



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1586 OF 2014

CHARLES OWINO ODERO.....CLAIMANT

VERSUS

D MANJI CONSTRUCTION LIMITED..... RESPONDENT

JUDGEMENT

1. On 7th July, 2009 the Claimant was employed by the Respondent as a Painter. He continuously worked in such capacity until his termination. The Claimant was paid a wage of Kshs.550.00 per day all computed and paid weekly.

2. In December, 2013 the Respondent issued the Claimant with a document to sign and retained it but he was not allowed to read or keep a copy. On 14th February, 2014 while the Claimant was undertaking his duties at Toyota Company site in South C, the Respondent officer Mr George Ochieng and Mugoya informed him that there was shortage of work and as such he had been dismissed.

3. The Claimant was aggrieved and thus reported the matter to the Labour officer. Several letters were written to the Respondent calling for reconciliation but the Respondent did not oblige.

The claim is that the actions of the Respondent were a disguised redundancy and amounted to unfair dismissal and thus wrongful and unfair. That the Claimant learnt there was no shortage of work at the Respondent as Mr Ochieng and Mugoya are still employed by the Respondent to date; the years of service were not put into account; and there was no due process or payment of terminal dues.

4. The Claimant is seeking for the payment of;

Notice pay at Kshs.16, 500.00;

Payment for untaken leave at Kshs.66, 000.00;

Prorated leave Kshs.8, 250.00;

Service/gratuity Kshs.33, 000.00;

Compensation; and

Costs.

5. The Claimant also testified in support of his case.

Defence

6. The defence is that the Respondent had and continues to experience diminished commercial work and hence the need to terminate the services of non-essential workers. The Claimant was dully served with notice to terminate his employment which he dully acknowledged on 5th December, 2013. The Claimant was presented with final tabulation of his dues for which he acknowledged in acceptance. Such pay included leave; notice, days worked.

7. The Respondent got a notice from the Labour Officer but before the negotiations could complete, the Claimant filed suit. The remedies sought are not due as the Claimant has been paid terminal benefits.

8. The defence is also that on several occasions the Claimant deserted work and no notice pay is due. The Claimant took all leave days and when he worked overtime, such was paid for in full. All work was paid for in terms of the letter of appointment. The termination was fair in the circumstances.

9. In evidence, the respondent's witness was Peter Nyipolo Nyaugo who testified that the Claimant was a Painter with the Respondent and they worked together from May, 2013 to February, 2014. The Claimant was at the respondent's project at Toyota Kenya Ltd and when the project was complete all due benefits were paid. The Claimant was issued with notice of termination which he accepted and signed. The Claimant was paid all leave earned; days worked; and service pay. The Claimant reported the matter to the labour office and when the Respondent produced the paid dues schedule, the labour officer dismissed his claim.

10. The witness also testified that the Claimant was not an employee of the Respondent from 2009 but from May, 2013. The project at Toyota ended and was handed over to the client on 1st March, 2014. The Claimant was given termination notice which took effect from 14th December, 2013. Upon the project completing, the Claimant remained at work for a week. no new notice was issued as he was aware the project was completed. There were other employees and all got notice as it was not per individual. The Claimant did not take leave but he was paid in lieu thereof. There was no payment for NSSF

Submissions

11. Only the Claimant filed written submissions.

Determination

12. It is common cause that the Claimant was an employee of the Respondent and was terminated due to what the Respondent states at paragraph (3)(I) to be due to the fact *Respondent had and continues to experience diminished commercial work, hence the need to terminate the services of non-essential workers.*

To the defence the Respondent also attached a termination notice to which its witness Mr Nyaugo testified was not a specific notice but a general notice that was sent to all Respondent employees. This is the notice dated 5th December, 2013 which was to take effect on 14th December, 2013. The Claimant was later terminated but continued work for one (1) more week.

13. The notice of termination was on the grounds that *your services are no longer required by this Company M/S D. MANJI CONSTRUCTION LIMITED due to less work.* This notice speaks to the defence of the Respondent that indeed there was no longer work for the Claimant to undertake hence the termination.

