



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 1990 OF 2011

DANIEL MUNGAI.....CLAIMANT

VERSUS

KABUTO CONTRACTORS LIMITED..... RESPONDENT

Mr Kamotho for Claimant

Mr Njuguna for Respondent

JUDGEMENT

1. The Claimant relies on the memorandum of Claim filed on 23rd November 2011. The Claimant testified under oath in support of his case. The evidence may be summarized as follows;
2. The Claimant was employed by the Respondent on 5th May 2006 as a Roller Operator at a construction site on a daily wage of Kshs 600 equivalent of Kshs 18,000 per month. The Claimant was not issued with a letter of appointment. The Claimant and fellow workers were paid at the end of each week and were not issued with payslips.
3. The Claimant used to work for 11 hours and therefore 3 hours more than the required number of working hours per day. That he worked on public holidays without pay. The company took Christmas break every year but the Claimant was not paid for days he was at home. The Claimant was not given housing or housing allowance. The Claimant was also not allowed to take annual leave.
4. The Claimant worked continuously until 28th May 2011 when he was orally informed not to report to work the following day. Out of the four (4) Roller Operators, only the Claimant's employment was terminated. That his colleagues work for the respondent until now. The Claimant was aggrieved by the termination and reported a dispute to a Labour Officer. The Claimant did not accept the settlement reached by the conciliator and came to court.
5. The Claimant seeks as per clause 6 of the statement of claim;
 - a. A declaration that the termination of the Claimant's employment was unfair
 - b. The Respondent to pay the Claimant
 - i. An award of 12 months' pay for unfair termination amounting to Kshs 288,000
 - ii. Notice pay amounting to Kshs 18,000
 - iii. In lieu of leave in the sum of Kshs 63,000

iv. Overtime amounting to Kshs 21,600

v. Payment for work done during public holidays Kshs 52,080

vi. House allowance Kshs 162,000

vii. Unremitted NSSF for 56 months Kshs 22,400

6. The Claimant had served for 5 years and states that **Section 37 of the Employment Act, 2007** applied to him hence the Claim for wrongful and unfair termination and payment of terminal benefits aforesaid.
7. The Respondent filed a reply to the memorandum of claim on 6th January 2012 stating *inter-alia* that the Claimant was its employee. That due to the nature of its work as a construction company, it engages its +employees on a casual basis as and when work is available. That it lays off workers when work is not available and recruits again once a new contract is obtained.
8. On diverse dates in 2006, 2007, 2008 and 2009 the Respondent secured several contracts for road construction projects and during these contract period the Claimant was on diverse dates engaged intermittently as a roller operator and on a casual basis. The Claimant was paid a daily rate of Kshs 200 in 2006, Kshs 250 in 2007, Kshs 300 in 2008 and Kshs 325 in the subsequent years. The last contract expired on 10th December 2009 and the Respondent laid off all its casual employees including the Claimant.
9. In August 2010, when the Respondent had a road project in progress the claimant was re-engaged on casual basis. This engagement was after 7 months lay off. The Claimant was therefore not in continuous employment as alleged or at all. In June 2011, the road construction came to an end and the Claimant was laid off. The Claimant reported the matter to the Thika District Labour Officer.
10. The Respondent produced the employment record of the Claimant at the Labour Office. The Labour Officer calculated the Claimant's terminal dues on the basis of these records pursuant to the provisions of the **Regulation of Wages (General Amendment) Order 2011** and the **Employment Act 2007** and by a letter dated 26th August 2011, the Labour Officer directed the Respondent to deposit the said dues in the sum of Kshs 17,791 with the labour office for onward transmission to the Claimant. The Claimant complied accordingly. The dispute was then marked as settled. The Respondent was therefore surprised to receive a demand letter dated 28th September 2011 from Kituo cha Sheria.
11. The Respondent called Mr Peter Rono (RW1) an accountant of the Respondent who testified in support of the Respondent's case. He relied on the employment records of the Claimant. In terms of the documents, the Claimant was recalled to work on 27th April, 2010 when the company was awarded a new contract. RW1 said that the company did not work during public holidays and the company closed before 15th December every year.
12. The company paid a consolidated wage and therefore the issue of house allowance did not arise. That the employees including the claimant were paid in lieu of leave days not taken. That the company subsequently got new work in Eldoret where they engaged local personnel and therefore did not recall the Claimant. RW1 stated that it was Government policy that contractors engage local labour. The witness added that all NSSF dues were submitted by the Respondent upon deduction but he did not produce the complete records of NSSF remittance. RW1 was not sure if the Claimant collected the settlement cheque from the labour office.
13. RW1 admitted that the Labour Office used a daily rate of Kshs 361.25 in computing the Claimants dues instead of a daily rate of Kshs 600 because at the time the Claimant earned a weekly wage of

Kshs 3600. The Claimant was paid for 4 public holidays worked. RW1 denied that the Claimant was dismissed from employment unlawfully or unfairly stating that the Respondent applied the law and policy applicable in the construction industry.

