



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 676 OF 2015

BETWEEN

LENNOX DZORO GAYA CLAIMANT

VERSUS

AFRICAN MARINE AND GENERAL ENGINEERING CO LTD..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

IRB Mbuya & Company Advocates for the Claimant

Beatrice Opolo Advocate instructed by the Federation of Kenya Employers for the Respondent

JUDGMENT

1. The Claimant states he was employed by the Respondent as a Mason from June 2010, to 14th October 2014. He was paid Kshs. 635 per day, as of the date of termination. He and other Employees were told by Respondent's Assistant Human Resources Manager, not to go back to work as they had lost their jobs. No reason was given explaining to the Claimant why he had lost his job. He prays for Judgment against the Respondent for:-

- a) 1 month pay in lieu of notice at Kshs. 20,775.
- b) Underpayment of wages for 3 years worked at Kshs. 153,550.
- c) Annual leave for 4 years and 4 months at Kshs. 73,435.
- d) Service pay at 15 days' salary for every completed year of service at Kshs. 83, 101.
- e) The equivalent of 12 months' salary in compensation for unfair termination at Kshs. 249,303.
- f) Punitive Damages.
- g) Certificate of Service.

h) Costs, Interest and any other suitable relief.

2. The Respondent filed its Statement of Response on 15th February 2016. Its position is that it employed the Claimant prior to its closure in 1998. He returned and was employed at Respondent's workplace, under an external contractor, in 2012. The external contractor had been engaged by the Respondent. The Claimant worked 5 days a week and was paid Kshs. 635 per day. The Respondent subsequently offered to employ the Claimant, and 3 other persons, following recommendation of its Chairman. The Claimant was asked to avail his academic and professional certificates to facilitate employment. He only produced a copy of Artisan Certificate and a copy of National Identity Card. He was asked to produce originals which he did not have. The number in his identity card did not tally with the number given in the Artisan Certificate. He failed to authenticate the documents. He asked the Respondent to allow him to carry his tools of trade his home, to enable him carry out some repair work at his home. He never returned. It is not true that his contract was terminated by the Respondent on 14th October 2014.

3. The Claimant, and the Assistant Human Resources Officer of the Respondent Wilson Ndolo Muli, gave evidence for the respective Parties on 5th October 2016, when hearing closed. The matter was last mentioned on 13th March 2017 when Parties confirmed filing of their Closing Submissions and Judgment scheduled for delivery.

4. The Claimant told the Court the Respondent dealt in ship repairs. He first worked for the Respondent in 1990-97 as a Mason. He did masonry work in ocean vessels, using cement to repair any cracks in the vessels. He was re-employed in 2010, working up to 2014. His Claim relates to the latter period.

5. He worked 5 days a week at the rate of Kshs. 635 per day. He was not issued with pay slips or written contracts. He holds National Grade Test 3 as shown in a copy of his Certificate issued in 1985. He explained the identity card number in his documents differed because the new card issued in 1996. He never went on annual leave. He was not registered to the National Social Security Fund. He was supposed to be paid about Kshs. 800 per day in accordance with his grade under the Wages Order. He was underpaid.

6. He confirmed on cross-examination that he was employed on 2 separate periods. He was not aware about a Company called Kabiru Construction. He did not know that identity card numbers do not change. He did not work for Kabiru Construction from 2010, which was a Subcontractor of the Respondent. He told the Court on redirection that there was no document produced by the Respondent linking him to Kabiru Construction.

7. Wilson Ndolo Muli testified that Claimant was given casual work by a Subcontractor who was building a perimetre wall for the Respondent. He earlier worked for the Respondent leaving in 1998 on redundancy. After Kabiru Construction finished its work, the Claimant was recommended for absorption within the Respondent, by Respondent's Chairman. He was asked to bring original of his certificates which he failed to do. He picked his tools of trade, and left the workplace, only to later on write demand letter and serve the Respondent with Court Summons afterwards. He was not an Employee of the Respondent. If he has any claims, these should be directed at Kabiru Construction.

