



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 2013 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th July 2016)

HUMPHREY OWINO OMONDI CLAIMANT

VERSUS

VISHNU BUILDERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Claim on 17th December, 2013, through the firm of Namada & Company Advocates seeking damages for unlawful termination. He states that on or about 4th March, 2004, he was employed by the Respondent as a Painter earning a salary of Shs. 450/= per day.
2. He states that during his employment he served the Respondent continuously and diligently to the satisfaction of the Respondent until 7th November, 2012, when he was dismissed from employment without being given any reason contrary to mandatory provisions of labour laws, natural justice and the constitutional right to fair labour practice, in that he had done nothing wrong to warrant disciplinary action being taken against him. He was never given a hearing before dismissal and due process was not followed in his termination.
3. It is the Claimant's contention that the Respondent's actions were unlawful, unfair and inhuman. That the termination was aggravated by the fact that the Respondent declined to pay the Claimant his terminal benefits and damages. He therefore prays for a declaration that the dismissal was unlawful and unfair, damages totaling to Shs. 337,500.00, costs and interest.
4. The Respondent filed a Reply to the Memorandum of Claim on 9.07.2015, denying the averments in the claim and put the Claimant to strict proof thereof.
5. In evidence the Claimant stated that he used to work from Monday to Saturday 1.00pm and that he was not a member of NHIF or NSSF. He stated that on 7.11.2012 he was told by his boss one Mr. Bimji that work had reduced and he together with 7 others should stop working.
6. They reported the matter to the labour officer who wrote letters to the Respondent who never

responded to the same. The Respondent also refused to negotiate the matter out of Court. The Claimant alleges that he suffered as a result of the Respondent's actions and prays for his claim to be allowed.

7. The Respondent put up one witness who led evidence to the effect that the Claimant was not an employee for 8 years but a casual labourer. The Respondent did not have painting work every day of the year but they would have one or two projects a year and would call in the Claimant for work.

8. In Submissions the Claimant stated that he was an employee and not a casual worker. He relied on Section 37 of the Employment Act, 2007, which is to the effect that a casual worker has a right to have his contract converted into a term contract after working continuously for an aggregate period of not less than one month. A worker whose contract has been converted as such is therefore entitled to all rights appurtenant to an employee.

9. They rely on the case of **Silas Mutwiri vs Haggai Multi Cargo Handling Services Limited Cause No. 107 of 2010** where it was held, the Claimant's casual labour from 2005 to 2009 was converted to a term contract after the application of Section 37. The Claimant urges the Court to hold that he ceased to be a casual employee by operation of law.

10. The Claimant further submits that fair procedure as stipulated under Section 45 of the Employment Act was not followed before his dismissal. He was not given any notice to show cause nor was he heard before he was dismissed. He relies on the case of **Donald Odeke Vs. Fidelity Security Ltd Cause 1998 of 2011** to buttress this position.

11. The Claimant also states that he is entitled to the prayers sought by virtue of the fact that due procedure was not followed before his termination, he was not given any notice before termination, the Respondent did not remit any NSSF or NHIF dues on behalf of the Claimant and as such he is entitled to gratuity.

12. The Respondent in his submissions states that the Claimant was not an employee but a casual labourer and as such is not entitled to any of the rights contained in the Employment Act. They state that the Claimant was paid at a daily rate of Shs. 450/= and he was not engaged for a period longer than a day as the need arose. They cite the case of **Francis Runji Karingi & 5 Others Vs China Hebei Water Conservancy Engineering Bureau (2014) eKLR** where it was held:

“The critical distinction between an ordinary employee and a casual employee, therefore, is that a casual employee is paid at the end of each day and is not engaged for more than 24 hours at a time.”

13. The Respondent states that they did not have any records in relation to the Claimant since he was a casual and engaged on oral terms.

14. The Respondent further states that the Claimant having been declared redundant on account of reduced business, the Respondent did not owe him any pay in lieu of notice. They cite the case of **Nelson Onyango Othoo Vs Wilham Kenya Limited (2012) eKLR** where the Court cited the case of **Consolata Wanjiku Ndirangu Vs Wilham Kenya Limited; Cause No. 222(N) of 2008** where it was held that:

“Because a casual employee is engaged for not more than 24 hours at a time, such an employee is only entitled to a termination notice of one day under Section 35(1) of the Employment Act. This means that in case of termination without notice, the employee is entitled to one day's pay and the bigger amount contemplated for redundancy under Section 40(1) (f)”.

15. The Respondent pray for the claim to be dismissed or in the alternative Court awards one day's pay in lieu of notice.

16. After considering the evidence of both parties, the issues for consideration are as follows:

1. Whether the Claimant was a casual or permanent employee.

2. If he was a permanent employee, if there was due process followed before the redundancy.

3. What remedies if any to grant in the circumstances.

17. On the 1st issue, evidence from the Claimant is that he was a permanent employee having been employed by the Respondent on 4.3.2004. He stated that he worked daily but was paid weekly. It is his contention that this cannot be termed as a casual engagement. Under Section 2 of the Employment Act 2007:

“Casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time”.

18. The guarding principle then is the period of payment to the said worker which should be daily.

19. Under Section 37(1) of Employment Act:

“Notwithstanding any provisions of this Act, where a casual employee:

a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

20. In the case of Claimant he was not paid daily but weekly and he worked continuously from 2004 to 2012. Despite the fact that the Respondents insist that he was on casual engagement, they have not produced employment record. They were required to do so by the Ministry of Labour on 4/12/2012 and they also never produced them.

21. That being the position, I find that the Claimant was a permanent employee and not a casual as submitted by the Respondent.

22. On the 2nd issue, the Claimant told Court that the Respondents terminated him after informing him that the work had reduced. The Respondents have denied this aspect. Reduction in work meant that the Claimant was declared redundant.

23. The process the Respondent should have followed is enumerated under Section 40 of Employment Act which states as follows:

(i) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(a) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(b) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(c) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(d) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(e) The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(f) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

24. This process was never followed. I therefore find for Claimant and find that the Respondent didn't follow the law in terminating him and therefore I find the redundancy unfair and unlawful and I award him as follows:

1. 1 month salary in lieu of notice = 13,500/=.

2. 12 months salary as compensation for unlawful redundancy = 13,500 x 12 = 162,000/=.

3. Severance pay for 8 years = 15 days salary x 8 = 7,500 x 8 = 54,000/=.

Total = 229,500/=

4. Respondent to pay costs of this suit.

Read in open Court this 28th day of July, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kouna for Respondent – Present

No appearance for Claimant