



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND RELATIONS COURT

AT MOMBASA

CAUSE NO. 270 OF 2015

CHENGO KITSAO CHENGO.....CLAIMANT

VS

UMOJA RUBBER PRODUCTS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 27.4.2015 claiming terminal dues plus compensation for unfair termination of his employment contract by the respondent on 13.3.2013. The respondent has denied that she unfairly terminated the claimant services and avers that it is the claimant who deserted work from 14.3.2013. She further avers that the claimant is not entitled to the reliefs sought in his suit. The suit was disposed of by way of written submissions and the pleadings filed.

Analysis and determination

2. After careful consideration of the pleadings and the submissions filed by the two parties, the following issues arose for determination:

- (a) When did the claimant commence his employment at the respondent.
- (b) What was the nature of the employment contract.
- (c) Whether the claimant deserted work or he was unfairly dismissed.
- (d) Whether he is entitled to the reliefs sought.

Commencement date

3. The claimant pleaded that he started working for the respondent as a casual work form 1996 and became permanent in 2009. The respondent has not denied the commencement date but only pleaded that the claimant started as a casual before being converted into a fixed term contract employee in 2010. The court therefore makes a finding in favour of the claimant that the commencement date was 1996. The employer being the author and custodian of employment records, she should have produced copy of the employment contract to rebut the allegation by the claimant that his services for her started in 1996. The obligation to produce employment record to dispose verbal allegations by an employee in any legal proceedings before the court is vested by section 10(7) of the Employment Act (EA). That obligation has

not been discharged and as such the said finding by this court above that the commencement date of his employment was 1996.

Nature of his employment contract

4. The claimant has pleaded and submitted that from 2009 he was converted to a permanent employee with a monthly salary. The respondent has on the other hand averred that from 2010, the claimant's casual employment was converted to fixed term contract. The burden of producing a written contract in court proceedings is on the employer as stated herein above. In this case the respondent never produced any written contract of employment. The reasonable inference the court can draw from such default is that either no such written contract was ever written or that it was made but is contrary to the respondent's pleadings.

5. After careful consideration of the pleadings and submissions, the court finds on a balance of probability that the claimant was employed on permanent basis but not under fixed term contract basis. If the claimant was on fixed term contract, the respondent could have produced a contract signed by the parties stating the commencement and the termination date. In addition, the respondent should have pleaded the particulars of the commencement and the termination date. Without the said pleading and adducing evidence as to the nature of the contract, the court finds and holds that the claimant was in permanent employment from 2009 to 13.3.2013, and not fixed term contract.

Desertion or unfairly dismissed

6. Under section 47 (5) of the Employment Act, the burden of proving unfair termination lies on the employee. In this case the claimant has pleaded that he was unfairly and wrongfully summarily dismissed on 13.3.2013. However, he did not substantiate the alleged unfairness. His witness statement filed with the suit also falls short of explaining that she was indeed dismissed by the respondent summarily and under what circumstances. He also never called any witness to support his alleged dismissal. Consequently, the court finds on a balance of probability that the claimant has not discharged her burden of prove under section 47 (5) Employment Act *supra*. Instead the court agrees with the respondent that it is the claimant who deserted work from 14.3.2013. The attendance record for March 2013 shows that the claimant stopped attending work from 14.3.2013. The court does not see anything wrong with the validity of the said attendance record. The fact that it refers to casual employees did not render the claimant a casual employee. In any case the parties agreed to the production of the documents without calling oral evidence.

Reliefs

7. In view of the foregoing finding that it is the claimant who terminated from work without notice through desertion, the court dismisses the prayer for salary in lieu of notice. The prayer for leave is also denied because the payslips produced by the respondent indicated that the claimant was paid cash in lieu of leave earned every month. He did not deny the payslips in his pleading but only raised the objection too late in his submissions 2 months after being served with the defence. As observed herein above the claimant accepted herein above to dispose of the suit by written submissions without raising any objections to the documents filed as evidence by the defence and that meant that he had admitted the validity and the authenticity of all the documents on record. His belated objection to the documents is therefore an afterthought and the court will not come to his aid.

8. He will also not get any service gratuity because he did not produce any evidence to prove that he was entitled to such a relief. He did not even plead any basis or terms upon which the relief accrued. He will also not get any payment for the overtime as prayed for every Saturday worked for the 17 years of his service. Under the law, an employee is only entitled to one day off and not 2 days per week. In this case the claimant pleaded that he used to work from Monday to Saturday every week. The claim for overtime based on services rendered on normal hours for 6 days a week is therefore unfounded and without any evidence to the contrary it must fail in the face of the clear statutory provision.

9. The claimant is however awarded salary for the days worked in March 2013. According to the attendance register for March 2013 produced by the defence, the claimant was marked absent 4 times in the 13 days he was still in employment in March 2013. He will therefore get salary for 9 days. His gross pay as at December 2012 was kshs. 9,028 x 9 /30 = 2,708.40/=. He will have interest from 13.3.2013.

Disposition

10. For the reason stated above, judgment is entered for **kshs.2,708.40/=** plus a quarter costs plus interest.

Signed, dated and delivered this 19th February 2016.

ONESMUS MAKAU

JUDGE