



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 89 OF 2014
(Originally Nairobi Cause No. 855 of 2010)
HEIRONIM OPII ORUKANI.....CLAIMANT

v

CHEMELIL SUGAR COMPANY LTD.....RESPONDENT

JUDGMENT

1. Heironim Opii Orukani (Claimant) commenced legal proceedings against Chemelil Sugar Company Ltd (Respondent) on 26 July 2010 and he stated the issue in dispute as *unfair termination*.
2. In the Statement of Claim, the Claimant sought a total of Kshs 502,675/10 being *one month pay in lieu of notice, overtime, accrued leave, gratuity and 12 months compensation for unfair termination*.
3. The Respondent filed a Defence on 23 March 2011, contending that the Claimant was paid Kshs 101,188/90 after conciliation.
4. The Cause was heard on 18 November 2014. The Respondent opted not to call any witness. The Claimant filed his submissions on 23 January 2015, while the Respondent filed its submissions on 5 February 2015.
5. After considering the pleadings, documents produced, testimony of the Claimant and submissions, the Court has identified the issues arising for determination as, *when the employment relationship commenced, nature of the employment relationship, whether the Claimant's services were terminated unfairly and appropriate relief*.

When relationship commenced

6. The Claimant pleaded and testified that he was engaged by the Respondent on 1 December 2002 as a casual employee and that he was not issued with a written contract.
7. The Respondent on its part pleaded that the relationship started on 1 April 2003.
8. Among the documents the Claimant annexed to the Statement of Claim was an Internal Memo dated 21 October 2005 from the Respondent's Factory Manager to the Human Resources Manager.
9. According to the Memo, the Human Resources Manager was being advised that the Claimant had started working with the Respondent on 1 December 2002, and requesting that the relationship should be formalized by confirming the Claimant and 2 other named employees into permanent employment.
10. Although no formal contract was issued to the Claimant or produced in Court, the Court is satisfied on the basis of the Memo that the Respondent initially engaged the Claimant on 1 December 2002 and not 1 April 2003.

Nature of employment relationship

11. The Respondent's pleaded case was that the Claimant was a temporary/casual staff paid on a daily rate after every fortnight. It was further pleaded that the Claimant served intermittently.
12. The Claimant on the other side asserted that the casual employment was unfair because he had continuously served the Respondent from 2002 to 2009. According to the Claimant, the casual employment was in contravention of the Employment Act, 2007.
13. The Respondent did not controvert the Claimant's contention that he served continuously from 2002.
14. The Claimant therefore was not a casual employee but was on a term contract by virtue of operation of the law and specifically section 37 of the Employment Act, 2007.

Whether termination of services unfair

15. According to the Claimant, his services were verbally terminated on 20 July 2009, and this was unfair and wrongful because he was not issued with a written notice.
16. Because the Claimant's contract was deemed term contract by operation of law, he was entitled to written notice of termination of contract.
17. The Claimant's unchallenged testimony was that his services were terminated verbally without notice. The Respondent's assertion in any case was that the Claimant was a casual employee whose engagement terminated at the end of each day has no legal basis, after he served for such a long time.
18. In this regard, the termination of the contract fell short of what is required by section 35 and 45(2) (c) of the Employment Act and was unfair.

Issue estoppel

19. The Respondent raised issue estoppel. In the pleadings, the Respondent contended that the matter was resolved after conciliation and the Claimant was paid Kshs 101,188/90.
20. But no agreement was produced in which the parties agreed that the Claimant was estopped from bringing a claim based on unfair termination or was discharging/indemnifying the Respondent from such litigation.

Appropriate relief/contractual/statutory entitlements

One month pay in lieu of Notice

21. The Claimant sought Kshs 12,420/- on account of one month pay in lieu of notice.
22. The Respondent pleaded that the Claimant was paid two weeks wages in lieu of notice.
23. The Claimant is entitled to the balance of one month pay in lieu of notice as claimed in the sum of Kshs 6,624/- (Respondent did not challenge the monthly wage figure).

Overtime (normal/rest days)

24. The Claimant was paid Kshs 59,620/30 on account of accumulated rest days. The amount was arrived at after the Labour Officer examined the records.
25. The Court has no basis for computing any other amount.

Accrued leave

26. The Claimant sought Kshs 66,864/- under this head. The Labour Officer who chaired the conciliation and examined the records made a finding/recommendation of Kshs 35,772/- for 86.4 accumulated leave days. The Court will not disturb this finding/recommendation.

Gratuity

27. Under this head, the Claimant sought Kshs 48,715/20. However, the Claimant did not lay any contractual or statutory basis for this claim and it is declined.

Compensation

28. The Court has reached the conclusion that the termination of the services of the Claimant was unfair. Compensation of not more than 12 months' gross wages is one of the primary remedies where the Court finds unfair termination.

29. Under this head, the Claimant sought Kshs 149,040/-.

30. The Claimant was kept as a 'casual' for nearly 7 years. This was an unfair labour practice and misuse of an employer's stronger bargaining power.

31. Considering the length of service and the nature of the contract, the Court would award him the maximum compensation as sought in the sum of Kshs 149,040/-.

Conclusion and Orders

32. The Court finds and holds that

a) the Claimant was employed by the Respondent on 1 December 2002.

b) The Claimant's employment was deemed converted to term contract by operation of section 37 of the Employment Act, 2007.

c) The termination of the Claimant's employment was unfair and the Court awards him and orders the Respondent to pay him

a) One month pay in lieu of Notice Kshs 6,624/-

b) 12 months wages compensation Kshs 149,040/-

TOTAL Kshs 155,664/-

33. The other heads of relief are dismissed.

34. Claimant to have costs assessed at Kshs 45,000/-.

Delivered, dated and signed in Nakuru on this 6th day of March 2015.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

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