



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 841 OF 2015
KESI MOHAMED SALIMCLAIMANT
VERSUS
KWALE INTERNATIONAL SUGAR CO. LTDRESPONDENT
J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment by the respondent on 18/9/2015. It is the claimant's case that although he started working as a casual employee, his services converted to regular term contract and as such he was entitled to the terms and conditions of service of a regular term employee including protection from unfair termination.

2. The respondent has admitted that she indeed employed the claimant on casual basis but denied that his contract converted to regular term contract under Section 37 of the Employment Act. Consequently, the respondent denies that the claimant was capable of being unfairly terminated because the protection of the law provided under Section 41,43,44 and 45 of the Act do not apply to casual employees and the damages sought herein cannot issue.

3. When the suit came up for pretrial directions together with other matters in this series namely 812-821 of 2015, 823 -829 of 2015 and 834-839 of 2015, the parties confirmed that there was no dispute in the facts that the claimants were employed by the respondent and that it is the same respondent who terminated their services. The parties further framed the following issues for determination:

- a. Whether the claimants were unfairly terminated
- b. If the above was affirmed, how much dues are payable to each claimant.

4. All the documentary evidence filed by the parties were admitted by consent and this suit was agreed to be the test suit for purposes of determination of liability. The suit was heard on 30/1/2017 when the claimant testified as CW1 and Mr. Khalfan Omari Benghe testified for the defence as RW1.

CLAIMANT'S CASE

5. CW1 testified that he was verbally employed by the respondent on 5/11/2007 as a supervisor of planting sugarcane and weeding in the respondent's farm. His daily wage of ksh.350 which was paid at the end of the month in arrears of ksh.9800. NSSF contribution was deducted and remitted every month

as per the NSSF statement produced as exhibit 1.

6. CW1 further stated that he was reporting to work from 6am and left at 5pm every day including public holidays except Sundays. Sometimes he used to work upto 7pm and he never went for any annual leave or paid any cash in lieu. He worked continuously upto 17/9/2015 when he was terminated without any prior notice, reason or hearing. He contended that his wages were also underpaid.

7. On cross examination, CW1 stated that he never used to sign anywhere whenever he worked overtime and he was never paid. He maintained that his salary was underpaid but he produced no written evidence that he has complained about the low pay. He denied that he was a casual employee and contended that he was infact a management staff. He denied that he was explained the reason for his termination as lack of sugarcane and maintained that there was a lot of sugarcane from farms. He concluded by stating that he worked continually for 7 years and all his employment records were in the custody of the respondent.

DEFENCE CASE

8. RW1 is the respondent's data clerk in the HR office. His duties include recruitment of casual workers who are paid weekly. He stated that the claimant was employed by the respondent as a field supervisor in the casual side earning ksh350 per day plus overtime which was paid on weekly intervals. RW1 further stated that the normal working hours for the claimant was from 6am to 12 noon and whenever he worked overtime or public holidays he was paid 150% and 200% of the normal pay respectively.

9. RW1 further stated that the supervisors recorded attendance of employees in their books and thereafter submit the data to the HR office for payments. He produced payment schedule as exhibit which shows the days worked, overtime pay and other allowances. He maintained that the claimant was being paid on weekly basis and he never complained in writing that he was underpaid. He denied that the claimant worked overtime without pay. He clarified that public holidays and Sundays were not working days and if one was required to work, a special request form was filled and payment done.

10. RW1 did not know why the claimant was terminated and whether or not the reason for the termination was explained to him. He maintained that the claimant was a casual employee for all the 8 years he worked for the respondent and as such he was not entitled to annual leave. He however confirmed that NSSF was deducted from his pay and remitted monthly

ANALYSIS AND DETERMINATION

11. There is no dispute that the claimant was employed by the respondent continuously for over 7 years. The issues agreed by the parties for determination have already been stated herein above and I will therefore proceed to answer them.

Unfair termination

12. The respondent's case is that the claimant was a casual employee whose services were terminable under Section 35(1) (a) of the Act without any prior notice. The said section provides that

“35 (1) (a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice”.

13. The claimant has however contended that his service had converted from causal to term contract by dint of Section 37 of the Act and as such he was entitled to protection from unfair termination. Section 37 provides that:

1. Notwithstanding any provision of this Act, where a causal employee

a. Works for a period or number of continuous working days which amount in the aggregate to the equivalent of not less than one month,

b.the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1) (c) shall apply to that contract of service.

2.

3. An employee whose contract of service has been converted in accordance with subsection (1) and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

4. ..in any dispute before the industrial court on the terms and conditions of service of casual employee, the Industrial Court shall have the power to vary the terms of service of casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act”.

14. The respondent has admitted that the claimant worked continuously for about 8 years on casual basis. She produced as exhibit schedule of the days worked by the claimant in 2015 which show that he worked over 36 weeks continuously which is way more than the minimum days required for casual employee to convert to regular term contract under Section 37(1) and (3) of the Act. Consequently it is my finding of fact and indeed my declaration that the claimant’s casual employment had converted from casual to term contract under Section 37(1) and (3) of the Act and he was therefore subject to the provision of Section 35(1) (c) and 45 of the Act.

15. Section 35(1) (c) of the Act provides that:

“Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty eight days next following the giving of notice in writing”.

16. Section 45 of the Act provides that

“(1) no employer shall terminate the employment of an employee unfairly

(2) A termination of employment is unfair if the employer fails to prove

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason and

(c) that the employment was terminated in accordance with fair procedure”.

17. In view of the admission by the respondent both in her pleadings and evidence that she never gave any notice to the claimant or fair hearing as required by the said Section 35 and 45 of the Act, I do not hesitate to find and hold that the termination of the claimants employment by the respondent on 18/9/2015 was unfair and unlawful. The contract of service having converted to a term contract under Section 37 of the Act, the respondent was barred by Section 45 of the Act from terminating it without prior notice of atleast 28 days in writing or without a valid and fair reason and having accorded the claimant a fair hearing on the reason cited for the termination.

Reliefs

Claim under Section 49 of the Act

18. Under Section 49 of the Act, I award the claimant ksh.12435 being one month salary in lieu of notice based on his daily wages of ksh414.50 provided for Farm Foreman by the Regulation of Wages (Agricultural Industry) (Amendment) Order 2015. In addition I award ksh.149,220 being 12 months

salary as compensation for unfair termination considering the long service by the claimant and also the fact that he did not contribute to the termination through misconduct.

Leave

19. The claimant worked continuously from 5/11/2007 to 18/9/2015 equaling to 7 years 10 months. Under Section 28 of the Act the claimant was entitled to 21 days annual leave after every 12 consecutive months of continuous service or 1.75 leave days per month on prorata basis. I have therefore computed the leave earned during the period of service to be 164.5 days based on 21 days annual leave under the Act.

20. The respondent has objected to the claim for leave on ground that it is time barred having been brought after the lapse of more than 3 years limitation period provided by Section 90 the Act. I however dismiss that objection because the denial of leave was a continuous breach and the claim having been brought within 12 months after cessation of the breach, the same is not time barred.

21. Section 90 provides

“notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act (Cap 22) no civil action or proceedings based or arising out of this Act or a contract of service in general shall or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof”.

22. The Court of Appeal has affirmed the foregoing provision in C.A NO 39 OF 2006 RIFTVALLEY RAILWAYS[KENYA] LTD VS HAWKINS WAGUNZA MURONSYE AND ANOTHER [2016] e KLR when it stated that:

“for it is clear from our reading of Section 90 aforesaid that there are no exceptions to the three years limitation period save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after cessation thereof”

23. In view of the foregoing, I proceed to calculate the amount payable the 164.5 leave days based on the claimants daily wage of ksh350 equaling to ksh10500 per month because it was greater than the basic monthly pay provided by the Agricultural Industry Wage Orders from 2007 to 2015. Consequently $ksh.10500 \times 164.5 / 26 = ksh66432.70$ but I award him ksh.55,663.17 which is the sum pleaded.

Under payment

24. The claim for underpayment is also not time barred for the reason given herein above in respect to the objection to the accrued leave. I will however not award underpayment under the General Wage Order as pleaded and submitted by the claimant but under the Agricultural Industry Wage Order because the claimant was employed under the Agricultural Industry as a Farm Supervisor.

25. As at April 2013 the minimum wage for Farm Foreman like the claimant was ksh.324 per day which was less than ksh.350, the claimant was receiving per day then. From May 2013, the minimum daily wage for a Farm Foreman was increased to ksh.370.05 per day. The said wage was ksh.20.05 less than what the claimant was earning daily and it continued till 30.4.2015 equaling to $ksh 20.05 \times 30 \text{ days} \times 24 \text{ months} = ksh.14436$. From 1/5/2015 to 18/9/2015 the minimum wage for the Farm Foreman was increased to ksh.414.50 representing an underpayment of ksh.64.50 per day equaling to $ksh.64.50 \times 108 \text{ days} = ksh.6966$. I therefore award the claimant a total of ksh.21402 as the underpaid wages.

Off days and public holidays worked

26. The claimant admitted in evidence that he never used to work on Sundays and if he missed work during public holidays he was not paid any wages. He however did not prove in evidence how many off

days and public holidays he worked and was paid and how many he did not work and therefore received no pay. For that reason he has not proved the claim for ksh.373,833.62 and ksh.82,386.33 for off days and public holidays respectively and I therefore dismiss the same.

Overtime

27. The claimant testified that his normal working hours was from 6am to 5pm but sometime he worked upto 7pm. RW1 has on the other hand contended that the claimants normal working time was from 6am to 12noon and if overtime work was required, a special request from was filled and payment done together with the normal wage on weekly basis. The claimant has however not proved by evidence the days he alleges to have worked upto 5pm and 7pm. The court is therefore persuaded by the pay schedule produced by the defence to make a finding of fact that the claimant was paid for all his overtime worked before termination and the claim for overtime is also dismissed.

Wage arrears

28. The claimant alleges that he was not paid wages for one week worked. No particulars of the alleged week save that the claim is based on the 2015 General Wage Order. I therefore dismiss the said claim for want of particulars and evidence.

DISPOSITION

29. For the reason that the claimants contract of service was unfairly terminated, I enter judgment for the claimant in the sum of ksh.238,940.20 plus costs and interest.

Dated signed and delivered this 21st July 2017

O.N. Makau

Judge