



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 326 OF 2016

BETWEEN

SAMUEL OCHIENG' OGEDA.....CLAIMANT

VERSUS

DOSHI ENTERPRISES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

C.B. Gor & Gor Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 22nd April 2016. He states he was employed by the Respondent Company, between 24th April 1997 and 7th October 2013, as a Fitter General Artisan Grade 1. At all material times he was paid according to the scale applicable to Artisan Grade 2, which resulted in cumulative underpayment of wages. His contract was terminated by the Respondent without just cause and/or notice. He was locked out the workplace by the Respondent around 6th and 7th October 2013, with the Security Guards advised not to let him in. He states, termination was unfair and prays for Judgment against the Respondent for the following:-

- a. 1 month salary in lieu of notice at Kshs. 27,612.
- b. Service pay at Kshs. 267,624.
- c. Annual leave pay for the period 1997 – 2013 at Kshs. 379,348.
- d. Underpayment of wages for 2010- 2013 at Kshs. 150,174.
- e. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 331,344

Total... Kshs. 1,426,912

f. Declaration that termination was unfair and unlawful.

g. Costs, Interest and any other suitable relief.

2. The Respondent filed its Statement of Response on 3rd June 2016. Its position is that the Claimant was its Employee, from 25th April 1997. He worked as a Casual Labourer whenever there was work for him to do. He worked for 1,698 days from 1997 to 2013. He supplied the Respondent with a Certificate equivalent to Artisan Grade 2 when he sought employment. He was therefore employed as such, and not underpaid. He deserted employment. The Respondent notified Mombasa County Labour Office about desertion. He had been offered contract renewal on 1st October 2013. He declined to sign the contract and left employment of his own volition. He was paid all dues on leaving employment. The Claimant signed a certificate on receiving the first installment of terminal dues, expressing his willingness to settle the Claim in full. There is no dispute between the Parties. He is not entitled to the prayers sought.

3. Parties were heard and closed their respective cases, on 9th December 2016. The Claimant gave evidence as did Respondent's Head of Production Samson Odingo Kodero and Human Resources Officer George Omondi Ong'any. The matter was last mentioned on 10th February 2017 when Parties confirmed the filing of their Submissions and Judgment set down for delivery.

4. The Claimant restated he was employed by the Respondent as Artisan Grade 2, while he held Certificate for Grade 1. He was underpaid. He was on casual employment from 1997 to 2012. He was later placed on fixed term contracts. He had demanded to be employed on permanent terms. He demanded to be paid in accordance with the correct grade. The Works Manager advised the anomaly would be remedied. The Respondent kept promising, but nothing was done. Subsequently, the Respondent offered to place the Claimant on another fixed term contract. He was in the end offered terminal dues at Kshs. 53,000. It was based on a rate lower than paid to a General Labourer.

5. Cross-examined, the Claimant testified that his contract was terminated by the Respondent. Security Guards were asked to lock him out. He was on fixed term contracts from the year 2009. The contracts were for 3 months. There was no break between the contracts. He worked in continuity. He was paid under Grade 2. His contracts did not state he was Grade 1. N.S.S.F contributions were remitted. The Claimant did not recall going on annual leave. It is true he was offered a last contract which he declined. He wanted to be employed on permanent terms. He clarified on redirection that he worked for 13 years and 8 months on casual terms and 2 years 9 months on contract. N.S.S.F contributions were not remitted for the period he was in casual employment.

6. Samson Odingo Kodero told the Court the Claimant worked from 1997, initially as a Casual Employee. He was a Fitter General. He was offered 3 months' contracts from around 2009. If there was insufficient work, he was taken in on casual terms. He worked up to October 2013. He was offered fresh contract. Other Employees were offered fresh contracts. They accepted fresh terms and signed. The Claimant refused to sign, insisting he should be offered permanent employment. He deserted. The fresh contract which he rejected is Respondent's annexure 4.

7. Kodero testified on cross-examination that the Claimant held Certificate of Upgrading of Scale dated 1983, and Grade Test Certificate dated 1988. He held both documents at the time he was employed. Odingo did not know the rate paid to the Claimant. The Respondent did not call the Claimant after he allegedly deserted.

8. Ong'any confirmed the Claimant worked for the Respondent from 1997. He worked irregularly. He was offered fixed term contracts, whenever there was sufficient work, and reverted to casual engagement when there was little work. He was lastly offered a fixed term contract which he declined to execute, insisting he wished to be employed on permanent terms. He returned to the workplace later, when Parties agreed on payable terminal dues. He signed Certificate of Final Dues in the presence of his Union Shop Steward. N.S.S.F contributions were remitted. He was paid a rate which fitted his profile, and in accordance with the Certificate he presented. Annual leave was utilized at the end of each contract period,

or paid for in cash.

9. The Human Resources Officer told the Court on cross-examination that the Respondent did not avail Claimant's annual leave records in Court. He would be expected to bring his most recent qualification documents to the Employer. The Grade Certificate was most recent document. Service pay was included in the amount offered to the Claimant by the Respondent. It was not indicated to be based on any number of days. The same omission applied to the computation of annual leave.

The Court Finds:-

10. There is evidence the Claimant was employed by the Respondent in 1997 as a Fitter General. He was from that year, to around the year 2009, a period of 8 years, employed as a Casual Employee.

11. Thereafter the Respondent offered him fixed term contracts each for a period of 3 months. The Claimant insisted he should be employed on regular terms. He was offered a 6 months' contract commencing 1st October 2013, which he declined.

12. The Court does not think the Claimant is entitled to compensation for unfair termination. He was on a fixed term contract. These contracts had been renewed in the past without fail, and the Claimant would, as of October 2013, have legitimately expected renewal. Renewal was offered, but the Claimant wanted much more than another fixed term contract; he wanted to be permanent and pensionable, to use the common parlance applied in defining Employees on regular contracts. He was not granted his wish, and declined renewal.

13. The Respondent does not appear to have terminated the Claimant's contract, refused to renew the contract, or in any way unfairly terminated the Claimant's contract, so as to be condemned to pay him compensation.

14. Section 37 of the Employment Act 2007 requires where a Casual Employee works for a continuous number of days, which amount in aggregate to the equivalent of not less than a month; or performs work which in aggregate cannot reasonably be completed within a period which amounts in aggregate to 3 months or more, the casual employment is deemed to be one where wages are paid monthly, and section 35[1] [c], which requires at least 28 days' notice of termination becomes, applicable.

15. Section 37 [1] [a] and [b] essentially converts casual employment to regular employment. As shown in provisions that follow, the converted Casual Employee becomes entitled to rest days and public holidays, which are deemed to be part of his continuing service. As the contract is deemed terminable under Section 35 [1] [c], the Casual Employee becomes entitled to notice pay. He also becomes eligible for service pay under Section 35 [5] which applies to contracts terminated under Section 35[1] [c].

16. Section 37 [3] states where the contract has been converted and the Employee works for 2 months or more continuously, he is entitled to terms and conditions which would apply had he not initially been employed as a Casual Employee. This provision affirms conversion, as do other provisions such as Section 37 [4] which confers on this Court jurisdiction to vary terms of casual employment, and in doing so, declare a Casual Employee to be employed on terms consistent with the terms contained in the Employment Act.

17. There was no need for the Claimant to insist on being employed as a Regular Employee; the Law deemed him to be one. The Respondent had fulfilled the requirement of the law on conversion, and there was nothing to be gained by offering the Claimant what he demanded. He had worked for years, and was offered the opportunity to continue working, with the law conferring on him all the benefits, protections and guarantees he would have in an indeterminate contract. His prayer for compensation for unfair termination has no basis and is declined.

18. He is not entitled to notice pay, having walked out employment of his own volition.

19. His pay slips show he was actively subscribed to the N.S.S.F. It is not clear why he seeks gratuity and service pay. He does not state which wage instrument allows him to have gratuity and service pay. He was subscribed to the NS.S.F. He did not avail his N.S.S.F account statements, to assist the Court in considering gratuity and service pay. The Respondent offered him service pay at Kshs. 25,872. While the Claimant did not establish the prayer for service pay, the Court nonetheless does not take away from an Employee, a benefit freely given by the Employer. ***Service pay is granted as offered by the Respondent at Kshs. 25,872.***

20. Annual leave was offered by the Respondent at Kshs. 27,165. It was not indicated this was with regard to which year, in Claimant's 16 years of service. Respondent's Witnesses did not avail any records of annual leave, to show the Claimant took annual leave at the end of each contract, or was compensated, in lieu of leave. The amount offered was not assigned to any leave earning period. He claims annual leave pay from 1997. The Court is not able to grant this prayer as pleaded, particularly as it is indicated the Claimant was not always present at work when on casual employment. The most reasonable computation would be from 27th October 2009, when he was issued a written contract offering him annual leave at 1.75 days for every month worked. This is a period of 48 months which at 1.75 days each month, amounts to 84 days of annual leave. ***Using a daily rate of Kshs. 1,062, annual leave pay is granted at Kshs. 89,208.***

21. There is no doubt the Claimant held National Trade Test Certificate Grade 1. The Certificate is dated 18th August 1988. Would the Claimant fail to show this Certificate to the Respondent for over 16 years? The Court does not think so. This is the Certificate which was most relevant to the work he did for the Respondent. It was there when he was employed. It was his latest Certificate, the Certificate of Upgrading, which the Respondent acknowledges to have known that the Claimant held, having issued in 1983.

22. The Court agrees with the Claimant that the Respondent deliberately ignored his pleas to be paid a wage rate commensurate with his Grade. This was a major grievance in the career of the Claimant. The Respondent should have honoured the demand of minimum wage levels for different Trade Grades, set by the law. The Claimant was underpaid, receiving a rate earned by Grade 2.

23. His prayer for underpayment of wages has merit. He relies on attached Wages Orders, covering the relevant periods. The Wage Orders are not disputed, neither is the computation done on underpayment of wages. ***The prayer is allowed in its totality at Kshs. 150,174.***

IN SUM, IT IS ORDERED:-

a) It is declared the Claimant left employment of his own volition.

b) He is granted service pay at Kshs. 25,872; annual leave pay at Kshs. 89,208; and underpayment of wages at Kshs. 150,174- total Kshs. 265,254.

c) No order on the costs.

d) Interest granted at 14% per annum from the date of Judgment till payment in full.

Dated and delivered at Mombasa this 28th day of June 2017.

James Rika

Judge