



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE 583 OF 2015

EMMANUEL MUSEMBI NTHAMBI.....CLAIMANT

VERSUS

TAMAR WIRE PRODUCTS LTD..... RESPONDENT

J U D G M E N T

Introduction

- 1) The claimant was employed by the respondent as a Machine Operator on casual basis on 2.1.2011 and worked continuously until 1.12.2014. According to him, his casual employment had converted to regular contract of employment under the law and as such he was protected from unfair termination. On the said 1.12. 2014, the respondent converted his service to periodic contract which was renewed until June 2015 when it lapsed. The claimant was offended and brought this suit on July 2015 claiming terminal dues plus compensation for unfair termination of his initial contract of service by the respondent on 2.12.2014.
- 2) The respondent has admitted that he employed the claimant in 2011 and on 1.12.2014 converted his service to fixed term contract which ran upto 2.6.2015. It is the defence case that claimant contract lapsed automatically by affluxion of time and as such no damages are payable for the alleged unfair termination.
- 3) The suit was disposed by written submissions on the strength of the parties' respective record.

Analysis and Determination

4) There is no dispute that from 2011 to 30.11.2014 the claimant was employed by the respondent as a machine operator on casual basis. There is also no dispute that from 1.12.2014, the respondent gave a written fixed term contract to the claimant which he signed and henceforth worked as a fixed term contract employee until 2.6.2015 when the contract lapsed by affluxion of time. The issues for determination are:-

- a. Whether the respondent unfairly terminated the claimant's employment contract on 2.12.2014.
- b. Whether the reliefs sought ought to issue.

Unfair Termination

5) The burden of unfair termination under section 47(5) of the Employment Act is on the employee who alleges that he was unfairly dismissed. In this case the claimant has stated in his written testimony that

the worked for the respondent continuously as a casual employee from January 2011 till 1.12.2014 when he was terminated. By then he had worked for a total of 3 years and 11 months. That as a result of the said long service as a casual, his contract had converted from casual to permanent employee. That during his service he was promoted to the position of supervisor. After termination the claimant was paid Kshs. 26850 as his terminal dues for the period served between January 2011 and December 2014.

6) The respondents HR Manager Mr. Osman Yakub stated in his written testimony that the claimant was employed from 2011 to 2014 when his services changed to contract basis. The respondent produced as exhibit letter dated 1.12.2014 which gave one month notice to the claimant that the nature of his contract would be converted to fixed term contract effective 1.12.2014. She also produced as exhibits copies of the fixed term contract which were signed between the claimant and respondent on 1.12.2014 and 2.3.2015.

7) After careful consideration of the evidence and the submission before the court, I find on balance of probability that claimant's original contract of employment was ended by a mutual agreement between the parties. The reason for the foregoing view is that, the claimant never protested the conversion of his employment contract to fixed term contracts. In deed he signed the fixed term contracts willingly and continued to work and earn salary under such arrangement for six months thereafter. He is therefore not sincere when he alleges that he was terminated unfairly without any reason or service of prior notice.

8) He was given the reason as new policy to convert casual staff to fixed term contracts and he was given one month notice in writing. He has not contested any of the exhibits filed by the defence and therefore the allegation of unfair termination is dismissed. It is my considered view that when parties to a contract agrees to averred the terms of the contract in writing, none of the parties can succeed in any law suit based on the allegation that the variation of the said terms of contract was done unfairly unless he can prove that the variation of the contract was founded on any, or all known vitiating factors. Consequently the answer to the first question herein is in the negative.

Reliefs

9) In view of the finding that the termination of the original contract was not unfair but done through mutual agreement and preceded by one month notice, I dismiss the claim for salary in lieu of notice and compensation for unfair termination.

10) Likewise the claim for under payment is dismissed for lack of evidence. The claimant was employed at Mazeras in Kilifi County and according to the defence, the wages paid to the claimant were within the provisions of the Wage order. The claimant has not denied that he was based in Mazeras in Kilifi County. The burden of proving underpayment is on the claimant who alleges underpayment. The said burden has not been discharged on a balance of probability.

Outstanding Leave

11) The Claimant alleged that he never went for his annual leave from January 2011 to 2.12.2014 equaling to 3 years and 11 months which translates to 82.25 leave days on prorate basis. He was paid cash for 59.5 days on 15.1.2015. The cash in lieu of 82.25 leave days is Kshs. 28471.15 less Kshs. 17800 paid on 15.1.2015 leaving a net of Kshs. 10671.15 which I hereby award to the claimant.

12) The claimant has also prayed for service pay for the same period. He alleged that although he was registered with the NSSF, the employer never remitted NSSF dues. The respondent has not adduced any evidence to prove the contrary. I therefore award the claimant service pay for 4 years at the conventional rate of 15 days per year of service. I award him Kshs. 18,000 less Kshs. 9000 paid as 2 years' service on 15.1.2015. The net is Kshs. 9000 which I award to the claimant.

13) In addition, I award the claimant a certificate of service as prayed because it is his right under section 51 of the Act and the respondent has not objected to the prayer.

Disposition

14) For the reason that the claimant's employment was not unfairly terminated, the suit is dismissed save for the award of Kshs. 19,671.15 explained herein above. The said award will attract interest at court's rate from 1.12.2014 till payment in full.

Signed, Dated and Delivered at Mombasa this 28th April 2017

ONESMUS MAKAU

JUDGE