



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1229 OF 2010

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 7TH APRIL, 2015)

JOHN MBAGILA OMBISACLAIMANT

VERSUS

RAFIKI MILLERS LIMITEDRESPONDENT

JUDGMENT

1. The Claimant herein filed his Memorandum of Claim on 11/10/2010 through the firm of Oonge & Co. Advocates. The Respondents herein are a registered company duly incorporated in Kenya and doing business within Nairobi.

Claimant's case

2. The Claimant's case is that, in or about the year 2001 he was employed as a general worker. His responsibility was to carry goods in the factory which he executed faithfully and was paid Kshs.10,400/= per month. There was no written contract between the Claimant and the Respondent and the Claimant was usually paid Kshs.400/= daily payable at the end of each week.
3. It is further the Claimant's case that on 2/3/2007, he was involved in an accident within the factory. He was treated and upon recovery, he sought to resume his duties but was informed that his services were no longer required. He was denied entry in the Respondents premises.

The Claimant sought help from the Labour office and the Respondents denied ever knowing him. The Claimant then proceeded to file this case before court. He had consulted his counsel who wrote a demand notice to Respondent. The Respondent replied to this demand notice referring the Claimant's counsel to the Respondents' insurance.

4. The Claimant avers that he worked for Respondent for 6 years and worked from Monday to Saturday. He now seeks prayers that he be paid 1 month salary in lieu of notice, his NSSF contribution for 6 years, service pay for the 6 years all totaling Kshs.81,440/= plus costs of this suit.

Respondent's case

5. The Respondent on their part filed their defence on 3/12/2010 through the firm of Jackson Omwenga & Co Advocates. They called 2 witnesses. The first witness RW1 told court that he too works for Respondent as a loader and he used to work with the Respondent. He however states that Claimant was a casual employee and he never got injured on duty. He said their NSSF

dues were never deducted from their wages as they were casuals and only worked whenever there was work to be done.

6. The RW2's evidence that he is Respondents supervisor and that the people who came to load at Respondents premises were casuals and used to work depending on availability of work and were paid daily and that Respondent never deducted NHIF nor NSSF remittances from the loaders. It is their evidence that Claimant was never their employee and was never dismissed. They deny admitting that Claimant was ever injured while on duty.

Issues for determination

7. Having considered evidence from both parties, issues for determination are as follows:

- i. Whether Claimant was an employee of the Respondent.
- ii. Whether the Claimant was dismissed by the Respondent.
- iii. Whether Claimant is entitled to the remedies sought.

8. On issue No. 1, there was no written contract between Claimant and Respondent. There was only an implied contract that the Claimant would work for Responded whenever work was available. This can be deduced from the Claimant's own evidence that he was a loader and was always paid a daily wage of Kshs.400/=.

RW1 who worked with the Claimant as a loader told court that they usually worked when there was work but if there was none, they worked elsewhere. Given the mode of this engagement, and without the continuity in work, the intention was not an employment contract but a casual engagement.

9. Given that there was no formal employment relationship between the Claimant and the Respondent, the issue of unfair termination cannot arise.

It is therefore the finding of this court that the Claimant's case lacks merit and is therefore dismissed accordingly.

Each party will bear their costs.

Dated and delivered in open court this 7th day of April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Rakoro for Claimant

Kairaria for Respondent