8. Muli told the Court on cross-examination he did not have a contract made between the Respondent and Kabiru Construction Limited. This contract was verbal. Muli confirmed the Claimant was a Mason, employed by the Respondent in 1998. The Witness did not have any document addressed to the Claimant requesting for the original of his documents.

The Court Finds:-

9. The Claimant had a long association with the Respondent, working as a Mason. It is not contested that he initially worked for the Respondent between 1990 and 1997. The Respondent went through some form of closure in 1998, as pleaded at paragraph 4 of the Statement of Response. The Claimant states he was reemployed by the Respondent around June 2010, until 14th October 2014 when he was advised there was

no more work. The Respondent's position is that the Claimant was employed to work on Respondent's perimeter wall by Kabiru Construction Limited, in October 2012. He was offered reemployment by the Respondent after Kabiru finished its work.

10. No details were supplied to the Court showing there was a Company called Kabiru Construction, which was at any time engaged by the Respondent, and which in turn employed the Claimant, to build a perimeter wall around the Respondent's workplace. It would have been easy for the Respondent to obtain and supply the Court with documents containing such details, particularly because the Respondent seems to know about the terms and conditions of employment between the Claimant and Kabiru Construction, including the fact that the Claimant was paid a daily rate of Kshs. 635, and worked for 5 days a week.

11. It is therefore difficult to accept the evidence of the Respondent that it engaged Kabiru Construction Limited, which in turn employed the Claimant.

12. Acceptance is made much more difficult taking into account that the Claimant and the Respondent were in an employment relationship going back to 1990. Even assuming the Claimant was engaged by a 3rd Party in 2010 or 2012, he was known to the Respondent from the 1990s. His claim is not based on obligations accruing from the 1990s.

13. There was no convincing reason why the Respondent would be asking for Claimant's academic and trade certificates, years after engaging him, and witnessing the quality of his masonry. He had worked in ocean vessels under the Respondent, and worked in construction of Respondent's perimeter wall. Why would the Respondent need his identity card and trade certificate after this long association, and doubt the authenticity of the trade certificate when it was availed by the Claimant?

14. The evidence of the Claimant that he was employed by the Respondent before and after the Respondent closed down in 1998, is more believable.

15. The Respondent appears not to challenge the assertion by the Claimant that he was not paid wages in accordance to his grade under the Wages Order. Paragraph 8 of the Statement of Response, states that the Respondent needed to have the Claimant's documents, to determine what wages the Claimant should be paid.

16. It was the responsibility of the Respondent to justify termination and show the process was carried out fairly, under Section 41, 43 and 45 of the Employment Act 2007. There is no evidence the Respondent discharged its obligation. If the Claimant asked for his tools of trade and left for home, there is no record of any attempts made by the Respondent to bring the Claimant to account for the employment offence of desertion.

17. The Claimant has established his case for notice pay, underpayment of wages, annual leave and service pay. He is entitled to compensation which the Court grants at the equivalent of 4 months' pay. The mode of computation under various heads has not been challenged. The Court has reviewed the figures and recomputed them where necessary.

18. The Respondent shall release to the Claimant his Certificate of Service.

19. No order on the costs.

20. Interest granted at 14% per annum from the date of Judgment till payment is made in full.

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: 1 month pay in lieu of notice at Kshs. 20,775; underpayment of wages at Kshs. 153,550; annual leave pay of 88 days at Kshs. 70,315; service

pay at 15 days' pay for 4 years completed in service at Kshs. 47,942; and the equivalent of 4 month's pay in compensation for unfair termination at Kshs. 83,100- total Kshs. 380,682.

c) Certificate of Service to issue.

d) No order on the costs.

e) Interest granted at 14% from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 27th day of June 2017.

James Rika

Judge