



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 435 OF 2013

BETWEEN

RASHID MSENA.....CLAIMANT

VERSUS

ARKSON QUARRIES.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Nyange Advocate instructed by Kituo Cha Sheria, Advocates for the Claimant

Ms. Salma Ramadhan Advocate instructed by Salma Ramadhan & Associates, Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed this Claim on 5th December 2013. He seeks from the Respondent, his former Employer, following orders:-

- a. 1 month salary in lieu of notice at Kshs. 30,000.
- b. Service pay at Kshs. 15,000.
- c. Salary for days worked in November 2013 at Kshs. 6,000.
- d. Annual leave pay of 1 year at Kshs. 30,000.
- e. Labour for repairing machine for cutting blocks at Kshs. 100,000

Total.....Kshs. 181,000.

He also prays for a declaration that termination was unlawful; he is issued the Certificate of Service; and any other relief the Court deems fit to grant. Although not included in his prayers/ reliefs, the Claimant

pleads for compensation under paragraph 9 of his Statement of Claim. He prays for costs.

2. He states he was employed by the Respondent as a Fabricator, in June 2012, until 7th November 2013 when his contract was terminated. He earned Kshs. 30,000 as the monthly salary, as of the date of termination. He was contracted by the Respondent to repair the Machine for cutting blocks at a cost of Kshs. 100,000. The Respondent refused to pay him after he had met his end of the contract. Termination was without notice and cause.

3. The Respondent filed its Statement of Response on 18th February 2014. Its position is that the Claimant was engaged as a Casual Employee, earning Kshs. 1,000 per day, as and when work was available. At no time was he contracted to repair the Respondent's stone cutting Machine. The Claim has no merit. The Respondent prays for dismissal of the Claim with costs to the Respondent.

4. The Claimant and his Witness Anderson Katana gave evidence on 17th July 2014. The Respondent testified on the same date through its Accountant Japheth Onyalo. Proceedings were marked as closed on the 24th July 2015, after the Respondent failed to present its remaining Witnesses. The Court retired to prepare its decision, reserved for 13th November 2015.

5. In a Ruling made on 8th October 2015, the Court found service of the hearing notices leading to the proceedings of 24th July 2015, had been served on the wrong firm of Advocates, the Respondent having changed its Advocates midstream. It was directed service be re-done. The Respondent's case was reopened, with 2 more Witnesses, Administrator Rita Rattos and Director Nawaz Shokatali, testifying on the 17th March 2016, bringing the proceedings to a close. The matter was last mentioned in Court on the 17th June 2016, when Parties confirmed the filing of their Submissions, and decision of the Court reserved for 29th July 2016.

Claimant's Case

6. The Claimant told the Court he was employed in June 2012 as a Fabricator. He earned a salary of Kshs. 30,000 per month. His contract was terminated on 7th November 2013. He was called by the Employer while at home, and told not to go to work.

7. There was no termination notice, and no reason for the termination decision. He was offered Kshs. 6,000 for days worked as the totality of his terminal benefits. He declined the offer. He testified he is claiming Notice Pay, Service Pay, Annual Leave Pay, Costs for the repair of the Machine, Compensation for unfair termination, Certificate of Service and Costs.

8. Cross-examined, the Claimant stated he worked for 17 months. It was not true that he was engaged as a Casual Worker, from 15th June 2013. He was paid after every 2 weeks. He was initially paid by Terence, a brother to his boss. Later, he was paid by Japheth.

9. His name appeared on the Respondent's Wages Account Schedules. He is shown to have been paid Kshs. 6,000 for 6 days, in the Schedule dated 30th June 2013. The Schedule for 9th July 2013 indicated the Claimant was paid Kshs. 3,000 for 3 days worked. He signed all the documents acknowledging payment.

10. His role of Fabricator, included repair of Machines. He was contracted to repair Respondent's Machine in August 2013. It took about a month to finish repairing. It was not a task carried out as part of his normal duties. He brought People from outside to repair. There was no written contract for repair. Among the People he brought for the task were Katana Anderson and Daniel Katana. Daniel was also employed by the Respondent. He was a Welder. He was a School Boy who worked during holidays. The Claimant confirmed on redirection that he was not issued a letter of employment. He was not issued pay slips. He repaired the Machine but was not paid for his work.

11. Katana testified he was asked by the Claimant to assist the Claimant in repairing the Machine. This was in August 2013. The Respondent agreed it would pay Kshs. 100,000 to the Claimant for repairing the Machine. He repaired the Machine but was paid nothing by the Respondent. Katana was to be paid Kshs. 50,000 by the Claimant upon completion of the task.

Respondent's Case

12. Accountant Onyalo testified he worked with the Respondent from September 2012. He used to visit the site and pay workers, twice in a month. The Claimant worked as a Casual Employee, with effect from 15th June 2013. He was paid Kshs. 1,000 daily. He was to maintain the Machines. He was paid regardless of whether he repaired the Machines. The Respondent had not moved to the Site in September 2012. There were no Workers there. Machines had not been procured. Rajit Singh was the site Supervisor. He complained that the Claimant was rude to him, and was not ready to take instructions. The Supervisor complained that the Claimant would sit under a shade, even when the Machine needed his attention. He declined to repair the Machine on 7th November 2013. The Supervisor told him to go home. Onyalo was not aware of any contract for repair of the Machine, entered into between the Claimant and the Respondent. Katana was an Employee of the Respondent.

13. Onyalo told the Court in cross-examination that he was not at the site, when the Claimant was dismissed. The Claimant was not given notice or a letter of termination. He was given an opportunity to State his case. Onyalo was not there when this was done. The Claimant was employed on 15th June 2013. He was not given a letter of employment. The quarry site in Kilifi started operations in June 2013. There were only Security Guards at the site prior to this.

14. Rita Rattos testified the Claimant worked at the site. He was a Casual Employee, paid daily. He was employed mid-June 2013. Rattos started working in 2012. The Claimant fabricated and maintained the Machines. The Wage Rota filed in Court by the Respondent confirms when he worked, and what he was paid. At the Respondent's Kilifi Office, the work carried out was in the form of paperwork. The Company was formed in 2011, but moved to the site and commenced mining only in 2013. Rattos was called by the Supervisor sometime in November 2013, and informed the Claimant had incited other Workers not to work. The Claimant was asked to go home and explain himself the following day. He did not explain himself. The Respondent instead was served with the Claimant's Advocates demand letter. The Machines arrived in 2013. There was no work at the quarry before their arrival. She knew Daniel but did not know Anderson. The Company operates Monday to Friday, and half day on Saturday. Sunday is rest day.

15. Rattos told the Court upon cross-examination that her Company was registered in 2011. There was no written contract concluded between the Parties. The Claimant was not issued pay slips. He was not subscribed to the N.S.S.F. There are no documents availed to the Court to show Machines arrived in 2013. The Claimant was rude, and incited other Employees. The Supervisor told Rattos this. Payment Voucher stated the Employer terminated the Claimant's contract on 7th November 2013. There was no notice. The Claimant was granted the opportunity to explain himself. Rattos restated in cross-examination that the quarry started mining in 2013. This was known to the Employees. The Claimant was instructed to report to Rattos by his Supervisor. He did not do so. Terminal dues were computed after the Claimant failed to report.

16. Shokatali confirmed his Company commenced site operations in 2013, the Office having opened in 2012. Office is in Kilifi Town, the Quarry about a Kilometre out of Town. The Claimant was a Casual Worker. Like most other Workers, save for the Security Guards, he started working for the Respondent mid-2013. He was a Fabricator. Machines tended to break around the frames, due to the nature of the work. He attended to this by fabricating. He was not contracted to repair the Machine for Kshs. 100,000. Shokatali did not know Anderson Katana. Daniel Katana may have been a Casual Employee. The Claimant should be ordered to accept the sum of Kshs. 6,000 offered by the Respondent, and his Claim dismissed with costs to the Respondent.

17. Shokatali stated on being questioned by the Claimant's Advocate, that the Claimant worked from June 2013, leaving in November 2013. He completed 3 months in employment. He was not under a written

contract. He was rude and incited others. This information was relayed to the Office by the Supervisor. It is true the Respondent terminated the Claimant's contract. He was not issued notice to show cause why disciplinary action should not be taken against him. He was asked to see Rattos. He failed to do so. He did not collect his terminal dues.

The Court Finds:-

18. In issue is whether the Claimant was engaged by the Respondent as a regular or casual Employee; whether he was in either case employed in June 2012 or June 2013; whether he was contracted outside the employment contract to carry out machine repair for the sum of Kshs. 100,000; whether he is entitled to this sum, terminal dues; and whether his contract was unfairly and unlawfully terminated by the Respondent, warranting compensatory award.

19. *Contract for repair of the Machine, at a consideration of Kshs.100,000:* The Claimant's position is that he was engaged by the Respondent to repair a specific Machine. He was to be paid Kshs. 100,000. He did this with the assistance of Daniel Katana and Anderson Katana. The Respondent reneged, and paid him nothing. This position was supported by Claimant's Witness Anderson Katana. The Respondent denied contracting the Claimant to perform this specific task. His role was to repair and maintain the Machines. The persons he claimed helped him were Co-Workers.

20. The Court upholds the evidence of the Respondent on this prayer. The Claimant was employed as a Fabricator. His duties included repair of the Respondent's Machines. He received wages for this. He did not convince the Court that he was engaged outside his contract of employment, to perform a specific extraneous task. The nature of this task appears to fit within the Claimant's general job description. The Persons he claims assisted him in undertaking the task, were themselves Workers engaged by the Respondent on regular wages. The claim for Kshs. 100,000 has no merit and is declined.

21. *Date and nature of employment:* The date of employment should have been conclusively shown by the Respondent, to fall on June 2013, through production of complete employment records. There was no letter of employment issued upon the Claimant on recruitment. The claim that the Company was incorporated in 2011 was not supported by documentary evidence. There were no Employees outside of the Respondent's Management brought before the Court to confirm operations did not start at the quarry until 2013. It was not shown that the Machines arrived in 2013. The Guards who were said to have been the lone group at the quarry before June 2013 were not called to confirm the assertion. The Claimant was categorical he was employed in June 2012, and worked for 17 months.

