



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 705 OF 2015
BETWEEN
SULEIMAN HAMADI MWIJABU.....CLAIMANT
VERSUS
SPEAR'S SHIP CONTRACTORS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Omollo Onyango & Company Advocates for the Claimant

Buyuka Obonyo Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 10th September 2015. He states he was employed by the Respondent as a Paper Liner in the year 1998, earning a daily rate of Kshs. 150. He was later transferred to serve as a Cook, in the cooking department, earning Kshs. 200 per day. He worked as a Cook up to the year 2009. He was transferred to verification department, loading and off-loading containers. He earned Kshs. 600 daily. On 4th May 2015, the Respondent asked him to proceed on annual leave. He called the Respondent while on leave. The Respondent told the Claimant to pay the Respondent Kshs. 2,500 to enable the Respondent process a Port Pass for the Claimant, so that the Claimant could start working at the Port Area. This is not where the Claimant worked before he left for annual leave. He did not have the sum of Kshs. 2,500 the Respondent had requested for. When the Claimant eventually reported for duty, he was locked out. He considered his contract terminated. He states termination was unfair and prays for the following orders against the Respondent:-

- a) Declaration that termination was unfair.
- b) 1 month salary in lieu of notice at Kshs. 18,000.
- c) Gratuity for 17 years of service at Kshs. 153,000.

d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 216,600.

Total... Kshs. 387,000

e) Costs and any other suitable relief.

2. The Respondent filed its Statement of Response on 4th November 2015. Its position is that the Claimant was employed as a Seasonal Labourer. The Respondent would on humanitarian ground assist the Claimant to secure employment with a Company called Consol Base. He retained a Port Pass issued by the Respondent. He did not work continuously for the Respondent from 1998 to 2009 as alleged. He absconded from duty because he was not used to work at the Port. The Respondent prays for dismissal of the Claim.

3. The Claimant was heard in Court on the 29th September 2016 when he rested his case. Respondent's Supervisor, Verification and Port, Michael Muyayi Mukanga testified on 10th February 2017 when hearing closed. The dispute was last mentioned on 17th March 2017 when Parties confirmed the filing of their Submissions and Judgment scheduled for delivery.

4. The Claimant restated the contents of his Statement of Claim, in his evidence. He became a Loader in the year 2009. He was paid in accordance with the amount of work done. He was supplied with Gate Passes by the Respondent, which were signed by the Supervisor. He was locked out after he returned from annual leave.

5. N.S.S.F contributions were paid only from 2013 after the Claimant lodged a Complaint. He was issued with a letter by the Respondent to identify him as an Employee of the Respondent.

6. Cross-examined, he testified he studied up to Class 8. The Respondent does not own a ship. It is contracted by Ship Owners. He was one of the Employees contracted to perform certain roles, when the Respondent was contracted by Ship Owners. He was casual at the beginning, working in different departments. He was one of the longest Casual Employee. Termination letter states verification work had gone down. It is not true that the Claimant was asked to work in lashing. He was told to go on leave and was not recalled. The Respondent was familiar with the Claimant and assigned him different roles. Redirected, he testified he was not trained in lashing. He had never been asked to pay for a Port Pass before

7. Mukanga confirmed the Claimant was employed in the various roles by the Respondent. The Respondent deals with containers. Mukanga pioneered a Kitchen Department to cater for staff. He was the Chef and would call the Claimant to assist with the cleaning of utensils. The Claimant was a Casual Employee.

8. The Respondent changed offices in 2009 and became involved in lashing, which comprised opening or unbuckling of containers. Mukanga became the Supervisor in lashing. The Claimant took a break of about 6 months during the changeover. He later came back and was taken to verification by Mukanga. He left employment around March 2015. The Respondent informed the Claimant there was no more work. The Claimant left and returned after 2 days. He attempted to force himself in. He was asked to take a lashing role. He declined. The Respondent had a contract with Consol Base. The Claimant was a Casual Employee. The Respondent issued the Claimant termination letter for administrative purposes. If the Claimant approaches the Respondent, the Respondent would consider returning the Claimant to work.

9. Cross-examined, Mukanga told the Court he found the Claimant already at work in 2002, when Mukanga was employed. Casual Employees congregated around the Respondent's premises and would be assigned work if it was available. There are no documents showing he was in casual employment. He had been issued with job identification. He was paid the same rate as a cook and paper liner. Claimant's exhibit 3 states Claimant worked from 1998. It is signed by Manager Ali Mahamoud. Mukanga did not have any documents showing the Claimant was away for 6 months. While in verification he worked under

a group leader. The group leaders would be paid and pay the Casuals in return. He refused to do lashing. He disappeared after that. He earned Kshs. 600 per day on average.

The Court Finds:-

10. There is no doubt in the mind of the Court that the Claimant was employed in various roles by the Respondent, from the year 1998. He performed the role of Paper Liner, Cook and Loader at various times. He was issued Port Passes by the Respondent. Mukanga found the Claimant in employment, when Mukanga joined in the year 2002. It is clearly stated in the letter of Spear's Ship Contractors Limited Manager Ali Mahamoud, that the Claimant was an Employee of the Respondent, from 1998. There was no indication in this letter that the Claimant was at any time, employed under any of the so-called gang-leaders, or employed by any other Company, other than the Respondent. The letter did not indicate any break in the service from 1998. It is categorical the Claimant worked for the Respondent, since 1998.

11. The law does not consider an Employee who has worked for an aggregate of about 17 years, to a Casual Employee. The Claimant is to be considered a regular Employee under Section 37 of the Employment Act, with full guarantees and protections available under the Employment Act 2007.

12. The Respondent did not show valid reason in terminating Claimant's contract. Respondent's Witness brimmed with inconsistencies, alleging the Claimant was issued with a letter of termination for administrative purposes, while at the same time alleging the Respondent did not terminate Claimant's contract; the Claimant just disappeared.

13. It was conceded by Respondent's Witness that the Claimant earned an average of Kshs. 600 per day, as of the time he left employment. There is no evidence however that the Claimant worked for 7 days a week, 30 days a month. He was paid nothing on termination. N.S.S.F contributions were only paid from 2013 after the Claimant lodged a complaint. He is entitled to service pay under Section 35 [5] of the Employment, for the period not enlisted under the National Scheme.

14. It is quite clear termination was at the instance of the Respondent. It was without reason and carried out unfairly. There was no hearing against the Claimant. It was not shown that he abandoned his job of his own volition, or that he declined to perform any role assigned by the Respondent. There is no forum at which the various allegations made by the Respondent against the Claimant, were presented to him, heard and established through the mechanism of a disciplinary hearing. He merits compensation for unfair termination.

IT IS ORDERED:-

a) It is declared termination was unfair.

b) The Respondent shall pay to the Claimant: 1 month salary in lieu of notice at Kshs. 15,600; service pay for the period 1998 to 2012 [13 years] at 15 days' salary for every year completed during this period at Kshs. 117,000; and the equivalent of 12 months' salary in compensation for unfair termination, at Kshs. 187,200- total Kshs. 319,800.

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 23rd day of June 2017

James Rika

Judge