



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1906 OF 2013

ISAYA OKALAMA ATSOLE.....CLAIMANT

VERSUS

COSMOTEK INTERIORS LIMITED.....RESPONDENT

Mr. Nyambane for claimant

Mr. Owala for respondent

JUDGMENT

1. By a memorandum of claim filed on 2nd December 2013, the claimant seeks compensation for unlawful and unfair termination of employment and terminal benefits set out as follows;
 - a) Arrear salary of seven (7) days in the sum of Kshs.4,200.
 - b) Three (3) months salary in lieu of notice in the sum of Kshs.54,000.
 - c) Service gratuity calculated at three months salary for each year served.

Facts of the case

2. The claimant testified under oath and adopted a witness statement dated 25th December 2013 as his evidence in the case.
3. The claimant was employed as a machine operator by the respondent on 24th June 2013 and worked for a period of three months. The claimant was paid a daily wage of Kshs.600. The claimant got injured on the palm in the course of duty and made a claim for compensation in Case No. 6410 of 2013 before the Magistrate Court.
4. The claimant states that when he wrote a demand letter to the respondent, the respondent terminated his employment without notice, opportunity to be heard and without payment of terminal benefits.
5. The claimant seeks payment of terminal benefits, damages, costs and interest.
6. The respondent filed a statement of defence on 5th December 2016 in which the respondent admits that the claimant worked for it for three months as a machine operator on a casual basis. That the claimant

received a daily wage.

7. The respondent denies having terminated the employment of the claimant because he was only hired on a daily basis and he did not work continuously.

8. The respondent reiterates that it was under no obligation to hire the services of the claimant. That there was no contract or collective bargaining agreement obliging the respondent to pay the terminal benefits sought by the claimant.

9. That as a daily worker who worked as and when there was work, the claimant was not entitled to notice pay or to service gratuity. The claim for six (6) days wage is also denied since the claimant was paid daily.

10. The respondent was served with the hearing notice dated 8th March 2017 to attend the hearing of the case during the service week. The respondent was represented by Owala & Co. Advocates who failed to attend the hearing without any explanation. The matter then proceeded exparte.

11. The oral evidence by the claimant went uncontroverted therefore.

12. The court finds that the claimant served the respondent for a continuous period of three months and was paid a daily wage of Kshs.600 per day.

13. That the claimant did not receive wages for seven (7) days and is entitled to payment of Kshs.4,200 which the court awards.

14. The claimant worked for the respondent for a period or a number of continuous working days which amounts in the aggregate to the equivalent of not less than one month and in terms of section 37 (1) (a), the claimant was no longer a casual employee and is entitled in terms of section 37 (3) to terms and conditions under the employment Act, as if he had not been initially employed as a casual.

15. Accordingly, the claimant is entitled to one month's salary in lieu of notice in the sum of Kshs.16,500 and is so awarded.

16. With regard to termination, the claimant having served continuously for two months or more from the date of employment, and having been deemed an employee in terms of the Act, was entitled to have his employment terminated for a valid reason and upon following a fair procedure in terms of sections 41 and 43 of the Employment Act, 2007. This was not the case, and the termination of employment of the claimant violated section 45 of the Act.

17. The claimant is entitled to compensation in terms of section 49 (1) (c) as read with section 49 (4) of the Act. In this regard the maximum compensation payable is the equivalent of twelve (12) months' salary. The claimant had only served for three (3) months. His employment was terminated for having dared to claim compensation for an injury incurred in the course of employment. The claimant suffered loss and damage and the conduct of the respondent is an aggravating circumstance. The claimant did not contribute to the termination and was not paid any terminal benefits upon termination.

18. The court awards the claimant equivalent of three (3) months salary as compensation in the sum of Kshs.49,500. The claim for payment of gratuity is invalid, the claimant having only served for three (3) months.

19. Judgment is entered in favour of the claimant as against the respondent in the sum of Kshs.70,200.

20. The award is payable with interest at court rates from date of Judgment till payment in full.

21. Costs to follow the outcome.

Dated, signed and delivered at Nairobi this 25th day of August 2017.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE