



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 353 OF 2012

SETH SHIKANGA ALUVALA.....CLAIMANT

VERSUS

GENERAL INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Seth Shikanga Aluvala against his former employer, General Industries Limited. The matter was heard by my brother **Nzioki wa Makau J** who is currently away on study leave. When Counsels for the parties appeared before me on 23rd March 2017, they agreed that I proceed to write judgment based on the evidence taken by my brother Judge plus the pleadings and submissions filed by the parties.

2. The Claimant's claim is contained in a Memorandum of Claim dated 2nd March 2012 and filed in Court on even date. The Respondent filed a Reply on 9th October 2015.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a general labourer from 23rd November 2003. He adds that he was issued with his first written contract in January 2011 which contract lasted for a period of six months. He was issued with a second contract effective 1st July 2011.

4. Upon reporting to work on 14th July 2011, the Claimant was instructed by the Respondent's Human Resource Manager to stop working and return after a few days. On 3rd August 2011, the Claimant was called by the Human Resource office to go to his place of work and upon arrival he was advised that management had made a decision to dismiss him. He was paid the sum of Kshs. 6,000 which he acknowledged by signing a voucher.

5. The Claimant avers that his dismissal was unlawful and unfair and therefore claims the following:

- a. One month's salary in lieu of notice.....Kshs. 8,722
- b. Service/gratuity @ 18 days salary per year.....31,400
- c. Salary for remainder of contract as damages.....43,610

d. Costs plus interest

The Respondent's Case

6. In its Reply dated 7th October 2015 and filed in Court on 9th October 2015, the Respondent denies that the Claimant worked continuously as a general labourer from 23rd November 2003 until July 2011. The Respondent states that the Claimant was first employed as a general worker on 23rd August 2004 and that he resigned from employment in February 2010.

7. The Respondent accepted the Claimant's resignation by letter dated 5th February 2010 and paid him all accrued terminal dues which the Claimant duly acknowledged. On 15th October 2010, upon application, the Claimant was re-employed as a casual labourer earning a daily wage. On 1st July 2011, the Claimant was issued with a six months' contract at a basic monthly salary of Kshs. 7,586 plus a house allowance of Kshs. 1,138.

8. On 14th July 2011, the Claimant's contract was terminated on the ground that his services were no longer required. The Claimant was paid all his dues which he duly acknowledged.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

10. The Claimant claims that the termination of his employment was without a justifiable cause. On its part, the Respondent states that the Claimant was terminated because his services were no longer required. The Respondent's Human Resource and Administration Officer, Joan Mutisya told the Court that the termination was in accordance with the Claimant's contract of employment.

11. The Court notes that the termination came barely two weeks into the Claimant's fixed term contract dated 1st July 2011 and in the absence of any explanation on the seemingly abrupt termination, the Court has reached the conclusion that the Respondent had no valid reason for termination as required under Section 43 of the Employment Act, 2007. Moreover, there was no evidence that the Claimant was given an opportunity to be heard as stipulated under Section 41 of the Act.

Remedies

12. Consequently the Court finds that the termination of the Claimant's employment was substantively and procedurally unfair and awards him three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct prior to the termination. I further award the Claimant the sum of Kshs. 4,174 being balance of notice pay.

13. In order to make a finding on the claim for service/gratuity I need to address the question as to the Claimant's employment period. While the effective date of employment is in contest, it is common cause that the Claimant resigned from the Respondent's employment on 4th February 2010.

14. The Claimant's second stint with the Respondent began on 15th October 2010 when he was re-employed. It is my view that once he was paid his terminal dues in February 2010, the Claimant's continuous employment with the Respondent came to an end. The consequence is that for purposes of service/ gratuity pay, the effective date of the Claimant's employment can only be reckoned from 15th

October 2010 when he rejoined the Respondent's employment. Having been terminated on 14th July 2011, the Claimant had not completed a single year of service to qualify for service pay.

This claim therefore fails and is dismissed.

15. Finally I enter judgment in favour of the Claimant in the following terms:

- a. 3 months' salary in compensation.....Kshs. 26,172
- b. Balance in notice pay.....4,174
- Total.....30,346**

16. This amount will attract interest at court rates from the date of judgment until payment in full.

17. The Claimant will have the costs of the case.

18. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF JULY 2017

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JUDGE

Appearance:

Mr. Wathome for the Claimant

Mr. Wageche for the Respondent