



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 820 OF 2013
SILUS OCHIENG OSANO CLAIMANT

VERSUS

HEAVY ENGINEERING LIMITED 1ST RESPONDENT

Claimant in person

Mr. Karuga for respondent

JUDGMENT

1. The suit is predicated on an amended memorandum of claim filed on 9th June 2014 pursuant to leave of court granted on 24th September 2015.

2. In terms thereof, the claimant seeks maximum compensation for wrongful dismissal and payment of terminal benefits set out under paragraph 5 of the amended memorandum of claim. The claim also seeks payment of interest and costs.

Statement of claim

3. The claimant was employed as a branch manager by the respondent on 1st August 2006. The claimant worked diligently and continuously until 17th September 2007 when his employment was terminated without notice or payment in lieu of notice.

4. The claimant states that he was underpaid by Kshs.176 daily for fourteen (14) months and claims the difference. He also seeks payment of accrued leave days for twenty six (26) days house allowance at the rate of 20% of the basic salary for fourteen (14) months, service pay calculated at sixteen (16) days salary for the one year served, transport allowance at Kshs.2,850 for fourteen (14) months and leave travelling allowance of Kshs.2,500.

5. The claimant states he ought to have been paid Kshs. 13,980 per month and thus claims the difference aforesaid.

6. The letter of temporary engagement at the rate of Kshs.290 per day instead of Kshs.466 per day was tendered in evidence as Appendix I.

7. Upon termination, the claimant was only paid Kshs.1,525 comprising of nineteen (19) days leave at

Kshs.945, and seven (7) days notice, at Kshs. 580.

8. Notice of intention to sue dated 2nd May 2013 was sent to the respondent but was not heeded hence the suit.

9. The collective agreement in place for two years from 1st September 2006 was also produced as Appendix 3. The claimant relies on it to claim terminal benefits aforesaid.

Response

10. The respondent filed an amended memorandum of reply filed on 2nd March 2014. The respondent states that the claimant was employed on 2nd August 2007 as a casual labourer and not 2006. The claimant's employment was terminated on 17th September 2007 when the respondent completed the Sondu Miriu project and the claimant and others became redundant.

11. The claimant complained to the Kenya Engineers Workers Union. That following an agreement dated 9th September 2011 between Federation of Kenya Employers, Kenya Engineers Workers Union and Heavy Engineering Limited, the dispute was settled completely. That the claimant's engagement was of a temporary nature and he was therefore a casual employee.

12. The suit is therefore misconceived and should be dismissed with costs.

13. Upon settlement the claimant was presented with Kshs.15,172 which is readily available at the labour office Kisumu for collection by the claimant.

14. Attached to the response was the casual engagement form dated and signed on 2nd August 2007; schedule of payment to casual workers including the claimant; calculation of July and final payment dated 13th February 2008 and clearance certificate.

Oral testimony

15. The claimant testified under oath whereas the respondent called Mr. David Nafula (RW1).

16. It is common cause that the claimant was employed on 1st August 2006 as a casual at a daily rate of Kshs.290. It is not in dispute that his last day of work was 17th September 2007. What is in dispute is whether he worked continuously as per the testimony by the claimant or he worked between 1st August 2006 to 19th August 2006; 26th January 2007 to 28th April 2007, 3rd May 2007 to 28th July 2007 and 2nd August 2007 to 17th September 2009 as per the testimony of RW1.

17. According to the claimant he worked seven (7) days a week from 7 a.m. up to 5 p.m. That he worked continuously until when his colleague was injured by a crane and the supervisor, one Mr. Chadran, wanted the claimant to provide to the police a false statement about the incident but he had declined. On 28th September 2006, the claimant was sent on compulsory leave. Upon his return, he was forced to sign casual engagement forms. When a Japanese engineer, who was a friend of the claimant went back to Japan, Mr. Chadran terminated the employment of the claimant. It is the Japanese engineer who had insisted that the claimant be recalled from compulsory leave.

18. The claimant seeks payment as per the statement of claim in terms of the collective bargaining agreement and compensation for the wrongful dismissal.

19. The claimant worked at the X-ray section of Sodu Miriu power project in Nyanza. He photographed welded metals. The claimant was a union member. The claimant was not paid final dues because he did not sign a discharge in full and final settlement.

20. The Kshs.15,172 was in respect of underpayments only. The claimant stated that he was supposed to be in job group 8 earning a salary of Kshs.13,980 per month. That in terms of Clause 4, employees in job group 4 – 8 were entitled to house allowance at the rate of 20% of the basic salary giving a sum of Kshs.2,700 per month.

21. The claimant added that he was in terms of Clause 17, entitled to Kshs.2,850 transport allowance. Furthermore, the claimant denied that he ever went on annual leave as alleged by the respondent or at all.

22. RW1 told court that the claimant took two (2) days leave every one month and was paid after every three (3) months.

23. RW1 said that claimant worked from 7.30 a.m. to 5 p.m. and one and a half (1^{1/2}) overtime daily rate and twice the rate on holidays and rest days was paid to him. That the claimant was paid cash and signed a pay sheet upon receipt. The respondent did not deduct statutory dues on the pay.

24. RW1 added that the claimant was paid all terminal benefits when the project was wound up but he declined to receive. The net pay was Kshs.1,770.

25. That there were about two hundred fifty (250) casual workers at the site and only 12 remained.

26. The claimant was to be paid Kshs.15,200 according to the calculations arrived at between the respondent and Kenya Engineering & Allied Workers Union, Kisumu branch; Federation of Kenya Employers was also involved in the discussions.

27. The list of employees produced in court including the claimant were accordingly paid by the respondent depositing their dues to the labour office Kisumu. The claimant has not taken his money to date, RW1 testified. Other employees collected their money.

28. RW1 stated that with regard to overtime, the claimant was not a branch manager as alleged. He was not entitled to Kshs.496 per day. The letter of employment he produced was not from the respondent.

29. RW1 relied on the refund sheet dated 21st September 2007 which shows the claimant had worked for one month and nineteen (19) days and was entitled to 3.26 leave days calculated at Kshs.290 per day. The original master roll supports this.

30. RW1 prays that the suit be dismissed with costs because it lacks any merit at all.

Determination

31. From the totality of evidence before court, the claimant was employed as a casual and did not work continuously as alleged or at all. To the contrary he worked intermittedly as demonstrated by RW1 in his sworn testimony. RW1 produced the master roll in support of this position. The dispute was conciliated upon by Labour office Kisumu. The respondent, the union and Federation of Kenya Employers participated in the conciliation and the dues due to all the casual workers were agreed upon and the list produced in court was developed.

32. With regard to the claimant the total amount due and owing to him was Kshs.15,200. The sum was deposited at Kisumu Labour office and it awaits collection by the claimant.

33. The court finds that the claimant was not dismissed from employment. To the contrary, and in line with the law that appertains in the construction industry, the claimant and other casuals were laid off upon completion of Sondu Miriu project.

34. The claimant has not proved on a balance of probability that he worked overtime and was not paid as claimed or at all. Similarly, the claimant has failed to demonstrate that he was entitled to a daily payment of Kshs.466 instead of Kshs.290 which he was paid from date of employment till the day of separation.

35. Similarly, the claimant has failed to demonstrate that he was entitled to transport allowance, leave allowance and house allowance he has claimed. These are items in the collective bargaining agreement (CBA) between the respondent and the Engineering Workers Union that was expressly not applicable to casual workers. The claimant was at the time not a unionsable employee.

36. It must be noted that an employee need not be a member of a union to benefit from a CBA. One only needs to be a unionsable employee as provided in the recognition agreement and the CBA between the employer and the employee.

37. The claimant needed to demonstrate, therefore, casual workers, including himself were unionsable employees in terms of the CBA he seeks to rely on. The claimant failed to do that and the reliefs sought are therefore dismissed.

38. The court having found that the claimant's services were not wrongfully and unfairly terminated, the claim for compensation is equally dismissed.

39. In the final analysis the court upholds the conciliation agreement arrived at in the Labour office Kisumu and finds that the claimant is entitled to Kshs.15,200 deposited at the Kisumu Labour office for his collection.

40. The suit is dismissed in its entirety.

41. Considering all the circumstances of the case, the court makes no order as to costs.

Dated and delivered at Nairobi this 7th day of October, 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE