



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU
CAUSE NO. 8 OF 2014
ROBERT SIMIYU MABUKU.....CLAIMANT

v

SPIN KNIT LIMITED.....RESPONDENT

JUDGMENT

1. Robert Simiyu Mabuku (Claimant) was employed by Spin Knit Ltd (Respondent) as a Machine Attendant.

2. On 16 January 2014, the Claimant instituted legal proceedings against the Respondent in a whopping 17 page Statement of Claim, and he stated the issues in dispute as

1. Unfair termination

2. Bad labour practice

3. Under-payments

4. None payment of annual leave between October, 2004 upto December, 2008.

3. The Respondent filed a Memorandum of Defence on 14 March 2014, and on 26 March 2014, the Claimant filed a generously worded 32 paragraph Response to Respondent's Memorandum of Defence.

4. The Cause was heard on 8 October 2014 and 18 November 2014. The Claimant filed his submissions on 27 November 2014 while the Respondent filed its submissions on 17 December 2014.

Claimant's case

5. The Claimant's case is that he was employed by the Respondent in October 2004 as a machine operator/tailor and that in 2006, he was promoted to Grade 5 in the department of cutting, designing/maintenance.

6. In 2007, his employment was converted into permanent terms. In 2008 and 2009, the Claimant pleaded, he raised issues about his designation as a machine operator yet he was working in the designing/maintenance department and that in September 2009 he was forced to sign a 3 month contract and thereafter he signed various fixed term contracts, the last one dated 12 November 2012 and expiring on 31 November 2012.

7. The Claimant also pleaded that the fixed term contracts had provisions which did not meet the minimum standards set out in the Employment Act and the Collective Bargaining Agreements between the Respondent and the Tailors and Textile Workers Union.
8. The Claimant further pleaded that he was underpaid and did not go on annual leave.
9. The Claimant testified. He stated that he was employed by the Respondent in 2004, and made reference to the National Social Security Fund statement and registration card which show he was registered on 19 May 2005.
10. He also stated that he was initially employed as a tailor/machine operator and he later served as a mechanic in the Knitting Department. He cited the Certificate of Service issued to him which showed he was a mechanic.
11. During cross examination, the Claimant he stated that he was a cutter, a machine mechanic assembling machines while in reexamination he stated that he was a mechanic from 2006.
12. The Claimant also stated that he was a member of the Tailors and Textile Workers Union from 2004 and that the pay slips showed he was being deducted monthly union subscriptions. The Union and Respondent had Collective Bargaining Agreements from 2007 to 2012.
13. The Claimant also stated that he signed various fixed term contracts in the course of the relationship. However, he stated that the Collective Bargaining Agreements did not provide for fixed term contracts and the employees raised complaints about the contracts through the union officials. According to him the contracts were unfair.
14. On the separation, the Claimant testified that he worked until 31 November 2012, when he was verbally informed to take a break. He consulted the shop steward but there were no answers forthcoming. On 5 December 2012, the Personnel Manager's Secretary called him and he was given the non renewal letter, but no reasons were given. He was paid Kshs 8,000/- and issued with a Certificate of Service. At the time of separation he was earning a basic wage of Kshs 10,355/-.
15. He further stated that he was not given notice of termination and this was discriminatory. The Claimant denied absconding from work.
16. On contractual and statutory entitlements, the Claimant stated that he went on leave only in 2010, but was not paid leave travelling allowance and that though he was a mechanic he was being paid wages at the rate of a machine attendant.
17. During cross examination, the Claimant stated that he was forced to sign the contracts and admitted filing a personnel particulars form and that the form showed he was a machine attendant. He stated the Collective Bargaining Agreement did not provide for fixed term contracts.
18. The Claimant further admitted applying for leave on 23 March 2009, and also taking 24 days leave in 2011.
19. On wages, the Claimant denied that his wages were above the rates agreed in the Collective Bargaining Agreements and stated that he was underpaid for 6 years.

Respondent's case

20. The Respondent pleaded that it employed the Claimant with effect from 1 December 2008, through a letter dated 11 December 2008. The contract was for 10 months.
21. The Respondent offered the Claimant another contract effective from 1 October 2009 for 11 months. The contract was dated 1 October 2009. The contract was to expire on 30 August 2010.

22. Through a contract dated 29 December 2010, the Respondent gave the Claimant another contract for 11 months effective 28 December 2010. The contract was to expire on 27 November 2011.

23. On 28 November 2011, the parties entered into a 3 month contract set to expire on 29 February 2012. On the expiry of this contract, another contract effective 1 March 2012 to 31 May 2012 but dated 23 March 2012 was entered into.

24. On 10 August 2012, another contract to run from 1 August 2012 to 30 October 2012 was signed. On 30 November 2012, the Respondent wrote to the Claimant informing him that his contract would not be renewed and that he would be paid certain dues as indicated in the letter.

25. The Respondent called two witnesses, a Supervisor and the Human Resources Manager.

26. The Supervisor stated that he joined the Respondent in 2004, and that the Claimant was employed in October 2008, and was deployed to his department in December 2008 and was a machine attendant.

27. The second witness stated that the Claimant was employed from 28 December 2010 and was given a new payroll number and that the records indicated the Claimant had previously worked for the Respondent but disappeared.

28. She further stated that the Claimant was on fixed term contracts and the last such contract was to expire on 31 November 2012 and renewal of contracts was dependent on availability of work.

29. On leave, the witness stated that the Claimant went on leave in 2011 and also took 6 days in 2012 leaving no outstanding leave days.

30. On separation, she stated that the services of the Claimant were not terminated and the notice of non renewal was given to the Claimant as good practice. The Claimant was paid terminal dues on end of contract.

Issues for determination

31. From the overly verbose pleadings, testimony, documents produced and written submissions, the Court has identified the issues arising for determination as, *when employment relationship commenced, whether there was continuity of service, whether the Claimant was a machine attendant or mechanic, whether the services of the claimant were terminated, if so, whether the termination was unfair, whether continuous fixed term contracts was constitute a bad labour practice and appropriate remedies.*

32. The Court notes that the Claimant annexed to his submissions, items of evidence. This is a practice which is not known to law or practice.

When employment relationship commenced

33. According to the Claimant, he was employed by the Respondent in 2004. To support this contention he cited the National Social Security Fund registration card which indicates that he was registered on 19 May 2005. The card show the Claimant's date of employment as October 2004 and place of employment as Spin Knit, Nakuru.

34. The National Social Security Fund Provisional Member of Statement on its part show the employer name as Spin Knit Ltd and date of employment as 1 October 2004 and date of registration as 19 May 2005. The statement further show the deductions commenced in May 2005.

35. The Respondent contends the employment relationship started on 1 December 2008, and reference was made to the contract document dated 11 December 2008, and personal particulars form dated 4 December 2008.

36. The National Social Security Fund registration card and Provisional statement are not contractual documents as between an employer and an employee. But where there is a dispute as to when an employment relationship commenced and it is the word of one against the other, it forms a formidable source of establishing which of the versions given by the parties is more probable, minding that the primary labour statutes recognise oral contracts.

37. The Claimant did not register with the National Social Security Fund in anticipation of a legal dispute.

38. Balancing the documents relied on by the Claimant and by the Respondent, the Court is of the view that the balance tilts in favour of the version given by the Claimant.

39. The Court therefore finds the relationship employment relationship commenced as October 2004 though it was reduced into writing on 11 December 2008.

Whether there was continuity of service

40. The Respondent's second witness testified that the Claimant had previously been employed by the Respondent and at some point he absconded and returned and was employed afresh on 28 December 2010.

41. The Claimant on his part stated that he signed a contract dated 1 October 2009, and this contract was to expire on 30 August 2010. The next contract he signed was on 29 December 2010.

42. It is clear that there was a break of about 4 months. The Respondent's explanation for the break was that the Claimant absconded. The Claimant did not himself bother to explain where he was from September 2010 to December 2010.

43. But what is clear is that the Claimant's contract expired at some time on 30 August 2010 and the next time he got another contract was on 29 December 2010, after a break of about 4 months. Whether he absconded or not is really not relevant.

44. On reengagement he was given a new payroll number. The Court finds as a fact that there was a break and thus there was no continuity of service.

Whether Claimant was a machine attendant or mechanic

45. The Claimant pleaded that he was a *design cutter*. In testimony he testified that he was employed as a tailor/machine operator and he later became a mechanic.

46. The Claimant testified that on appointment he was designated as tailor/machine operator and that in 2006, he became a mechanic. The Respondent's assertion is that he was a machine attendant.

47. But during cross examination, the Claimant stated that he was a *cutter*. Later he stated he was a machine mechanic assembling machines.

48. The Respondent issued the Claimant with a Certificate of Service indicating he was a mechanic.

49. Based on the Certificate of Service, the Court finds that though the Claimant was engaged as a tailor/machine operator, he became a mechanic at some point which none of the parties clearly disclosed. Because the Respondent did not make reference to when the designation changed, the Court further finds as contended by the Claimant that he became a mechanic in 2006.

Whether services of the Claimant were terminated

50. The Claimant was on several fixed term contracts. The contracts had explicit expiry dates. The last such contract produced by the Claimant was to expire on 31 November 2012.

51. Apart from the expiry date, the contract at clause 6 had provision for termination by notice and it further provided that the contract would automatically end on the stated date.

52. The Claimant served up to the last day of the contract shortly before he was given a notice of non renewal of contract. With the express provision for automatic expiry, the Claimant was not entitled to be given notice. He was aware from the start of the contract when it would come to an end.

53. The Court therefore finds that the services of the Claimant were not terminated. It is not necessary therefore to discuss the consequential question of unfairness.

Whether continuous fixed term contracts constitute a bad labour practice/invalid

54. This question is not easy. The Claimant challenged his fixed term contracts on two prongs. One prong was contractual, that the Collective Bargaining Agreement between the Respondent and his Union did not recognise short term/fixed contracts.

55. But neither did the Collective Bargaining Agreements explicitly outlaw fixed term contracts.

56. In raising the issue the Claimant contended that he was put at a disadvantage in relation to certain contractual entitlements enjoyed by other employees on *permanent contracts* such as period of termination notice, leave and gratuity.

57. Clause 27 of the Collective Bargaining Agreements provided for payment of gratuity after 3 years service as a permanent employee. The various contracts entered into between the parties herein did not provide for gratuity.

58. The Collective Bargaining Agreement was voluntarily and mutually entered into. The parties agreed to the terms set out therein. The parties were alive to the customs and practices of the industry and of the employer in giving short term contracts or ought to have known.

59. And for a party to seek to invalidate the terms of an agreed agreement, the threshold or bar has always been set high.

60. I am therefore unable to agree with the Claimant that he was put at a contractual disadvantage in regard to notice, leave or gratuity as against the so called *permanent employees*.

61. But within the employment relationship, the statutory framework has prescribed certain minimum standards, which standards are sometimes called irreducible minimum standards. All employment contracts including Collective Bargaining Agreements must therefore satisfy the minimum standards.

62. And with the above realization, the Court will examine the second prong of attack by the Claimant.

63. The second prong was on unfairness, a constitutional and statutory concept in the Kenyan legal framework.

64. Article 41 of the Constitution guarantees to every person the right to fair labour practices. This right can be limited pursuant to the conditions in Article 24 of the Constitution being met.

65. Sections 9(1)(a) and (b), 10(2)(e) , 35(1)(b) and 37 of the Employment Act, 2007 all contemplate contracts of a limited duration.

66. The Claimant challenged the fixed term contracts on the basis that it provided for terms below the minimums set out in law. Reference was made in the submissions to notice, leave, gratuity and underpayments.

67. The Claimant cited Nairobi Cause No. 469(N) of 2009, *Bakery, Confectionery, Food Manufacturing*

& *Allied Workers Union v Sameer Agriculture & Livestock (K) Ltd* where a paragraph appears to the effect that

The engagement of all employees on short term contracts is therefore in our view a bad labour practice which must be discouraged. It must be discouraged because it is open to abuse. It has been abused in this case.

69. In my view, the above *dicta* is not universally correct because the statutory framework itself has given legal recognition to short term or limited term contracts. Each contract must be examined within its context to determine whether there is an abuse to amount to a bad labour practice.

69. The case under consideration has not met the standard for the Court to find that there was unfair labour practice.

70. I say so cognizant that where an employee is denied the minimum statutory entitlements because of the nature of the fixed term contract, the Court would not hesitate to find unfair labour practice.

71. The Employment Act, 2007 has set out certain entitlements of employees as regard notice period, leave, service pay among other entitlements.

72. The Claimant did not demonstrate that any of his contractual entitlements did not meet the minimum prescribed entitlements.

Appropriate relief

Setting aside the contract

73. The contract between the parties expired in 2012. It would serve no legal purpose to set it aside now.

Three months pay in lieu of notice

74. The Claimant sought Kshs 32,046/- under this head. The Court has found the Claimant's services were not terminated. He would not be entitled to pay in lieu of notice.

Underpayments

75. Under this head, the Claimant sought a total of Kshs 246,039/40, being underpayments for 6 years.

76. In oral testimony he did not make any reference to underpayments and the wages he was getting during the periods he pleaded he was underpaid.

77. The Court found he was a mechanic from 2006.

78. The Claimant annexed to the Memorandum of Claim the Collective Bargaining Agreements for 2007/2009 and 2011/2013.

79. The 2007 Collective Bargaining Agreement though effective for 24 months had a provision providing that it would continue after expiry until amended. The Court will therefore take it that it was in effect until the 2011 Collective Bargaining Agreement was entered into because no agreement for 2009/2011 was produced.

80. Under the job classification for purposes of wages, (clause 30) the classification of mechanic has been classified under ungraded artisan and also under *Artisan GTT III, GTT II* and *GTT I*.

81. The Claimant did not provide any evidence that he had sat and passed the Government Trade Test to qualify as a graded Artisan.

82. Based on the material produced he must be taken to have been an ungraded artisan (mechanic).
83. The basic wage for an ungraded artisan, according to the 2007/2009 Collective Bargaining Agreement was Kshs 6,989/-.
84. According to RSM II dated 1 October 2009 and expiring on 30 August 2010, the Claimant's basic wage was Kshs 6,465/-.
85. It is clear that during this 11 month contract, the Claimant was underpaid by Kshs 5,754/-.
86. The next contract, RSM III dated 29 December 2010, show the Claimant was on a basic pay of Kshs 7,112/-. This was above the agreed rate for ungraded artisans (mechanic)-(Claimant's pay slip for September 2010m also show he was on a basic wage of Kshs 7,112/-).
87. The next contract, RSM VI dated 28 November 2011 show the Claimant was on a basic wage of Kshs 8,001 /-.This contract was now subject to the 2011 Collective Bargaining Agreement which became effective from 1 October 2011.
88. The basic wage for an ungraded artisan (mechanic) according to this latter Collective Bargaining Agreement was Kshs 9,450/-. The Claimant annexed to the Memorandum of Claim a pay slip for October 2011. It corroborates the basic wage in the contract of Kshs 8,001/-.
89. On the basis of the material before Court, the Court is satisfied that the Claimant should have been earning a basic pay of Kshs 9,450/- but he was earning Kshs 8,001/- during the 3 months when the contract dated 28 November 2011 was running. He was underpaid on the basic pay by Kshs 4,347/-.
90. The Respondent produced the Claimant's contract for March to May 2012 (appendix 9). The basic pay is indicated as Kshs 8,801/-. The basic wage at this time was Kshs 9,450/- and he was thus underpaid by Kshs 1,947/-.
91. The contracts produced and marked as appendices RSM V dated 14 June 2012, RSM VI dated 10 July 2012,RSM VII dated 10 August 2012 RSM VIII dated 12 November 2012 all indicate basic wages of Kshs 9,500/-, Kshs 9,500/-, Kshs 9,500/- and Kshs 10,355/- respectively.
92. I am unable to accede to the Claimant's contention that he was underpaid during this period.
93. The 2 Collective Bargaining Agreements provided at clause(s) 17 for flat rate of house allowance of Kshs 1,900/- and Kshs 2,450/- respectively. The Claimant has not demonstrated that he was paid house allowance below the rates agreed mutually by the parties.