22. Section 10 [7] of the Employment Act stipulates:

“ If in any legal proceedings an Employer fails to produce a written contract, or the written particulars prescribed in subsection 1, the burden of proving of disproving an alleged term of employment stipulated in the contract shall be on the Employer.”

23. The Respondent did not issue the Claimant a written contract. The Claimant holds he was employed in June 2012. It was for the Respondent to disprove this. The Respondent did not prove the date of June 2013 as the date the Claimant was employed. The issue must therefore be resolved in favour of the Claimant. It is the finding of the Court that the Claimant was employed in June 2012, and worked for 17 months.

24. Flowing from this finding, it cannot be that the Claimant was in casual employment after working for 17 months continuously. Even if he had worked for the 3 months admitted by the Respondent, he would not be considered in casual employment under Section 37 of the Employment Act 2007. He had worked for a number of continuous days in aggregate of more than 1 month. Alternatively, the Court views the nature of the work carried out by the Claimant as being central to the business operated by the Respondent. Shokatali testified the Machine frames frequently broke as a result of the nature of the work. The Claimant was required to fabricate to restore functionality. This was not a transient role, to be carried out by temporary labour. It was a function central to the Respondent, and which demanded regular

engagement of skilled labour to keep production going on. The Court is satisfied that the Claimant was a regular Employee, entitled to the full protection of the Employment Act 2007.

25. *Was termination fair and lawful?* Section 43 and 45 of the Employment Act require the Employer to demonstrate valid reason or reasons, for termination. Section 41 and 45 demand the process is fair and in accordance with rules of natural justice. There were allegations that the Claimant was rude to the Supervisor and incited fellow Workers to down their tools. He downed his tools. This information was passed onto the Office at Kilifi Town by Site Supervisor. Rattos and Shokatali received this information from the Supervisor. They did not witness the Claimant engage in the alleged acts of misconduct. There is no evidence in any form, from the Supervisor. There is no way of establishing that the allegations against the Claimant were true. Those allegations cannot have amounted to valid reasons. They were never investigated by the Management and established.

26. Rattos testified that the Claimant refused to report to her, and eventually abandoned his employment. The payment voucher however indicates termination was at the instance of the Employer. Shokatali conceded as much.

27. There was no hearing availed to the Claimant as contemplated under Section 41 ad 45 of the Employment Act 2007. The Claimant was not called upon to show cause why disciplinary action should not be taken against him, based on any of the allegations facing him- incitement, rudeness or desertion. Termination was unfair both in substance and procedure.

28. *Remedies:* The Claimant urges the Court to grant him compensation based on a monthly salary of Kshs. 30,000.

29. Whereas the Court is satisfied he was not in casual employment, this rate of monthly salary does not appear to be the correct base rate in redressing his claim. He is shown in the Wage Schedules to have worked on certain occasion for as little as 3 days in a month. The average rate of pay is difficult to achieve, given the inconsistency, but it certainly cannot be Kshs. 30,000 monthly. The Wage Schedules, for the period the Respondent acknowledges the Claimant worked, show him to have worked for about 15 days a month, on most occasions. Regard must be made for the period un-acknowledged by the Respondent, preceding June 2013. The Court shall, in exercise of its discretion, and for purposes of achieving a fair-go-all round, adopt 15 days' salary at Kshs. 15,000 as the monthly salary. ***He is allowed 3 months' salary in compensation for unfair termination at Kshs. 45,000.***

30. ***Notice pay is granted to the Claimant, at the equivalent of 1 month salary at Kshs. 15,000.***

31. It was conceded by the Respondent that the Claimant was not subscribed to any Social Security Plan. ***He is allowed service pay at half of the adopted monthly salary, at Kshs. 7,500.***

32. Kshs. 6,000 for days worked in November 2013, is not contested. The sum was offered by the Respondent to the Claimant. He did not accept the offer. ***He is allowed the prayer for salary for days worked, at Kshs. 6,000.***

33. ***The Respondent shall release the Claimant's Certificate of Service forthwith, in obedience to Section 51 of the Employment Act.***

34. ***Parties shall meet their costs of the litigation.***

IN SUM, ***IT IS ORDERED:-***

a. It is declared termination was unfair.

b. The Respondent shall pay to the Claimant: 3 months' salary in compensation for unfair termination at Kshs 45,000; 1 month salary in notice pay at Kshs. 15,000; service pay at Kshs. 7,500; and Kshs. 6,000 as salary for days worked in November 2013- total Kshs. 73,500.

c. The Respondent shall release to the Claimant his Certificate of Service forthwith.

d. Parties shall meet their costs of the litigation.

e. Award shall be satisfied in full within 30 days of its delivery.

Dated and delivered at Mombasa this 29th day of July, 2016.

James Rika

Judge