REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

APPEAL NO. 6 OF 2015

CRESCENT CONSTRUCTION LIMITED ……..... CLAIMANT

Versus

ZAKARIA MAINA ..... 1ST RESPONDENT

(An appeal from the Judgment of the Senior Principal Magistrate at Milimani Courts, Nairobi Hon. E. Maina dated 21st February 2007 in SPMCC NO. 1372 of 2003)

M/S Nzioki Mutua for the appellant

Mr. Njoroge Nyaga for the respondent

JUDGMENT

1. By a memorandum of appeal dated 8th March 2007, the appellant appeals against a judgment of the Senior Principal Magistrate Hon. E. Maina delivered 21st day of February 2007.

2. In the main, the appellant states that the finding of the lower court is not supported by evidence on record or by known law, and in particular the Employment Act Cap 226 of the laws of Kenya (now repealed). That the learned Magistrate erred in law by shifting the burden of proof on the appellant to dispute the claims made by the respondent.

3. That the respondent ought to have produced documentary evidence to prove he was a permanent employee which he did not. That the learned magistrate ought to have found that the respondent was employed as a casual employee by the appellant and was therefore not entitled to the reliefs sought. The learned magistrate ought to have found that the respondent's job was tied to the construction project and it therefore ended upon expiry of the project.

4. The appellant prays that the appeal be allowed and the judgment of Hon. E. Maina be set aside and in substitution thereof, the respondent's claim be dismissed with costs to the appellant.

5. The appeal is opposed by the respondent.

6. The suit was commenced by a plaint dated 30th January 2002 and was defended by a statement of defence dated 27th March 2003.

7. The court notes at the outset from the record of appeal, at paragraph 4 of the statement of defence that the appellant denied the plaintiff was ever its employee and therefore could not have terminated his employment as alleged by the respondent or at all and the respondent was therefore not entitled to any of the reliefs sought in paragraph 8(a – f) of the amended plaint.

8. From the record, the respondent relied on his own testimony and that of PW2, Mr. Ibrahim Omego Zakayo his witness in the case. The appellant called two witnesses DW1 Mark Kebogo Kazehale and Josphat Nguru *'DW2'*. DW1 the administration manager of the respondent contradicted the pleadings of the appellant, in that, he admits that the respondent was employed by the appellant as a watchman, contrary to the outright denial in paragraph 4 of the statement of defence.

9. Although the learned magistrate did not bring this out this contradiction in his judgment, the learned magistrate correctly found that the respondent was an employee of the appellant from the evidence before court.

10. From the record, whereas the respondent states that he was employed by the appellant on 4th March 1996, DW1 states that the respondent must have started work in August 1998 when the particular project commenced. DW1 admitted that he did not work for the appellant at the time, and he did not have the records for the respondent. It is not in dispute that the respondent worked for the appellant until 14th June 2001. It is the court's considered view that the learned magistrate came to the correct conclusion of fact and law that the claimant having been in continuous employment for this period of time, would not be classified as a casual and was therefore entitled to the terminal benefits set out in the plaint and proved on a balance of probability by the respondent vide his oral testimony and that of PW2.

11. In this regard, the learned magistrate correctly found that the respondent was entitled to payment in lieu of one month notice in terms of section 16 of the Employment Act, Cap 226 of the laws of Kenya (now repealed).

12. The learned magistrate made further findings supported by evidence before court that, the respondent had accumulated 76 days leave, since he was entitled to at least 21 days leave per year and had only taken 14 days in 1996 and 18 days in 2001. The respondent was able to establish and the learned magistrate correctly found that the respondent was not issued with any letter of appointment, a payslip or certificate of service. The respondent further proved that he was entitled to house allowance since he was not housed by the appellant at 15% of his basic pay. This is in terms of the Employment Act and the Collective Bargaining Agreement in place in the Construction Sector at the time.

13. The court is unable to fault the findings of fact and law by the learned Magistrate because the same were sound and based on the evidence adduced before her.

14. The fact that the testimony by DW1 contradicted the pleadings by the appellant did not help the appellant's case.

15. The respondent told the court that he used to work from 6 p.m. to 8 a.m., a period of 14 hours a day and was not paid overtime. That his salary was Kshs.7,800.00 per month.

16. This court finds no error on the part of the learned magistrate in the manner he evaluated the evidence before him and in the application of the employment law before arriving at the decision he made.

17. The lower court did not shift the burden of proof to the appellant but found that all the particulars of claim including the special damages claimed had been proved on a balance of probability.

18. Although the respondent was an employee in the construction industry, which is based on projects

with specific beginning and specific ending as was found by the ELRC in **Benson Omuyonge vs. Lax ManBhai Construction Limited [2014] eKLR**, the respondent was employed as a watchman and it was not established by the appellant that the respondent worked intermitedly. To the contrary, the lower court correctly found that he had worked continuously from 1996 to 2001, a period of 5 years and 3 months and was entitled to payment of severance pay for the period served in terms of the Collective Bargaining Agreement applicable.

19. Even in cases where an employee in the construction industry works intermitedly, he is entitled to notice pay, leave pay, house allowance and overtime as guided by the Regulation of wages (Building Construction Industry) applicable at the time and the CBA. See **ELRC at Nairobi, cause no. 1990 of 2011, Daniel Mungai Vs. Kabuito Contractors Limited.**

20. In the final analysis, the court finds that the appeal lacks merit and is dismissed with costs in this court and court below.

Dated and delivered at Nairobi this 31st day of May, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE