



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 379 OF 2016
(CONSOLIDATED WITH ELRCC NO. 380 OF 2016)

BERNARD OCHING ODHIAMBO.....1ST CLAIMANT
SAMUEL DANGA KARIMA.....2ND CLAIMANT
VS
PRIME ALUMINIUM CASEMENT LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimants was employed by the respondent between 2014 and 2015 as casual labourers and their wages were paid on weekly intervals. Their services were terminated in 2015 by the respondent without any prior notice or valid reason being communicated to them. They therefore aver that the said termination was unfair and unlawful because it was done in violation of section 41, 43 and 45 of the Employment Act and pray for one month salary in lieu of notice, accumulated leave, service pay, and compensation for unfair termination.

2. The Respondent admits that she employed the Claimants between 2014 and 2015 on casual basis as and when work was available but denies that she unfairly terminated their employment. It is the defence case that there was no work for which to hire the claimants as casuals and she indeed notified the claimants to that effect. She further denied all the dues sought by the claimants and avers that as casual employees they were not entitled to the same. She therefore prayed for the suit to be dismissed with costs.

3. The hearing was dispensed with and the parties adopted their pleadings, witness statements and the documentary evidence and proceeded to file written submissions.

Claimants' case

4. The first Claimant stated that he was employed by the respondent on 6.6.2014 and worked continuously until 7.7.2014 as a casual labourer and his wages was kshs.2550 per week. That on 6.7.2015, he was terminated without any prior notice or valid reason. That he was also neither issued with any Certificate of Service nor was he paid his terminal dues and contractual benefits for long service.

5. The second claimant stated that he was employed by the respondent on 14.4.2014 as a casual labourer

for a weekly wage of kshs. 2400. That he was terminated on 17.8.2015 without any prior notice or valid reason. That he was also neither issued with any Certificate of Service nor was he paid his terminal dues or contractual benefits for long service.

Defence case

6. MR. Remji S. Voru is the respondent's Foreman. He admitted that the claimant were employed by the respondent between 2014 and 2015 on and off on casual basis. That in 2015 he was informed by the General Foreman to notify some Casual workers including the claimants that there was no more work for them to do because of the scarcity of work at the company. That he notified the claimants according to the instructions given to him but later in September 2015 the respondent was summoned to the labour office where he was ordered to pay terminal dues to the claimants and she complied on 8.9.2015.

7. MR. Devshi Karsan Bhudiya is the General Foreman for the respondent. He also admitted that the claimants were casual employees of the respondent between 2014 and 2015. He however contended that the claimants were only hired on and off, as and when work was available. That in 2015 he instructed the foreman Mr. Voru to notify casual workers including claimants that there was no work for them. That in September 2015 the respondent was summoned to the labour officer where she was ordered to pay terminal dues to the claimants and she complied on 8.9.2015.

Analysis and Determination

8. After considering the pleadings, evidence and submissions filed, it is clear that the claimant was employed by the Respondent as casual labourer between 2014 and 2015 and their wages were paid on weekly intervals. There is also no dispute that it is the respondent who terminated the claimants' employment in 2015. The issues for determination are whether the Claimant's contract of employment had converted to regular term contract; whether the termination of their contract of employment was unfair and whether the reliefs sought by the Claimant should be granted.

Conversion to regular term contract

9. The counsel submitted that the claimants worked continuously from 2014 to 2015 and therefore under section 37 of the Employment Act, their contracts of service had converted from casual to regular term contract. That however submissions is from the bar because the same is neither pleaded nor substantiated by the claimants in their respective witness statements. I therefore believe the evidence by the two defence witnesses that the claimants were only hired on and off as and when there was work for them to do on casual basis. That had the claimants pleaded and testified that they served continuously, then the employer would have been obligated under section 10 (7) of the Employment Act to disprove that oral allegation by employment records. For the foregoing reason I find that the claimants have not proved on a balance of probability that their casual employment had converted to regular term contract under section 37 of the said Act.

Unfair termination

10. Termination of employment is unfair if the employer fails to prove that it was founded on valid and fair reasons and that it was done after following a fair procedure. In this case however, the nature of employment was such that the requirement for substantive and procedural fairness guaranteed under section 35, 40, 41 and 45 of the Employment Act was not applicable. As opined herein above the employer proved on balance of probability that the claimants were serving on casual basis. That their employment was not continuous enough to qualify for conversion to regular terms contract under section 37 of the Employment Act. Under section 47(5) of the Act, the onus of proving unfair termination of employment is on the employee. In this case, I find that the said burden of proof has not been discharged because the claimants have not proved that their contract of employment was protected from sudden termination by the said provision of the law.

Reliefs

11. The Claimants have prayed for declaration that their employment was unfairly and unjustly terminated and that they should be awarded damages made up of one month salary in lieu of notice, twelve months salary as compensation for unfair termination leave outstanding and service pay. In view of my finding herein above that the claimants were never converted to regular term employees, I decline to make the declarations that the termination of their services was unfair and unjust.

Notice and compensation for unfair termination

12. In view of the foregoing finding that the claimant has not proved that termination of his employment was unfair, I decline to award him salary in lieu of notice and compensation for the unfair termination of his employment contract.

Leave and service pay

13. In view of the finding that the claimants never served continuously their claims for leave and service pay are dismissed.

Disposition

14. For the reasons stated above the suit is dismissed. Each party shall bear his or her own costs.

Signed, dated and delivered at Mombasa this 18th day of November 2016.

O.N. MAKAU

JUDGE