



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 14 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PASCAL AMBEYI AMUKOYACLAIMANT

-VERSUS-

KRIMIR CRAFTRESPONDENT

JUDGMENT

By his undated Memorandum of Claim filed in court on 6th February 2014 the Claimant avers that he was employed by the Respondent in July 2012 as a general worker at a monthly basic salary of Kshs. 7200. His employment was terminated on 6th August 2013. He alleges that the termination was unfair because the Respondent did not give him an opportunity to defend himself.

The Claimant states that on 11th September 2013 he wrote a letter to the respondent demanding payment of his terminal dues after confirming the amount due from the Ministry of Labour but the Respondent failed to respond. He sent a reminder on 3rd October 2013 but the Respondent persisted in the refusal to respond or pay thus compelling him to file this suit after sending a final reminder on 24th October 2013.

The Claimant prays for judgment against the Respondent as follows:-

1. Pay in lieu of notice	Kshs. 15,408
2. Leave due	Kshs. 11,684.40
3. Service 1 year	Kshs. 7,704.00
4. Underpayments	Kshs. 72196.80
5. Compensation for unfair termination	Kshs 184,896.00
Total Claim	Kshs.291,889.20

He further prays that the court grants any other relief the court may deem fit to grant including costs of the suit.

The Respondent filed a Statement of Defence denying the averments in the Claim and specifically that the Claimant was paid Kshs. 7,200 per month or that he was employed in July 2012. The Respondent further denies that the Claimant is entitled to the remedies sought and prays that the Claim be dismissed with costs.

The Respondent attached a copy of a hand written schedule in which it is recorded that the Claimant worked on the following dates:

Date Employed 27th October 2012 (6 days)

Nov. 2012	26 days
Dec 2012	24 days
Jan 2013	18 days
Feb 2013	14 days
March 2013	21 days
April 2013	21 days
May 2013	26 days
June 2013	26 days
July 2013	26 days
August 2013	25 days
September 2013	6 days

The case was heard on 27th October 2016 in the absence of the Respondent after the court certified that the Respondent was properly served with hearing notice and an affidavit of service filed in court.

The Claimant testified that he lives in Eldoret and is a casual labourer. He testified that on 1st July 2012 he went to look for work at Krimir where he met a man of Asian origin by the name Kanti. Kanti interviewed him then gave him work to do. He did sandpaper and varnish. He was then employed. He worked for one-and-a-half years.

He testified that on 6th August 2013 he reported for work as usual. At 5pm Kanti started calling the workers one by one. When it was the Claimant's turn, Kanti told him to remove his working clothes and not to report to work the following day. When he asked why, Kanti responded that it was not his mother's place. The Claimant went home and the following day reported to the Labour Office at Eldoret. The Labour Officer worked out his terminal dues as claimed in his Memorandum of Claim which he presented to the Respondent who refused to pay. He reported back to the Labour Officer who advised him to go to court.

The Claimant testified that he wrote demand letters to the Respondent on 3rd October 2013, but there was no response.

The Claimant testified that he was not employed in July as alleged in the Statement of Defence. He testified that Irene Mugo who wrote the statement filed with the Statement of Defence was the Respondent's secretary. The Claimant testified that he was earning Kshs. 7200 per month.

The Claimant prayed for orders as prayed for in the memorandum of Claim. He testified that he was not a member of NSSF and NHIF.

In the submissions filed on behalf of the Claimant by Ms. Soita instructed by Mwakio Kirwa & Co. advocates for the Claimant, it is submitted that there existed an oral employment contract of employment between the Claimant and the respondent and that the contract was unfairly terminated by the

Respondent who further refused to pay terminal dues as tabulated by the Labour Officer, Eldoret. It was submitted that the termination of employment was unfair both substantively for want of valid reason and procedurally for want of fair procedure.

The Claimant relied on section 41 and 45 of the Employment Act and on the following cases:

Walter Ogal Anuro V Teachers Service Commission [2013]eKLR in which the court held that for termination of employment to pass the fairness test there must be both substantive and procedural fairness.

Alphonse Machanga Mwachanya v Operation 680 Limited [2013]eKLR in which the court summarised the fairness requirements of set out in section 41 of the Employment Act as follow:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

The Claimant further relied on the case of **Nicholus Muasya Kyula v Farmchem Limited Industrial Court Cause no. 1992 of 2011** where the court held that

"It is not sufficient for the employer to make allegations against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at."