Determination

14. The issues for determination that arise in the matter are;

- i. Whether the Claimant's employment was terminated for a valid reason and in terms of a fair procedure.
- ii. Whether the Claimant is owed any terminal benefits.

Issue i

15. The totality of evidence before court shows that the Claimant served the Respondent intermittently in various road construction sites and would be engaged and laid off as and when the respondent obtained a new construction project. It is not in dispute that as at the time the Claimant was laid off in the year 2011, he earned a daily wage of Kshs 600 paid weekly. The Claimant worked as a roller operator. The evidence before court does not show that the Claimant was underpaid

16. The record of NSSF and NHIF produced indicate that the Respondent duly remitted the deductions though RW1 was unable to produce the record for 2006. The Claimant has therefore failed to prove on a balance of probability that he was a permanent employee. To the contrary the court is satisfied that the Claimant was engaged as and when a new contract was secured and was laid off when the works were completed. That this had happened severally between the year 2006 to 2011 when the Claimant lastly left the employment of the Respondent.

17. The court is guided by the decision in **Benson Omuyonge –Vs- LaxmanBhai Construction Ltd (2014) eKLR** where the court held in dismissing a similar claim that;

“The construction industry is based on projects with specific beginning and specific ending. Employees are contracted to work for the duration of the project. Being a project employee with years of experience working at different sites for the Respondents clients, the claimant would know that his contract was to end with the completion of the project”.

18. This case applies *mutatis mutandis* to the Claimant herein. The Claimant had been engaged, laid off and re-engaged severally by the Respondent between the years 2006 and 2011. The Claimant was well aware that he would be laid off when a specific contract came to an end and would be re-engaged as and when a new opportunity arose.

19. The Claimant was less than candid to the court in stating that he was a permanent employee and was targeted unlawfully and unfairly for termination. These allegations are not borne out by the facts presented to the court. The claim by the Claimant that he was unlawfully and unfairly terminated from employment has no sound basis and same is dismissed.

20. With regard to the terminal benefits payable to the Claimant. The Claimant has proved that he is entitled to;

a. Notice pay

Payment of Kshs 18,000 in lieu of one month notice in terms of the law applicable.

b. Leave due

The court accepts the submission by the Respondent that the Claimant is owed Kshs 18,000 in lieu

of leave days not taken and awards the Claimant accordingly.

c. Public Holidays

The court accepts that the claimant was owed money in respect of 4 public holidays worked in the sum of Kshs 4,800 using a daily charge of Kshs 600 instead of Kshs 361.25 applied by the Labour Office. The Claimant is awarded accordingly.

d. House Allowance

The Claimant has not proved on a balance of probability that he was owed a house allowance over and above the Kshs 600 daily wage he received. The Claim is not supported by the Regulation of wages (Building and Construction Industry) order 2004 applicable at the time. The claim is therefore dismissed for want of proof.

e. Overtime Allowance

This claim should fail because no evidence has been adduced to show the claimant worked overtime and was not paid. The same is accordingly dismissed for want of proof.

f. Refund of NSSF not remitted for 56 months

The Respondent demonstrated that it had remitted all NSSF and NHIF dues in respect of the Claimant. The Claim is dismissed for want of proof.

21. In the final analysis the award payable to the Claimant is as follows;

- i. Kshs 18,000 in lieu of notice
- ii. Kshs 8,100 in lieu of leave
- iii. Kshs 4,800 for 4 public holidays worked

Total award Kshs 30,900

22. In the event the Claimant collected the cheque for Kshs 17,791.50 deposited with the Labour Office Thika, the Respondent should only pay the balance.

23. The award is payable with interest at court rates from date of filing suit till payment in full. The Respondent is to provide the claimant with certificate of service within 14 days from date of judgement. The Respondent is also to pay the costs of the suit.

Dated and delivered in Nairobi this 1st day of April, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE