



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1388 OF 2012

NEMUEL NYAGERICLAIMANT

VERSUS

LABORATORY & ALLIED LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 14th August 2012 seeking relief against the Respondent. He averred that the Respondent was his employer from 7th January 2002 till 25th October 2006 when he was dismissed from service. He averred that the dismissal was unjustifiable, unlawful and without any prior notice. He worked long hours and was underpaid and never went on leave nor receive payment in lieu thereof. He claimed Kshs. 331,860/- made up of the one month in lieu of notice, unpaid house allowance, unpaid overtime, underpayment of salary and unpaid leave. He also sought costs of the suit as well as interest on the sums he claimed.
2. The Respondent filed a Memorandum of Response on 27th November 2012. In it, the Respondent averred that the Claimant was a casual during the year 2006 and was paid daily wages at the end of each day. It was averred that the Claimant stopped reporting for duty at the Respondent's premises and thus was not terminated as alleged. It was averred that the Claimant was not entitled to a month's notice as his contract ended at the end of the day and he was re-engaged the following day depending on the availability of work.
3. The Claimant testified on 6th October 2014. He stated that he was employed by the Respondent as a labourer and later became a machine operator in charge of the syrup section. He testified that on 26th October 2006 he reported for work and was at his workplace when he was told that the General Manager wanted to see him. He was accused of refusal to give staff materials for production on 20th October. He stated that he was not at work on 20th October 2006. He was not given notice and therefore he sought service pay, overtime and compensation. He testified that it was false to suggest that each day he left and returned the next day as a new worker. He stated that he used to sign a three month contract and was never a daily casual.
4. In cross examination by counsel for the Respondent, the Claimant testified that his services were unlawfully and without notice terminated by the Respondent. He testified that he had three-month contracts which were renewed.
5. The Respondent called Naomi Kamau who testified that she is the Respondent's Administrative Officer. She stated that the Claimant was a daily paid casual labourer. He was assisting in issuing

- raw material, packing the medicine, washing buckets and containers and was paid at the end of every day. He was paid 159/- per day and was earning Kshs. 250/- per day at the time of dismissal. She testified that he was never dismissed and that he was only called if there was work. she stated that there was no dismissal. If there was overtime worked he was paid each day.
6. In cross examination she testified that the Claimant was paid at the end of the day. She stated that the Claimant was paid a wage of Kshs. 250/- which was the minimum wage at the time. She testified that the hours of work were 8 hours from 8.00am to 5.00pm which included an hour-long break for lunch. She testified that the Claimant did not work continuously for 5 days in a week.
 7. In re-examination she read one of the contracts produced by the Respondent and testified that the Claimant worked and was paid daily as he was a daily paid worker.
 8. The parties agreed to file written submissions. At the time of penning this judgment the Claimant's submissions are not on file. The Respondent filed submissions on 26th March 2015. In the submissions, the Respondent submitted that the Claimant's case was that he was employed by the Respondent first as a labourer and then rose to position of store keeper earning Kshs. 5,000/- payable monthly. His further testimony was that he had a 3 months contract renewed upon expiry and that he was dismissed on 25th October 2006. The Respondent's case was that the Claimant was a casual worker engaged intermittently as such subject to the availability of work until 2006 and was paid a daily wage rate of Kshs. 250/- at the time of his dismissal. The Respondent identified three issues for determination:-
 1. Whether the Claimant was a casual employee or a contract employee
 2. Whether the Claimant was terminated
 3. Whether the Claimant is entitled to the reliefs sought.
 9. The Respondent submitted that the Claimant had not proved his case and the Claimant's suit should be dismissed with costs.
 10. The judgment was scheduled for delivery earlier but had to be deferred as the Court's copy of the Statement of Claim was missing. A copy was eventually availed and judgment set for 14th May 2015.
 11. The issues for determination can be distilled from the three issues the Respondent identified in its submissions.
 1. Whether the Claimant was a contract employee or a daily casual
 2. How was his service terminated?
 3. Is he entitled to any reliefs?
 4. Who is to bear the costs of this suit?
 12. The Court has considered the Claimant's pleadings, his testimony, the Respondent's pleadings and testimony of the witness as well as submissions on record in coming to this decision.
 13. The Claimant was employed by the Respondent. On his part, the Claimant asserts that he was employed on 3 month contracts which were renewed while the Respondent on its part asserts that the Claimant was a daily paid worker. Curiously the Claimant did not avail any of his contracts of service. Also curious was the failure by the Respondent to avail proof of the daily payments for the daily paid worker. The Respondent availed as supporting documents to its Response to Statement of Claim 2 contracts that the Claimant had signed. The documents were headed TEMPORARY DAILY PAID WORKER CONTRACT. They were for a period of 21 days. The contracts provided that the employee would be paid a rate to be collected daily and that the rate was consolidated and includes housing allowance. The contract contradicts the testimony of both the Claimant and the Respondent's witness. The Claimant alleged 3 month contracts while the Respondent alleged the Claimant was a daily paid casual. If the Claimant was a daily paid casual, was the payment made each day? There was no proof of this.

14. The Claimant was a casual but one who enjoyed a monthly contract. The Claimant was thus a worker to whom notice of one month was required. The contracts that were exhibited by the Respondent exemplify the poor labour relations the Respondent has. How inconsiderate can an employer be in offering 60 or 30 days contracts for years on end? What certainty or job security does the employee have for that matter? It is deplorable that servitude is perpetuated in such institutions as the Respondent.

15. The Claimant was entitled to notice and payment in accordance with the wages guidelines applicable. He was entitled to leave and leave allowance. In view of the non-adherence to the dictates of the law the termination was unlawful and unfair in the circumstances. Considering the fact that the Respondent acted callously in the matter I would award the maximum compensation of 12 months. In the final result I enter judgment for the Claimant against the Respondent for:-

- a. Kshs. 7,950/- as notice
- b. Kshs. 95,400/- as compensation
- c. Kshs. 7,950/- as leave allowance
- d. Costs of the suit
- e. Certificate of service in terms of Section 51 of the Employment Act.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of **May** 2015

Nzioki wa Makau

JUDGE