Gratuity

94. The Claimant prayed for Kshs 55,171/20 on account of gratuity for 8 years.
95. Clause 27 of the Collective Bargaining Agreement provided for Gratuity in the following terms
- a. On completion of three years service with an employer with effect from date of **permanent employment**, an employee shall be entitled to pay for each completed year of service as follows:-
....
96. I have emphasised the word *permanent employment*. The Claimant was not on permanent employment. He was on a contract for a known period.
97. The Respondent in its submissions urged that the Claimant was not in continuous employment because he disappeared at some point in 2010. This evidence was not controverted.

98. The Claimant's contract did not provide for gratuity. He was a member of the Union. The terms and conditions agreed in the Collective Bargaining Agreement were applicable to him save that he was on fixed term contracts. He had not met the 3 year threshold because there was a 4 month break.

99. Had the Claimant met the 3 year threshold, the Court would have awarded him gratuity according to the terms of the Collective Bargaining Agreement.

100. Any gratuity relating to the period 2004 to 2010 should have been claimed by August 2013. The Cause here was filed in 2014. The gratuity for this period would therefore be statute bared by section 90 of the Employment Act, 2007.

Leave for 7 years and leave travelling allowance

101. Clause 9 of the contract provided for leave travelling allowance.

102. In 2010, the Claimant was paid Kshs 2,350/- as leave travelling allowance. In 2011, he was paid Kshs 5,200/- and in 2012, he was paid Kshs 1,600/-. There is no indication that the Claimant was paid leave travelling allowance prior to 2010.

103. The Court would award him leave travelling allowance of Kshs 6,000/- for 2007/2008/2009 as per the Collective Bargaining Agreement effective from 1 October 2007.

Compensation

104. The Claimant's services were not terminated. Compensation pursuant to section 49(1) (c) of the Employment Act, 2007 is not applicable.

105. Before concluding a few words about the pleadings. As already stated the Memorandum of Claim and Reply to Response were generously worded. It was so generously worded with facts, which unfortunately the Claimant did not testify on. These facts are mere allegations in the pleadings and until proved remain just that.

106. Had the Claimant led evidence on some of these facts, this judgment might have taken a different tangent.

Conclusion and Orders

107. The Court finds and holds that

(a) The Claimant was a mechanic from 2006.

(b) The services of the Claimant were not terminated.

(c) The fixed term contracts were not invalid/unfair.

(d) The Claimant would have been entitled to the benefit of the terms and conditions of service agreed between the Tailors and Textiles Union and the Respondent on meeting the agreed thresholds.

108. The Court awards and orders the Respondent to pay the Claimant

a. Leave travelling allowance(2007-2009) Kshs 6,000/-

b. Underpayments Kshs 12,048/-

TOTAL Kshs 18,048/-

109. The Claimant to have costs.

Delivered, dated and signed in open court in Nakuru on this 23rd day of January 2015.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers