



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 345 OF 2014

SYLAS ODHIAMBO NANDI.....CLAIMANT

VS

COASTAL BOTTLERS LIMITED...RESPONDENT

JUDGMENT

Introduction

1./ This is a claim for ksh.1,437,320 as his employment terminal dues made up of Service pay, Leave allowances, three months salary in lieu of notice and overtime worked from 2002 to 30.9.2011 when his employment was terminated without notice by the respondent.

2. The respondent has admitted that she employed the claimant from 1.3.2002 under fixed term contract which was renewed until 30.9.2008 when the last contract lapsed and it was not renewed. She further avers that after the lapse of the said contract she paid to the claimant all his lawful dues and prayed for the suit to be dismissed as the claimant is not entitled to reliefs sought.

3. The suit was heard on 11.11.2015, 25.4.2016 and 30.4.2016 when the claimant testified as Cw1 and the respondent called her former HR Manager Mr. Benjamine Otunya as Rw1. Thereafter parties filed written submissions.

Claimant's case

4. Cw1 stated that he was first employed by the respondent in 2000 as a sorter on casual basis but in March 2002, he was employed under a written contract earning kshs.4200 per month. The said pay was later reviewed to kshs.4620. On 24.2.2004 he was transferred to the transport section as a Mechanic and his salary was increased to kshs.7318 plus House Allowance of kshs.1098 and kshs 1000 incentive allowance. He contended that after the lapse of the fixed contract in February 2005, he continued to work as a mechanic under the same terms without any written contract until 30.9.2011 when he was stopped at the gate by guards with instructions from the respondent. He had not been served with any prior notice, so asked his supervisor about the matter and he confirmed the termination.

5. Cw1 prayed for salary in lieu of notice and overtime pay because he used to work extra hours and sometimes worked during public holidays. He further prayed for leave for 9 years because he never went for any leave due to lack of a reliever.

6. On cross examination Cw1 confirmed that a letter dated 23.9.2008 had been given by the HR to the

Accountant to remove him (Cw1) from the payroll and pay his terminal due. He further confirmed that his name was removed from the payroll of October 2008. He however maintained that he continued working thereafter and signing an attendance register which was filled manually. He admitted that the forms he was relying on to claim for overtime pay were prepared by him and they were not approved by the supervisor or HR Manager through signature and official stamp.

Defence case

7. Rw1 worked for the respondent between May 2014 and May 2016 as the HR Manager. That during the course of his work he came across records of employment for the claimant which shows that he worked for the respondent from 1.3.2002 under renewable fixed term contracts of 6 months which later was increased to one year term. That the last contract lapsed on 30.9.2008 and it was never renewed. That on 23.9.2008, the HR Manager in office then, wrote to the Payroll Accountant to compute the claimant's formal dues and remove him from the payroll. That the dues were calculated and paid and the claimant's name eventually removed from the payroll. That the dues paid included salary upto 30.9.2008, 143 leave days, 11 days salary in lieu of notice, overtime, 6 years and severance pay. That employees were being paid through their bank accounts.

8. Rw1 denied the claim for service pay because the claimant was a member and contributed to the NSSF. He also denied the claim for overtime because although the forms produced by the claimant were genuine, the information therein was not authenticated. That the forms lack the signature of the Head of Department (HOD) and the HR Manager authorizing payment.

9. On cross examination Rw1 stated that unless there was an express termination, the claimant's contract was deemed to have been renewed. He however maintained that the contract herein lapsed on 30.9.2008.

Analysis and Determination

10. Upon consideration of the pleadings, evidence and submissions presented by the two parties, there is no dispute that the claimant was employed by the respondent under fixed term contracts which were renewed until February 2005. There is also no dispute that the claimant continued working under the same terms until 30.9.2008 when he was removed from the respondents' payroll. The issues for determination are:

- a. Whether the claimant worked for the respondent upto 30.9.2008 or 30.9.2011**
- b. If the termination was on 30.9.2008, is the suit statute barred.**
- c. If the termination was on 30.9.2011, is the claimant entitled to the reliefs sought.**

Termination on 30.9.2009 or 30.9.2011

11. The claimant has alleged that he continued working for the respondent after 30.9.2008 under the same terms he was enjoying under the fixed term contract that expired in February 2005. He produced a Performance Appraisal Form dated 15.12.2008 as proof of the contention that he continued working after 30.9.2008. The respondent has however maintained that the claimant's employment ended on 30.9.2008 after the contract lapsed. She has dismissed the Performance Appraisal Form dated 15.12.2008 as invalid because it was issued on 18.8.2003 and it does not indicate period of the assessment.

12. After careful consideration of the material presented to the court, I find that the claimant has failed to prove on a balance of probability that he continued working for the respondent after 30.9.2008. He did not call any witness to testify in his support and also never produced relevant documentary evidence to that effect. Having not denied that his wages were paid through the bank and that he was a member of the NSSF, the claimant should have produced at least statements for his bank account and NSSF as evidence of his continued employment. Instead he made general allegation that he used to sign manual Attendance Register and accused the employer for failure to produce the same as evidence. He also produced a

Periodic Performance Assessment Form dated 15.12.2008 but issued on 8.8.2003. However he did not explain why the assessment was done using a form issued on 8.8.2003. He did not also prove the period for which the assessment was done because the form did not specify the assessment period. Consequently I find that the claimant has not proved on balance of probability that he worked upto 30.9.2011.

13. On the other hand, I am satisfied that the defence has proved on a balance of probability that the claimant's employment ended on 30.9.2008 after she failed to further renew his fixed term contract signed in March 2004. Under section 10 (7) of the Employment Act, the employer is enjoined to disprove oral allegations made by his employee in legal proceedings by employment records. In this case the employer has produced records including letter dated 23.9.2008 by HR Manager to the Accountant advising him to remove the claimant from the Payroll effective 30.9.2008 and pay his terminal dues. She also produced payrolls to prove that the Accountant indeed complied with the instructions by the HR Manager by removing Cw1 from October Payroll. Consequently, I find in favour of the defence that the claimant's services to the respondent ended on 30.9.2008 and not 30.9.2011 as alleged by the claimant.

Statute Barred Suit

14. Under section 90 of the Employment Act a claim founded in the Act or contract of employment is time barred unless it is commenced within 3 years next after the cause of action arose. In this case the dues sought accrued on 30.9.2008 when the claimant's services ended at the respondent. From then to 28.7.2014 when the suit was filed is over 5 years. Consequently I agree with the defence that the claim herein is statute barred.

Reliefs sought

15. In view of the foregoing, the reliefs sought in the suit are declined.

Disposition

16. For the reasons stated above, the suit is dismissed. No order as to costs.

Signed, dated and delivered at Mombasa this 2nd day of December 2016.

O.N. MAKAU

JUDGE