



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

CAUSE NO. 158 OF 2015

LAWI WEKESA WASIKECLAIMANT

VERSUS

MATTAN CONTRACTORS LIMITED RESPONDENT

JUDGEMENT

1. The Claimant does not set out the issue/s in dispute as required under Rule 4 of the Court Rules. However the orders sought are with regard to unfair termination.
2. The claim is that on September 2012 the Claimant was employed by the Respondent as a Machine or Plant Operator earning kshs.20, 000.00 salary per month. He worked diligently until January 2015 when he was terminated and the Respondent refused to pay his terminal dues. No Certificate of Service was issued. The Claimant is also that the terminated was not justified as there was no notice issued; the Claimant was never given a hearing prior to termination; and the failure to issue certificate of service was meant to injure the claimant.
3. The claim is for notice pay; salary for January 2015; letter of service; annual leave pay for 28 days; compensation for unfair termination; and general damages for unfair termination with costs.
4. In evidence the Claimant testified that on 28th January 2015 he was sent to pick a machine at night. When he was offloading this machine he slipped and the machine fell. Since it was night and there were no lights and the vehicle had no breaks the Claimant could not see. The engineer on site called the supervisor and complained that a machine had been dropped who came and chased the Claimant away. There was no prior notice or the salary due paid.
5. The claim is also that the Respondent practice was that no letter of employment was issued to any employee. He was paid in cash but later he was told to open a bank account where the salary was deposited but later this was paid via Mpesa. The Claimant is seeking his dues on the grounds that he was made to work during the day and night, seven days a week without any break.
6. The Claimant also testified that in the statement of defence it is stated that he was a casual which is not true as he was paid per month and was employed to operate and drive a particular machine. This evidence should be disregarded and the Court make a finding that he is entitled to the claims.

Defence

7. The defence is that the Claimant was not terminated without a good cause that was justified. The Claimant was employed as a casual from 2014 and was called on and off whenever there was tarmac being applied on roads as he was a PTR machine operator which is used only used when tarmacking and

to smoothen the tarmac. The Claimant was not employed for 3 years.

8. The defence is also that on 27th January 2015 the Claimant reported to work while drunk wherein he caused an accident by driving the PTR machine into a ditch and he disappeared upon learning that the accident had been reported to the police and he was due for arrest. The Claimant is not entitled to the claims set out and should be dismissed with costs.

9. In evidence, the Respondent called Mohamed Hussein who was the site manager for the Respondent and worked closely with the claimant. That the Claimant was a machine operator a damper and when new roles came, the Claimant would be called when there was work for him. The Claimant would also be called when any other employee was absent as he was not on full time.

10. That on 25th January 2015 the Claimant collected a hired machine to bring it to the site at Upperhill near Kenyatta national hospital where the Respondent was doing road work. While offloading the machine, the Claimant was in a hurry and the machine landed in a ditch. The manager was present as well as the witness who were watching as events were unfolding. There was no way of removing the PTM machine from the ditch. When the Claimant was called by the manager, it was apparent he was drunk and the witness made this observation. For being drunk and acting in a hurry, the Claimant caused the accident and caused damage to the machine. The police were called and upon filing a report, a new machine was hired to remove the PTM machine from the ditch. The Claimant failed to report on duty after the police report. He has never been seen at work again.

Determination

11. The issue in dispute is not set out. This can only be discerned from the pleadings. That the Claimant was unfairly terminated without notice or being given any reasons; and that the Claimant was not paid his due. This was contested by the Respondent who stated that the Claimant was a casual employee, he caused an accident while at work due to being drunk and acting in a hurry; this was reported to the police and the Claimant never turned up for work again.

12. The practice of an employer failing to keep a record of its employees, causal or permanent, on contract terms or open contracts is an act against its interests. Such a practice works against such an employer. It is contrary to the law. Such a record should be maintained at all material times pursuant to Part X of the Employment Act and particularly at section 79 thus;

79. An employer shall keep a register in which the employer shall enter the full name, age, sex, occupation, date of employment, nationality and educational level of each of his employees and a return of employees for each calendar year, ending on 31st December containing such information shall be sent to the Director not later than 31st January of the following year.

13. These provisions are set out in mandatory terms. They are to be adhered to without exception. The sector within which the Respondent operates, construction of roads, and the nature of employment of the Claimant as a machine operator has not been exempted by the Minister from keeping a record of such an employee.

14. The defence that the Claimant was a casual employee is not supported by any evidence. The duty is upon the employer to keep a record of its employees at any given time. This is a good practice as such a record is used to effect payments and to ensure the safety and security of such employees while at the Respondent employment. To keep such a record would in itself set out who are the full time or casual employees. It is not an offence to keep some employees as casuals. Where the nature of work required to be undertaken by a particular employee is of the nature that is *ad hoc*, not planned for or on short term, to keep such a record would vilify the Respondent and or help the Court assess the exact relationship between the Claimant and the respondent. The Court is left with the evidence of the Claimant and the Respondent and without any record, the evidence of the Claimant is to be believed.

15. The claimant's evidence is that he was employed in September 2012 and was terminated in January

2015. He was paid in cash, later via the bank and then via Mpesa. The records for these transactions are to be kept by the employer and not the claimant. as such, where the Claimant remained in the employment of the Respondent for the period 2012 to 2015, or for the period of 2014 as stated by the Respondent and remained as such over a period of two (2) months and above, section 37 of the Employment Act apply. By operation of the law, he became a full time employee. By the nature of employment that the Claimant performed, it was continuous, did not end within a month, two months or within a time that can be considered as short term for a casual employee.

16. I therefore find the Claimant was an employee of the respondent. Before termination he was entitled to notice or payment in lieu.

17. Even where the Claimant grossly misconducted himself, the act of driving and dropping a machine that was of high value to the respondent, where such amounted to good grounds for summary dismissal, section 41(2) of the Employment Act requires that he should have been given notice and a hearing. I find no such notice or set out reasons for the summary action of dismissing him from his employment. The report lodged with the police when the Claimant had an accident was not pursued so as to ensure a sanction against him. Little is mentioned in this regard. To therefore fail to pursue the Claimant even where he is said to have been a casual employee to account for his serious misconduct is to leave the Respondent as the employer exposed to a claim such as this one. The failure to issue notice to the Claimant noting that he was drunk while at work; he acted in a rush manner and caused an accident; and fail to pursue the police report is to leave him at large. The consequence in employment and labour relations is to terminate the Claimant without due process which is unfair under the provisions of section 45 of the Employment Act.

Remedy

18. In view of the analysis set out above, where the Respondent failed to keep a record its employees were, casual or otherwise and the Claimant remained in their employment until 28th January 2015, he should be paid his salary for January 2015. However, the Claimant in evidence stated that his salaries were paid through Mpesa but did not set out and to award in such hazy circumstances would not be appropriate.

19. Notice pay is due and this is awarded at Kshs.20, 000.00.

20. Noting the failure to keep a record, failing the give the Claimant notice or follow up on his misconduct and let him free as it were, this resulted in a procedural lapse and the Claimant is entitled to compensation. Such shall be awarded at one month's salary at kshs.20, 000.00.

Judgement is entered for the Claimant for notice pay at 20,000.00 and compensation at kshs.20, 000.00. Each party shall meet its own costs.

Orders accordingly.

Delivered in open court at Nairobi and dated this 27th day of January 2016.

M. Mbaru

JUDGE