



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 565 OF 2013
BERNARD SHIVACHI LIDWAGA CLAIMANT
VERSUS
REGAL PHARMACEUTICALS RESPONDENT

Claimant in person

Mr. Kiiru for respondent

JUDGMENT

- 1.** The claimant was employed by the respondent as a machine operator on casual basis on 20th August 2001 until the year 2007, a period of six (6) years.
- 2.** On 9th June 2008 the employer put him and other employees on contract. The claimant and others wanted to be paid terminal benefits for days worked but the respondent put them on notice that, if they did not want to work under contracts, they should go home. The claimant and others had no choice but to sign new contracts without getting paid service gratuity for days worked. They joined the Kenya Chemical and Allied workers Union thereafter and worked on one year contracts until 14th December 2012 when the company closed for Christmas. Upon return to work on 2nd January 2013, there was a list of twenty five employees on the notice board. Security guards prevented those on the list from entering company premises including the claimant. That is how the claimant's employment ended.
- 3.** At the time of termination of employment the claimant earned a monthly basic salary of Kshs.12,252 and 20% of the basic salary was paid as house allowance until December 2012. The period before signing of contracts, no house allowance was paid. The claimant had utilized all leave days before he left. Prior to contracts the claimant was paid a daily rate of Kshs.338. At the time they worked five (5) days a week for eight (8) hours.
- 4.** The claimant seeks compensation for unlawful and unfair termination of employment and terminal benefits set out as:
 - a) two months salary in lieu of notice Kshs.24,504;
 - b) service gratuity for six (6) years Kshs.88,622.80;
 - c) housing allowance Kshs.148,741.10;

d) annual leave Kshs.93,931.20;

e) leave travelling allowance Kshs.20,583.30.

5. The claimant under cross examination denied that his contract of employment expired stating that as a union member, his employment was governed by the collective bargaining agreement (CBA).

6. The claimant seeks payment for leave and leave travelling allowance for six (6) years when he was a casual. He stated that he took leave after he signed a contract. Other claimants listed in the statement of claim did not pursue their claims.

Defence

7. The respondent filed a reply to the statement of claim on 2nd May 2013 in which it states that the claimant was at all material times employed on a fixed term contract as a machine operator for a period of eleven (11) months and five (5) days from 9th January 2012 until 14th December 2012 when the contract ended. That renewal of the contract was at the respondent's discretion.

8. All the particulars of claim are denied by the respondent. The respondent further states that the claimant was registered with NSSF and therefore no service gratuity is payable.

9. The claim for annual leave is also denied by the respondent stating that the claimant had taken annual leave. Claim for housing allowance is equally denied and the claimant is put to strict proof.

10. The respondent reiterates that the claimant was not unlawfully or unfairly removed from work.

11. The claim for notice pay and compensation is therefore denied.

12. Respondent called RW1 Joan Cherotich Ndungu in support of its case. RW1 is the Human Resource Assistant from 2012. She was now Human Resource Officer.

13. RW1 told the court that she knew the claimant and that he worked for the respondent from 2008 and the contract of employment ended in the year 2012. That the claimant served on one year contract. That the claimant left employment on 14th December 2012 upon expiry of his contract. He served as a machine operator. That claimant went on leave regularly and had documents to that effect in the list of documents filed on 1st February 2016. That the claimant was registered with NSSF and was paid housing allowance as reflected in his payslips also produced. That upon expiry of contract, there was no requirement for notice. That payment of leave travelling allowance started to be paid in 2012 when the respondent concluded a CBA with the union. That the claimant is entitled to Kshs.4,450 leave travelling allowance which was not paid.

14. That since termination of contract was by effluxion of time, the termination was lawful and claimant is not entitled to any compensation.

15. That the suit be dismissed with costs except payment of Kshs.4,450 leave travelling allowance.

16. Determination

The issues for determination are as follows;

- i. When did the claimant start working for the respondent?
- ii. How did the employment of claimant end?
- iii. Is the claimant entitled to any reliefs sought?

Issue i

17. The claimant in his statement of claim and testimony under oath stated that he was employed by the respondent on 25th August 2001 and worked as a casual for six (6) years until when he was placed on one year contract from 9th June 2008.

18. The respondent in the statement of claim avers that the claimant only worked for the respondent from 9th January 2012 upto 14th December 2012, a period of eleven (11) months and five (5) days when the contract expired by effluxion of time.

19. RW1, the witness for the respondent contradicted the pleadings of the respondent by stating that the claimant was employed by the respondent from the year 2008 until 14th December 2012.

20. It is apparent that the respondent was not candid on the date and year the claimant was employed by the respondent. Because of this blunt denial, the respondent did not address the period from 20th August 2001 until 9th June 2008 which the claimant states was employed as a casual but worked continuously for a period of six (6) years and therefore was a permanent employee in terms of the law and ought to have been paid terminal benefits before being converted to a fixed term contract employee on 9th June 2008.

21. The claimant's version of events is credible and in court's view probably true and the court finds that the claimant has proved on a balance of probability that he served the respondent continuously for a period of six (6) years from 20th August 2001 to 9th June 2008 and was not paid the terminal benefits claimed because the respondent unlawfully regarded the claimant and others as casuals. Furthermore, the court believes that the respondent disregarded the attempts by the claimant and his colleagues to be paid terminal benefits before they were converted to fixed term contract employees. These claims remained continuous injury in terms of section 90 of the Employment Act, 2007 until date of termination of employment.

22. It is not in dispute that for the period 9th June 2008 the date confirmed by RW1 as when the claimant started working up to 14th February 2012 the claimant worked on one (1) year fixed contract. The court finds that the last fixed term contract expired by effluxion of time on 14th December 2012 and therefore the termination of employment of the claimant was lawful. The claimant is not entitled to compensation for unlawful and unfair termination of employment.

23. Accordingly, the court finds that the claimant is entitled to the terminal benefits set out in paragraph 5 (b), (c), (d), (e) and (f) of the statement of claim and awards the claimant as follows:

i. Service gratuity for six (6) years period between 2nd August 2001 to 9th June 2008 in the sum of Kshs.88,622.80.

ii. Annual leave for six (6) years in the sum of Kshs.111,901.60.

iii. House allowance for six (6) years in the sum of Kshs.148,741.10.

iv. Leave travelling allowance in the sum of Kshs.33,250 for the six year period.

Total award is Kshs.382,515.50.

v. Interest at court rates from date of filing suit till payment in full.

vi. Costs of the suit.

Dated and delivered at Nairobi this 25th day of November 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE