



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 595 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 6<sup>th</sup> December 2017)

SAMUEL ONYANGO OLUM.....CLAIMANT

VERSUS

KENYA PAPER MILLS LIMITED.....1<sup>ST</sup> RESPONDENT

CHANDARIA INDUSTRIES LIMITED.....2<sup>ND</sup> RESPONDENT

JUDGMENT

1. The Claimant herein filed his Memorandum Claim on 11<sup>th</sup> April 2012 alleging wrongful dismissal and non-payment of his terminal dues through the firm of Namada and Company Advocates.
2. The Claimant's case is that on 24<sup>th</sup> May 2009 he was employed by the Respondent as a Machine Operator and continuously worked for the Respondent his last salary being 503/= per day.
3. He avers that the two Respondents interchangeably used the same employees and names in different operations and it became practically difficult to determine who was his actual employer.
4. He states that on 31.8.2011, the Respondent's Personnel Manager wrongfully dismissed him from employment for unknown and/or unexplained reasons. This was after the Claimant had gone to the said Manager to claim for his unpaid salary.
5. The Claimant avers that he reported the dispute to the District Labour Officer, Thika who summoned the Respondents to appear before him in order to negotiate an amicable resolution but the Respondents refused to attend.
6. He avers that since his dismissal, the Respondents have failed and/or declined to pay him his terminal dues and damages which he claims as calculated under paragraph 7 of his claim all totaling 246,031/=.
7. The Respondent on their part filed defence on 19<sup>th</sup> June 2012 through the firm of M/S Mungai Kalende & Company Advocates. They deny that the Claimant was retained on 24<sup>th</sup> May 2009 but aver that he was contracted by the 2<sup>nd</sup> Respondent as a casual worker in Production Department (Reel up Section) and not as a Machine Operator as alleged on a day to day basis.
8. They also deny that his salary was 503/= per day but aver that it was 335.40 per day which amount was paid in full until the date of his termination on 31<sup>st</sup> August 2011.

9. The 2<sup>nd</sup> Respondent avers that the Claimant's duties were terminated as a result of gross misconduct after he was engaged in a physical fight with other colleagues whilst on duty thereby disrupting the 2<sup>nd</sup> Respondent's operations.

10. The 2<sup>nd</sup> Respondent also avers that they were invited for a meeting at the Thika District Labour Office upon the request of the Claimant but the Claimant failed to attend the said meeting.

11. The 2<sup>nd</sup> Respondent avers that the Claimant's demand are baseless and unjustified and want this claim dismissed.

12. The Respondent called one witness who when cross examined stated that the Claimant was a casual worker but he didn't have the records of employment as his evidence. He also stated that the Claimant's NSSF dues were remitted but he did not have the records in Court. On leave he stated that the Claimant was not entitled to leave because he was a casual employee.

13. I have examined all evidence adduced before me plus the submissions made. The issues for determination are as follows:-

**1. Whether there were valid reasons to warrant dismissal of the Claimant.**

**2. Whether due process was followed before his dismissal.**

**3. Whether Claimant is entitled to remedies sought.**

14. On the 1<sup>st</sup> issue, the Claimant has stated he was an employee of Respondent having been employed from May 2009. The Respondents aver this was not a permanent employment but a casual engagement. As whether to treat this engagement as causal or not – I refer to Section 9(1) and (2) of Employment Act 2007 which states as follows:

**1) "A contract of service:**

**a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or**

**b. which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.**

**2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).**

15. Section 10(1) of Employment Act also states as follows:-

**"A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment."**

16. In view of these provisions of the law, an employer has an obligation to issue an employee with an appointment letter within 2 months of employment.

17. Under Section 10(7) – where there is no employment letter then the duty of proving or disproving an alleged term of the contract falls on the employee.

18. In the current case, the Claimant served the Respondent and was never issued with an appointment

letter. He served for over 2 years and issue of casual employment would not have arisen. He was also a member of NSSF and NHIF and the Respondent submitted the dues. In the circumstances, the averment that he was a casual worker does not stand.

19. There was also no letter of termination issued to the Claimant after the alleged misconduct. In the circumstances it is my finding that there were no valid reasons to terminate the employment of the Claimant.

20. The manner in which the Claimant was dismissed is also not clear. Section 41 of Employment Act 2007 states as follows:-

**“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.**

21. This process was never followed before Claimant was dismissed.

22. Section 45(2) of Employment Act 2007 states as follows:-

***(2) A termination of employment by an employer 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:-***

***(i) related to the employee’s conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

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

23. In view of this fact, I make a finding that the Claimant was unfairly and unlawfully dismissed.

24. In terms of dues, I also find for the Claimant and award him as follows:-

***1. 1 month salary in lieu of notice = 15,094 (as per the Claimant’s evidence as Respondent did not produce any documents to the contrary).***

***2. Unpaid wages for the 3 shifts that he worked in the month of July = 503 x 3 = 1,509/=.***

***3. Salary in lieu of leave for the 2 year period = 15,094 x 2 = 30,188/=***

***4. Compensation equivalent to 12 months salary for unlawful termination = 12 x 15,094 = 181,128/=***

***Total = 227,919/=***

***5. The Claimant is also entitled to costs of this suit plus interest at Court rates with effect from***

*the date of this judgement.*

**Dated and delivered in open Court this 6<sup>th</sup> day of December, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for the Respondent

Wathome for the Claimant