

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1391 OF 2014

PAUL KILONZO.....CLAIMANT

VERSUS

SILPACK INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on in the Magistrate's Court at Nairobi and the suit was transferred to this court by Ougo J. on 16th May 2014. The Claimant thereafter amended his claim on 13th February 2015. The claim was heard and a judgment given by Nduma J. on 9th September 2016 before he set aside the judgment which was after ex-parte hearing on 12th July 2016. The matter was heard afresh before me on 6th November 2017. In his claim, the Claimant averred that he was employed by the Respondent in January 2001 as a carton balling machine operator. He averred that he served the Respondent with diligence until 23rd May 2008 when he was wrongfully and unfairly dismissed from service and that the Respondent refused to pay him his terminal benefits. The Claimant thus sought pay in lieu of notice; overtime worked and not paid; NHIF, NSSF deducted and not paid; service for 7 years and house allowance for 7 years as well as costs of the suit and interest on the sums claimed.

2. The Respondent filed defence and in its amended defence denied that the Claimant was employed as a carton balling machine operator. It was averred that the Claimant was employed on casual basis. The Respondent denied that the Claimant served it with loyalty and diligence and averred that there was no termination nor were there any terminal dues due to the Claimant.

3. The Claimant testified on 6th November 2017 and stated that he was hired by the Respondent in January 2001 after completion of the 3 month probation period was retained as casual for 7 years. He worked as a baling machine operator in the carton division. He baled the waste and his was a day job as the night and day waste was baled during the day from 8.00am. He worked from Monday to Saturday with Sundays and Public Holidays being off days. He was paid daily initially and payment changed to Fridays to ensure there was funds to pay NSSF and NHIF. He stated that on 23rd May 2008 the production manager Mavji came to his machine at 8.30am and begun scolding him and that he was told he was old and the next day he would be got rid of. He testified that when he went to work the next day on 24th he was not allowed to get into the premises and was told my Mavji that he was dismissed. He asked for his terminal dues and was told to go wherever he wanted as the company was through with him and he therefore came to court. He testified that he had not received any warning letter and he had worked with diligence and honour. He asked for payment of his terminal dues inclusive of overtime, NSSF deducted and not remitted, service pay, house allowance, compensation and costs of the suit.

4. In cross-examination he testified that there were deductions of NSSF and NHIF dues and he believed that the employees who paid NSSF were those in continuous employ. He stated that he was paid overtime and that there was no period he was a permanent employee. He stated that he had production daily and therefore was continuously employed. He stated that he was paid daily and after NSSF dues were deducted he was paid on Saturday. He sought NSSF dues and stated that he never went to Labour as he was not in the union.

5. The Respondent called Florence Ambalo Eshitera an administrator of the Respondent. She testified that the Claimant was not known to her previously and that she knew him as a person who used to work as a casual for the Respondent. He would report each day and was paid daily when he worked. She referred to the work sheets produced by the Respondent for the years 2001 to 2004 and pointed out the Claimant's name where he signed for the payments he received. She testified that the NSSF dues for the Claimant were paid and the daily wage he received was inclusive of house allowance. She asked that the claim be dismissed as it lacked merit.

6. In cross-examination she testified that the NSSF dues were deducted as from April 2008 and that at the time the Claimant was a casual and that the work the Claimant did was that of a casual. She said it could even have been for 10 years.

7. In re-examination, she testified that NSSF was paid for only 2 months and the Claimant left in May and that he was a daily casual paid at the end of the day.

8. The Claimant filed submissions on 17th November 2017 and the Respondent filed its submissions on 11th December 2017. The Claimant submitted that the Respondent had not placed all the employment records before the court. He submitted that the Respondent had not absorbed him on permanent terms thereby denying him fair terms of remuneration and that he was entitled to the claimed sums. The Respondent on its part submitted that the Claimant was a casual employee who would camp outside its premises alongside others and would be called for work when there was work to be done on a particular day. It was submitted that the Claimant admitted he was paid overtime and that it was the Claimant who did not turn up for work any other day after being told there was no work on a particular day. It was submitted that the Claimant never showed up at the Respondent's premises for consideration of daily work and never explained his disappearance. It was submitted that the Claimant's claim for service pay was misplaced as he was not a permanent employee. The Respondent relied on the case of **Peter Azei v Trade Winds Aviation Services Limited Cause No. 223N of 2008** (unreported) for the proposition that the law applicable to the claim is the repealed Employment Act cap 226, the Regulation of Wages and Conditions of Work and the Trade Disputes

Act cap 234 (now repealed). The Respondent submitted that the Claimant had not proved on a balance of probabilities that he was a regular employee and that he relied on the present Employment Act to assert that his employ converted to permanent terms. It was submitted that the Claimant had not proved on a balance of probabilities that he was dismissed and that the issue of unfair termination did not arise. The Respondent cited the case of **Josephat Njuguna v High Rise Self Group [2014] eKLR** and argued that the Claimant deserted work never to return and that he was a casual employee hired as and when the need arose.

9. The cause of action accrued when the repealed Employment Act cap 226 was in force. The Claimant sought various reliefs which when juxtaposed against the applicable law would be inapplicable. The conversion of a continuous period of employ as a casual into a permanent employment is only now available under the Employment Act 2007. In my view, the Claimant's assertions on dismissal by a Mr. Mavji were so vivid as to indicate that the Claimant was barred from entry of the Respondent's premises to perform his work and constituted constructive dismissal. Constructive dismissal is where the employer acts in a manner that makes work impossible. Mavji told the Claimant he was too old and was no longer needed to do the carton baling work. He therefore was dismissed by the Respondent. The Claimant was therefore entitled to notice which I will assess as the monthly wage he would be entitled to had he worked for a month being Kshs. 6,656/-. He would also be entitled to the NSSF and NHIF deductions the Respondent made in the two months of April and May being Kshs. 600/- as claimed. The Employment Act cap 226 did not provide for compensation for loss of employment under any circumstances and the Claimant will therefore not be entitled to any compensation for the unfair dismissal from employment. The Claimant filed suit *in forma pauperis* and therefore an order of costs would not lie. In the final result the Claimant will be entitled to Kshs. 7,256/- only.

It is so ordered.

Dated and delivered at Nairobi this 18th day of December 2017

Nzioki wa Makau

JUDGE