



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 41 OF 2013

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

AFRICANUS ISEBE ETIAT.....CLAIMANT

VRS

CHEMILIL SUGAR CO. LTD.....RESPONDENT

JUDGMENT

By memorandum of claim dated 19th December, 2011 and filed on 9th January, 2013 the Claimant seeks the following remedies

- a) Kshs. 589,152 as itemised at paragraph 6 above.
- b) Redundancy dues.
- c) Costs of the suit.
- d) Interest on a, b & c above.

The Claim of Shs. 589,152 is made up of the following

- a) Three month pay in lieu of notice (90x414).....Kshs.37,260
- b) Unpaid leave allowance (8x815).....Kshs.14,520
- c) Unpaid leave (240x414).....Kshs.111,780
- d) Off days (144x414).....Kshs. 59,616
- e) Overtime (244x414).....Kshs.101,016
- f) Severance pay (208x414).....Kshs. 86,112
- g) House Allowance (288x1863).....Kshs. 178,848

TOTAL

Kshs.589,152

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The Respondent filed its memorandum of Defence 24th February, 2014. In the Defence the Respondent avers that the Claimant was a casual employee who worked intermittently as a sanitary attendant and the termination of his employment was in accordance with Section 35(1) (a) of the Employment Act. the Respondent avers that the Claimant lodged a complaint with the Ministry of Labour following which an agreement was reached to pay the Claimant Shs. 101,188.90 made up as follows;

- a) Two weeks salary in lieu of notice.....Kshs. 5796.40
- b) 86.4 days accumulated leave days up to
30th June, 2009.....Kshs. 35,772.20
- c) 144 days accumulated off days since 1st June 2006 Kshs. 59,620.30

Total

Kshs. 101,188.90

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The Respondent denied owing the Claimant the sum of Shs. 589,152 and avers that the claim is an afterthought, frivolous and vexatious as the Claimant has already been paid his full terminal benefits.

The case was heard on 24th June, 2015. The Claimant testified on his behalf while Alfred Kiprop the respondent's training officer testified on its behalf.

The Facts as presented by the witnesses are not contested.

The claimant was employed by the Respondent on 2003 as a sanitary attendant. He worked continuously until 13th July, 2009 when the Respondent outsourced the sanitary services. The Claimant together with the other employees who lost their jobs due to the retrenchment lodged a complaint with the Ministry of Labour following which the Respondent agreed to pay the Claimant and the other employees who lost their jobs 2 weeks pay in lieu of leave, accumulated leave and off days. The Claimant was paid a total of Shs. 101,188.90.

The Claimant alleges that what he is claiming is the amount tabulated by the labour Ministry of Labour while the respondent also claims what it paid is what was granted by the Ministry of Labour. The Respondent has in addition agreed to pay severance pay but the Claimant demands the full difference between what it is claiming and what has been paid by the Respondent which he considers was part payment.

The issues for determination set out in the Claimant's written submissions which I adopt are whether or not the Claimant was a casual employee, whether the termination of his employment was unlawful and whether he is entitled to the prayers sought.

As pointed out by the Claimant's counsel, Section 37(i) of the Employment Act provides for conversion of a casual employee to term contract after working for one month continuously of three months intermittently. Having worked continuously from 2003 to 13th July 2009, the Claimant was no longer a casual employee. He was a monthly contract employee as provided in Section 37(2) and (3) . For this reason the Claimant was entitled to one months salary in lieu of notice.

On issue number 2, the Claimant's employment was terminated when the services he was rendering were outsourced. He therefore lost his job through redundancy.

Section 41 of the Employment Act is therefore not applicable as the procedure for termination of his employment falls under Section 40 of the Act.

On the Claimant's prayers, no explanation or justification has been made for the claim of 3 months salary in lieu of notice. As I have pointed out above he was entitled to one month's salary in lieu of notice.

The Claimant has not explained how he arrived at the tabulation of 240 leave days. For the 6 years and 2 months that he worked for the respondent the Claimant is entitled to 129.5 leave days which at Shs. 414 per day which the Claimant was earning at the time of redundancy amount works out at Shs. 53,613 which I award him under this head.

The Claimant prays for 144 off- days at Shs. 59,616. He was already paid Shs. 59,620 for the same and is not entitled to any further payment under the same head of payment. The Claimant is entitled to severance pay of Shs. 37,260 at the rate of 15 days salary per year worked and not Shs. 86,112 claimed. There is no provision for payment of leave allowance by law and the Claimant has not stated the legal or contractual basis for the claim while the Claimant's daily wage was inclusive of house allowance and the claim for house allowance therefore has no basis. No overtime was proved.

Having been declared redundant, the claim for compensation for unfair termination must also fail.

For the foregoing reasons I award the Claimant Shs. 60,896.10 made up as follows

- a) 1 months salary in lieu notice in the sum ofShs.11,592
- b) 129.5 leave daysShs.53,613
- c) 144 off daysShs.59,620
- d) Severance pay ofShs. 37,260

Total	Shs. 162,085
Less payment received	Shs. 101,188.90
Payment due	Shs. 60,896.10
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The Respondent shall also issue a certificate of service to the Claimant within 30 days.

Dated and signed and delivered this 21st Day of January, 2016

MAUREEN ONYANGO

JUDGE