14. On 14th December, 2013 the Claimant was paid Kshs.6, 187.00 for;

Leave pay for July to October all 5 months.

15. On 30th December, 2013 the Claimant was also paid Kshs.5, 500.00 being service pay for full year worked being 10 days' pay all at Kshs.550.00 total amount being Kshs.5, 500.00.
16. There is also pay of Kshs.2, 475.00 being pay for leave days due for 2 months.
17. In evidence, the Claimant admitted to signing the payment vouchers though he was not given a copy. That the payments received were less from what he had expected to be paid. Service pay is claimed on the basis that NSSF dues were not paid. The Claimant also admitted that he took 2 leave days each month and was paid. He is however seeking leave pay from 2009 to 2013.
18. Where an employer is faced with shortage of work, the law defines the same as a situation of redundancy as defined under section 2 of the Employment Act and the Labour Relations Act. Section 40 of the Employment Act sets out the procedural requirements for an employer to follow once faced with redundancy as held by the Court of Appeal in **Kenya Airways Limited versus Aviation and Allied Workers Union & others [2014] eKLR**.
19. Section 40 of the Employment Act contemplate two forms of notices in a redundancy. A general notice informing all employees of the same and a specific notice to the affected employee(s). the first notice must be issued in view of the prevailing circumstance and to let the employees know there is the eventuality of work reduction this may lead to reorganisation, restructuring and or lay off of employees. The specific notice to the affected employee is based on a criteria and the logic that the notified employee is laid off due to the reasons earlier noted in the general notice.
20. It therefore follows logic that an employer should not terminate employees following the general notice as at this point, the affected and specific employees may not have been identified. In any event, the specific notice to the affected employee must issue as held in **Jane Khalechi versus Oxford University Press [2012] eKLR**. A redundancy should not target a specific employee. It is the reduction of work, the reorganisation and restructuring that lead to the redundancy and not the skills of the employee as held in **Hesbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited [2013] eKLR**.
21. In the claimant's case, he was terminated following the general notice. There is no notice to him stating that he was one of the affected employees as a result of the Respondent work reduction. This was procedurally not lawful.
22. Section 10 of the Employment Act read together with section 73 and 74 requires that the employer should keep all work records and submit the same before court once suit has been filed. The records filed by the Respondent have not been challenged by the Claimant in any material way save that his evidence was that he was paid less to what he had expected.
23. The payments made by the Respondent relate to service pay for one year; notice pay for one year, leave due for days worked in 2013. Without a challenge to the filed records, I take these records are true and specific to the claimant's employment with the respondent.
24. Upon redundancy, the Claimant was entitled to notice which was not issued. The Claimant is awarded Kshs.16, 500.00 being pay for a full months' notice based on the daily wage of Kshs.550.00.
25. Service pay acknowledged at Kshs.5, 500.00 is a based on 10 days' pay and the legal minimum is 15 days making a difference of Kshs.2, 750.00.
26. Leave payments of Kshs.6, 187.00 acknowledged by the Claimant on the evidence that he took 2 days leave every month and was paid does find to be a generous computation of any leave days owe. No leave pay is outstanding unpaid. In addition, the Claimant also received a sum of Kshs.2, 475.00 for leave pay for May and June, 2013. Putting all these into account, the claim for leave pay is declined.
27. On the failure by the Respondent to follow the law in terms of the provisions of section 40 is laying off the Claimant following the notice of redundancy, compensation is due. Putting the facts that the

Claimant was paid all terminal dues save for notice and shortfall in service pay and thus the Respondent largely complied with the law, in putting such into account in terms of section 45(5) of the Employment Act, compensation is awarded at one month pay all being Kshs.16,500.00;

Accordingly, judgement is hereby entered for the Claimant against the Respondent for compensation at Kshs.16, 500.00; service pays Kshs.2, 750.00; notice pay Kshs.16, 500.00; and 50% costs.

Dated, signed and read in open court this 8th day of June, 2017

M. MBARU

JUDGE

In the presence of:

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