The Claimant also relied on the case of **Kabengi Mugo v Syngenta East Africa Limited Industrial Court Cause No. 1476 of 2011** where the Court held that -

"The Kenyan employment law no longer accepts the 'at will doctrine' whereby an employer can fire employees at will, for any reason or no reason."

The Claimant also relied on the case of **Donald Odeke v Fidelity Security Limited Industrial Court Cause No. 1998 of 2011** where the Court held that-

"It does not matter what offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair."

It is submitted the failure by the Respondent to attend court to defend its case and the late filing of a defence consisting of general denials are admissions of allegations by the Claimant.

Determination

I have considered the pleadings and evidence on record as well as the written submissions and authorities cited by the Claimant.

The Respondent does not deny that the Claimant was its employee. All it denies is that he worked for the period he alleges in the Memorandum of Claim and the prayers sought. The Respondent alleges that the Claimant was a casual employee. However the fact that the Respondent did not attend court for hearing and has not moved the court even after being served with submissions of the Claimant may well be

construed to mean that the Respondent has no cogent defence to the claim. Be that as it may, section 47(5) requires that the Claimant proves his case.

The issues for determination in my opinion are the following:

1. Whether the claimant was a casual as alleged by the Respondent in the defence;
2. Whether the Claimant's employment was terminated unfairly by the Respondent; and,
3. If the Claimant is entitled to the remedies sought.

Was the Claimant a casual employee

The Respondent stated that the Claimant was a casual labourer earning a salary of Kshs. 1800 per month. By the Respondent's own admission, the Claimant worked continuously from October 2012 to September 2013. Section 37 of the Employment Act provides as follows with respect to casual employment-

37. Conversion of causal employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.

Having worked continuously for longer than one month, the claimant's terms of employment converted by operation of the law to regular employment as provided in section 37. He was thus not a casual employee.

Was the Claimant's employment unfairly terminated

The Respondent denied that the Claimant's employment was terminated but did not state how he left employment. This leaves only the claimant's evidence for consideration by the court. It was the

Claimant's evidence that he was called by Kanti and told to leave and not report back to work. This is unfair termination as there was no compliance with section 41 of the Act which gives the procedure for termination of employment, and section 43 which provides for giving of valid reasons for termination of employment.

I therefore find that the termination of the Claimant's employment was valid.

What remedies are the Claimant is entitled to

The Claimant is entitled to pay in lieu of notice, having been terminated without notice. He is also entitled to annual leave having worked for more than two months. The Claimant is also entitled to service pay in accordance with section 35(5) as read with 35(6) of the Act, and to compensation for unfair termination.

It is however not clear what the claimant's salary was for purposes of ascertaining whether he was underpaid or not. According to the Respondent the Claimant was paid kshs. 1800 per month but according to the Claimant's tabulation he was paid Kshs. 300 per day and Kshs. 7200 per month.

The daily wages of a general Labourer in Eldoret (under Municipalities) in the Regulation of Wages and Conditions of Employment (General) Order 2012, was 379.40 while the monthly basic minimum wage was Sh. 7915.90 with 15% house allowance making a total of Kshs.9103.30. Assuming the Claimant was paid Kshs. 7200 as he claims then he was underpaid by Kshs. 1903.30. He was therefore underpaid by Kshs.22839.60 for the 12 months that he worked for the Respondent from October 2012 to September 2013. I award her the said sum of **Kshs. 22839.60.**

I therefore award the Claimant the following:

1. Pay in lieu of notice Kshs. 9103.30
2. 21 days annual leave Kshs. 6372.30
3. 1 Years service pay Kshs. 4551.65
4. 12 months underpayments Kshs.22,839.60

5. Compensation: In view of the fact that the claimant worked for only 12 months and taking into account all relevant factors I award him 2 months salary as compensation for unfair termination in the sum of Kshs. 18206.60.

6. The Respondent shall also pay Claimant's costs. The decretal sum shall attract interest at court rates from date of judgment.

Orders accordingly.

Dated, Signed and Delivered this 4th day of May, 2017

MAUREEN ONYANGO

JUDGE