



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 317 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 22nd April, 2015)

KENNEDY KIBEGA.....CLAIMANT

VERSUS

POLYPIPES LIMITED (STEEL DIVISION).....RESPONDENT

JUDGMENT

1. The Claimant herein filed his Claim on 4/3/2014 in person. The Claim is for wrongful and unfair termination of the said Claimant and failure by the Respondents to pay his terminal dues. The Respondent is a limited liability company duly incorporated in Kenya and registered under the Companies Act and carrying on business in Nairobi in the Republic of Kenya.

Claimant's case

2. The Claimant's evidence is that he was employed by the Respondent on 16/2/1995 at a daily wage of Kshs.354 and later increased to 457/= which translates upto 11,882/= per month. He was not given any written appointment letter. He worked in the Steel Mill diligently and he avers that on 16/1/2013, he came to work as usual but on reaching the gate the guards informed him that the management had ordered that he and others should not be allowed in. He contacted his union for help and later the labour office. The Respondents were summoned for a meeting and they refused to come. The Claimant then filed this case in court seeking prayers as per his Memorandum of Claim. He avers that his termination was unfair hence his claim herein.
3. In cross examination the Claimant has told court that the company he initially worked for was called Premier Rolling Mills but this company changed its name to Polypipes which has the same director. He avers that he started working for Polypipes in 2001. He denies signing any contract in 2009. He denied a signature shown to him as not being his.

He contends that in 2008 after the post-election violence, he went away but came back to work in 2009. His ID No he said is No. 9446554 which has been put under the names of other workers vis – Henry Oluoch, Ronald Arunga, Godfrey Mwangi and Kennedy Akinyi. This was confirmed by the court. Also the signatories' against those names were denied by Claimant as not being his.

In the work schedule shown to court, the Claimant stated that his name is shown and it is indicated he was a casual but one cannot be a casual for 16 years.

4. The Claimant called 2 witnesses Paul Amukobole and Livingstone Oundo who gave evidence that they worked for Respondent like the Claimant and were all sacked on 17/1/2013 without any

reason.

Respondents case

5. The Respondents filed their reply to the Memorandum of Claim on 4/3/2015 through the firm of Okongo Wandago & Company Advocates. They contend that the Claimant was engaged by them on casual basis and was being paid weekly and was paid only for days worked. In 2013 however the Small Mill department where he used to work was shut down and so he became redundant. The Respondents sought to rely on the attendance register to show he worked on and off and is not therefore entitled to prayers sought.

Issues for determination

6. Upon considering the evidence of both parties issues for determination are as follows:

- a. **Whether Claimant was an employee of the Respondent and on what terms.**
- b. **Whether the Claimant's termination was unfair and unjustified.**
- c. **Whether Claimant is entitled to prayers sought.**

7. On 1st issue, the fact of Claimant's employment with Respondent is verified from Respondent's documents where the Claimant's name and ID No. appear even written against names of other people. This is also proof that the documentation of the Respondent is not authentic but a forgery. This is seen at page 10 of Respondents documents. The Claimant was never given an appointment letter but this is because the Respondent treated him as a casual during the period he worked. He was also paid daily wages. Section 9(1) and (2) 2007 states that:

1. ***"A contract of service:-***

- a. ***for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or***
- b. ***which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.***

2. ***An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)."***

The period within which Claimant worked exceeds 3 months and to continue treating him as a casual was a breach of the clear provision of the law. It is for this reason that I find that having worked for Respondent for the period he did, he could not continue being treated as a casual. I therefore convert the casual term to a permanent term as envisaged in the law above stated.

8. Having found as above, it is also my finding that the manner in which he was terminated verbally was against clear provisions of law under Section 41 of Employment Act which states as follows:

"(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee

may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

9. I therefore find for Claimant and award him as follows:

1. ***1 month salary in lieu of notice = 11,882/=***
2. ***Service pay for 18 years = 11,882 x 0.5 x 18 = 106,938/=***

TOTAL = Kshs.118,820/=

Claim for leave is not proved.

The Respondent will also pay costs of this suit and issue Claimant with a Certificate of Service..

Dated and delivered in open court this 22nd day of April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant – present

No appearance for Respondent