recruitment that he did not hold the KCSE. He disclosed he was not a Form 4 Leaver. He had worked for 4 years without being asked for this Certificate.

5. He was not given notice before termination. He did not have any warning. He was not heard. He was not paid terminal dues. Termination was against the protections afforded to Employees under Principles of Natural Justice, Sections 35, 41, 43, 45 and 49 of the Employment Act and International Labour Organization [ILO] Convention on Termination of Employment of 1982.

6. Although employed on casual terms, he qualified conversion into regular employment under Section 37 of the Employment Act. The Respondent did not prove the terms of employment it alleged the Claimant worked under, as required by Section 10 [7] of the Employment Act. Not a single short term contract was availed to the Court. No employment records with details of the Claimant were availed to the Court as required under Section 74 [1] of the Employment Act 2007. The law places the responsibility of documenting an employment relationship on the Employer, as concluded **in Francis Maina Kamau v. Lee Construction [2014] e-KLR**. In the absence of documents from the Respondent disproving the position taken by the Claimant, the Court ought to uphold the Claimant's position.

7. The Claimant submits he has shown his contract was unfairly terminated and he merits the prayers sought.

Respondent's Case

8. The Respondent submits the Claimant did not provide any documents showing his contract was terminated by the Respondent. He did not supply the Court with a termination letter. He worked as a Casual Employee. He did not work for 4 years. The N.S.S.F Statements attached to the Statement of Claim do not show the Claimant was employed by the Respondent. It is impossible the Claimant would work for almost 5 years, and fail to have a single document showing he worked for the Respondent for that period.

9. In **Cause Number 1840 of 2015 between Nicholas Kipkemoi Korir v. Hatari Security Guards Limited** it was held he who alleges must prove, and the standard of proof in all Civil Claims is on the balance of probability. Section 47 [5] of the Employment Act 2007 requires the Employee to show unfair or unlawful termination has occurred, while the burden of justifying termination lies with the Employer. The

Court would have to speculate to grant the prayers sought. The Respondent prays the Court to dismiss the Claim with costs.

The Court Finds:-

10. Parties agree the Claimant was employed by the Respondent as a Machine Operator, earning a daily wage of Kshs. 432. They agree he left employment on 20th June 2014. They do not agree on the period worked. They do not agree on the nature of employment- whether it was regular or irregular employment. They do not agree whether the contract was terminated by the Respondent, unfairly, unlawfully or otherwise. The Claimant relies on the decision in **Francis Maina Kamau v. Lee Construction [2014] e-KLR** in urging the Court to find, it is the responsibility of the Employer to document the employment relationship. The Respondent relies on decision in **Nicholas Kipkemoi Korir v. Hatari Security Guards Limited** where the Court found the Employee must prove unfair and/or unlawful termination has taken place. It is not enough for the Employee to make allegations on oath or pleadings. The Employee must avail some form of documentation.

11. Both decisions belong to the Employment and Labour Relations Court of Kenya.

12. The 2nd decision however related to situation where the employment relationship had not been shown to exist at all. The Claim was undefended, but the Court held the Claimant had, as a minimum, to show he was in an employment relationship with the Respondent.

13. In the current situation, Parties agree they were in an employment relationship. It is the nature of the relationship they are unable to agree on. In resolving their disagreement, the most applicable and relevant decision is the first case of **Francis Maina Kamau**. In issue is the question of the terms and conditions of employment, not whether there was an employment relationship.

14. The decision correctly interpreted Sections 10 [7] and 74[1] of the Employment Act 2007. It is the obligation of the Employer to supply the Court with written records disproving what the Employee alleges to comprise his terms and conditions of employment. The Respondent alleges the Claimant was employed on short term contracts which did not run for 4 years the Claimant alleges to have worked. No short term contracts were provided to the Court. It is not correct under this law to demand the Claimant proves he worked for 4 years. The date when employment commences, and when it lapses; the period of employment; are terms of employment. They are to be documented and shown to the Court, by the Employer. The Court has in the past stated Employment and Labour Relations Claims are not in strict sense Civil Claims, where he who alleges must prove. This is so with regard to terms of employment under Section 10 [7] of the Employment Act, as well as Sexual Discrimination and Harassment Claims under Sections 4, 5 and 6 of the Employment Act. The law recognizes employment records are ordinarily in the custody of Employers, and Employers frequently engage Employees by word of mouth, frequently leaving the employment relationship undocumented. It would be foolish to demand therefore, that an Employee produces documents which may not exist. The Respondent should have provided the Court with the Casual Register, Pay Rolls, and Pay Slips etc. It was for the Respondent to show through employment records, that the terms alleged by the Claimant, were not the terms and conditions under which he served.

15. The Court is satisfied the Claimant was employed initially on casual employment. He worked for 4 years, and merited conversion into regular terms under Section 37 of the Employment Act. The Court has the discretion under this law to deem the Claimant to have worked on regular terms, and avail to the Claimant the whole gamut of the benefits available to regular Employees under the Act.

16. As a regular Employee, was his contract terminated by the Respondent lawfully and fairly? He states he reported to work on 20th June 2014. He was paid his dues for the week, and told not to report to work again, by the Company Secretary. The Respondent states it did not terminate the Claimant's contract. As stated above, the Respondent did not avail to the Court any contract. There was no contract expiring 20th June 2014, produced before the Court. The Respondent vacillated between short term contracts and casual engagement. In either case, the Court is satisfied, without speculating, that the Claimant merited

conversion into regular employment; the Respondent terminated the Claimant's contract; and refused to continue employing him, ostensibly on the ground that the Claimant did not have a form 4 Certificate. This was a fresh demand, not made on recruitment. The Claimant had worked for 4 years. It was irrational to demand he provides form 4 Certificate, while he did not hold one, and while this was known from the inception by the Respondent. He was not heard, given notice before termination. He showed through his Submissions, Pleadings and Witness Statement- all accepted consensually as part of the record- that his contract was unfairly terminated by the Respondent. He satisfied the provision of Section 47 [5] of the Employment Act. The Respondent did not justify termination under this law and under Section 43 and 45 of the Act. Fair procedure under Section 41 was disregarded.

17. Termination was unfair. ***The Claimant is granted the equivalent of 7 months' wages in compensation for unfair termination at Kshs. 78,624.***

18. ***He is granted 1 month wages in lieu of notice at Kshs. 11,232.***

19. The Respondent appears not to have allowed the Claimant to enjoy his annual leave entitlement. Its position is that the Claimant was in casual employment, not allowed the ordinary benefits due to regular Employees under the Act. The Court has concluded the Claimant merited conversion, and deserves the benefits available to regular Employees under the Act. ***He is allowed annual leave pay for 4 years at 21 days per years, amounting to Kshs. 36,288.***

20. The prayer for Public Holidays worked was too generalized. The days are not named. The mode of computing holiday pay is not shown. Similarly the prayer for house allowance is weak. The Claimant was paid a daily wage, which under the relevant Wage Order, seems to have comprised the housing element. These 2 prayers are not persuasively claimed and are rejected.

21. Lastly the Claimant exhibited N.S.S.F Statements showing he was actively subscribed to the Fund. He does not merit the prayer for years of service under Section 35 [6] of the Employment Act. ***The Respondent shall release to the Claimant his Certificate of Service, as required under Section 51 of the Employment Act 2007.*** Parties shall meet their costs of the Claim.

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: 7 months' wages in compensation for unfair termination at Kshs. 78,624; 1 month wages in lieu of notice at Kshs. 11,232; and annual leave pay at Kshs. 36,288- total Kshs. 126,144.

c) Certificate of Service to issue.

d) No order on the costs and interest.

Dated and delivered at Mombasa this 17th day of February, 2017.

James Rika

Judge