



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1832 OF 2011

KENYA BUILDING, CONSTRUCTION, TIMBER, FURNITURE

AND ALLIED INDUSTRIES EMPLOYEES UNION CLAIMANT

VERSUS

BHAKTIPRIYA BUILDERS LTD RESPONDENT

JUDGEMENT

1. The dispute herein is the wrongful dismissal of Philip Osha Omwango, the grievant.
2. The claimant herein the Kenya Building, Construction, Timber, Furniture and Allied Industries Employees Union filed the memorandum of claim on 1st November 2011. On 17th February 2014, the respondent entered appearance but did not file any defence. On 7th January 2015, the respondent was served with the hearing notice coming up on 11th February 2015 but did not attend the hearing. the court proceeded and heard the claimant on his evidence and the submissions filed.
3. The claim is that the claimant being the trade union serving the building, timber, furniture and allied industries and which covered the respondent and the grievant was their members. In June 2006, the grievant was employed as a Storekeeper earning kshs.250.00 per day but was terminated by the respondent on 6th April 2009. The grievant was verbally informed that his services were no long needed. That despite the parties not having a recognition agreement and collective agreement, the grievants employment was regulated and based on the Regulation of Wages in the Building and Construction industry order vide Legal Notice No. 94 of 2004.
4. The claimant is seeking the payment of;
 - a. Notice pay
 - b. Leave earned
 - c. Underpayments
 - d. Service gratuity
 - e. Public holidays
5. In this case the grievant earned kshs.250.00 per day instead of the kshs.10,390 and kshs.2,078.00 as housing allowance being 20% of his salary which translated to kshs.480.00 per day. In this regard therefore, the claimant is seeking;
 - a. Payment in lieu of notice at kshs.12, 480.00;
 - b. Leave earned at kshs.22, 200.00;

- c. Underpayment of wages all being Kshs.197, 340.00;
- d. Service gratuity at kshs.15, 360.00; and
- e. Public holidays worked at kshs.12, 000.00

Total dues being kshs.257, 460.00

6. The claimant is also seeking compensation for unfair termination of the grievant as no reasons or notice was given before his dismissal.

7. The claimant also called the grievant in evidence and testified that as the respondent Storekeeper he commenced work in June 2006, he was not given a written contract as before his appointments he had been a casual with the respondent on piece work. The respondent being a contractor in construction and had various projects. Before June 2006 the grievant was given piece work and when he changed to Storekeeper no contract was given. He was paid Kshs.250.00 per day by signing vouchers which were kept by the respondent and no copies were given to him. all the daily wages were consolidated and paid weekly.

8. The grievant also gave evidence that under the regulations he was supposed to be paid Kshs.10, 890.00 per months but he was underpaid. On 6th April 2009 the grievant went to the Runda site where the respondent was undertaking construction work. He knew that the employees had a pay increase and thus asked the foreman Mwangi for his pay increase. He called the contractor who said that if the grievant did not want to work on his then pay, he should leave. On 7th April 2009 the contractor told the grievant to leave the respondent site as he was not going to increase his salary. He was not paid any terminal dues. He tried to talk to the foreman so as to get his service pay but the respondent refused. He reported the matter to the Labour Officer but no action was taken. Since he was a member of the union, the matter was taken up by the claimant.

9. The grievant also stated that he was in the employment of the respondent for 2 years and 10 months and thus entitled to notice, service pay, leave earned and pay for work done over the public holidays. The grievant thus supported his claims and demands.

10. It is trite that the duty rests on an employer to keep all work records and where an employee is continuously engaged for periods of over 3 months to reduce such a relationship into writing so as to have the terms and conditions of such an engagement agreed upon. In the absence of such written agreement, the operative law section 37 and 35 apply. The law thus converts verbal/casual agreements of employment into full time employment with benefits due and before the termination of the same, notice has to issue.

37. (1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot 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 or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

11. Even where an employer fails to issue a written contract of service, the law operates automatically in continuous work that does not end within the legal minimum for casual work and after 3 months. thus by operation of the law, where the claimant served for periods exceeding 3 months a s casual and was engaged on the same job by the respondent as the employer, he became full time and had benefits in law. Equally section 35 required that before termination of full time employment, notice was due or payment in lieu of such notice.

35. (1) A contract of service not being a contract to perform specific work, without reference to time or to

undertake a journey shall, if made to be performed in Kenya, be deemed to be—

(a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;

(b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or

(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

12. The benefits that accrue to an employee serving for a period such as the claimant did for 2 years and 10 months is entitled to take annual leave, receive minimum wage in the sector of engagement, receive service gratuity where there is no evidence of payment of statutory dues and payment for work during public holidays. In this case I find the claimant is entitled to his terminal dues outlined in the memorandum of claim.

13. Where notice of termination of full time employment is not issued and the reasons of such termination given in writing, the resulting termination becomes unfair. The claimant is therefore entitled to compensation for the unfair process taken against the grievant and for the lack of being given any reasons for the termination.

I therefore enter judgement for the claimant in the following terms;

- a. **A declaration that the termination of the grievant was unfair;**
- b. **Compensation at 12 months' salary at kshs.149,760;**
- c. **Notice pay at kshs.12,480.00;**
- d. **Leave due at kshs.22,200.00;**
- e. **Underpayments at kshs.197,340.00;**
- f. **Service pay at Kshs.15,360.00; and**
- g. **Public holidays at kshs.12,000.00**
- h. **Costs herein awarded to the claimant.**

Delivered in open Court dated and signed in Nairobi on this 19th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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