



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI

CAUSE NO. 840 OF 2011

SAMWEL OKINDA APONGA.....1ST CLAIMANT

ISMAEL EBOSA LEVY.....2ND CLAIMANT

VERSUS

MATCH MASTER LIMITED.....RESPONDENT

M/s Matunda for Claimant

Mr. Ochieng Ogutu for Respondent

JUDGMENT

1. The two Claimants filed a Joint Plaint dated 13th July, 2009 in the Milimani Resident Magistrate's Court at Nairobi.
2. The matter was transferred to this court on 29th September, 2010 and a Memorandum of Claim was filed on 2nd June, 2011 in which the 1st Claimant seeks;
 - a. 4 days salary for December, 2008 and January, 2009
 - b. One month pay in lieu of notice
 - c. 21 days annual leave for 10 years worked and
 - d. Severance pay calculated at 15 days salary for the 10 years worked
3. The 2nd Claimant on the other hand seeks;
 - a. One month's salary in lieu of notice
 - b. 21 days annual leave for 7 years worked
 - c. Underpayment for 24 months for 2006 to 2008 in the sum of Ksh.23,083.00; and
 - d. Severance pay calculated at 15 days salary for the 7 years worked.

Facts of the Claim

3. The 1st Claimant was employed as a Machine Operator by the Respondent in January, 1998. At the time the Respondent was named Crown Match. The name later changed to Match Masters Ltd. He worked as a Machine Operator until the 2nd January, 2009.
4. The 2nd Claimant worked in the same capacity. On 2nd January, 2009, the two got letters placing them on probation.
5. The Claimants refused to sign since they had served the Respondent continuously for many years. The 1st Claimant was offered Kshs.7,000.00 to thank him for the previous years worked.
6. The 1st Claimant refused and was told to go away and let others willing to take the money to do so. This also happened to the 2nd Claimant.
7. The Claimants reported the matter at Kiambu Labour Office. This was after employees went on strike demanding payment of severance pay for the years worked.
8. The 1st Claimant produced an identity card marked exhibit I which showed he was an employee of the Respondent.
9. The 1st Claimant was a shop steward and represented other employees at the Labour Office. It was agreed that the Respondent would employ the Claimants and others on a permanent basis. He produced exhibit 'II' in this respect.
10. In the alternative, employees were to be paid service pay for years worked before being converted to contract terms.
11. At the time of termination, the 1st Claimant was paid Ksh.257.00 per day and was paid weekly. He worked six (6) days a week for nine (9) hours a day. They were paid overtime. The Claimant did the same job every day until termination.
12. The Claimants were asked to remove the uniform and go home upon refusing to sign probationary contracts.
13. The 1st Claimant withstood very close cross-examination by counsel for the Respondent. He denied he was a casual as he had worked continuously for the Respondent in the same status. The 1st Claimant was not registered with NSSF and therefore was entitled to severance pay as claimed, he told the court.
14. The 1st Claimant added that for the entire period they worked, they were not granted leave because the Respondent unlawfully regarded them as casuals.
15. The Claimants only seek terminal benefits but no compensation for the termination.
16. The 2nd Claimant testified also in support of his claim. He told the court that he was employed by the Respondent on 2nd February, 2000. He was inducted on the job by the 1st Claimant for four months. He was then allocated a new machine. He worked continuously until 3rd January, 2009 in the capacity of Machine Operator.
17. He told the court that on the day, he was given a three months contract to sign but he declined. He refused to forfeit his seven (7) years of service. He was sent home for that purpose. He worked daily and was paid Ksh.220.00 per day by the time he left. He was registered with NSSF in 2004. He claims terminal benefits set out hereinbefore.

18. The 2nd Claimant did not go on leave for seven (7) years and eleven (11) months and claims in lieu thereof. As a Machine Operator he was supposed to be paid Ksh.257.00 per day but was paid Ksh.220.00. He states that he was underpaid and claims the difference for 24 months from 2006 to 2008 at Ksh.32.00 per day for 26 days a month in the sum of Ksh.23,088.00

19. He also seeks severance pay for seven (7) years and eleven (11) months since he was registered with NSSF in 2004.

20. The 2nd Claimant withstood cross-examination well in support of his claim. He denied he was employed as a casual at one time since he worked continuously from the date of employment until termination.

Defence

21. The Respondent filed a Response to the Claimants' Memorandum of Claim dated 2nd August, 2011 in which the Respondent made a bare denial of the reliefs sought by the 1st and 2nd Claimants.

22. The Respondent states that the Claimants were employed as casuals at all material times, were offered employment on permanent basis but declined the offer and instead absconded from duty. The Respondent therefore denies having terminated their services as alleged or at all.

23. RW1, Simon Munyambo Muriungi testified in support of the Respondent's case. He told the court that he joined the Respondent in January, 2007 and was a Supervisor of the Claimants. The 1st Claimant was an Assistant Operator of flame filling machine and was a casual. He left work in 2009. He told the court that he had found both Claimants at the Respondent's employment in 2007.

24. RW1 told the court that he selected ten casuals for employment on permanent basis but the Claimants and three others refused to sign the letters of offer. The 2nd Claimant also worked in the same position as the 1st Claimant and worked as a casual. The two left employment as a result.

25. Issues for determination

i. Were the Claimants casual workers?

ii. If the answer to (i) is in the negative, are they entitled to the reliefs sought?

Issue (i)

26. This court has in many decisions clarified what is meant by a casual worker and when is a worker initially employed as a casual deemed to have converted into permanent status and therefore entitled to the basic minimum benefits provided to an employee under the Employment Act 2007.

27. Under part 2 of the Employment Act, 2007, a 'casual employee' is defined as follows;

"means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time."

28. The evidence by the Claimants and that by RW1, clearly show the Claimants worked for the Respondent continuously for a number of years. That the Claimants had daily rates of payment but were paid weekly.

29. It goes without saying that the Claimants were not employed as casuals.

30. Even if the Respondent had initially intended to employ the two as casuals, that status ceased in terms of Section 37(1) which provides;

“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 351(c) shall apply to that contract of service.”

31. The import of Section 35(1)(c) is to provide for termination of that contract by the employer giving one month notice to the employee. This is what the Claimants seek and are entitled to one month's salary in lieu of notice.

32. The other implication which follows automatically, is that the employees are entitled to the Basic Minimum Conditions of Employment under Part V of the Act which include;

i. Annual leave of at least 21 days for every year of service in terms of Section 28(1) thereof. The Claimants have sought payment in lieu of 21 days leave for the period worked. The Respondent offered no defence at all to this claim and the same is granted by the court.

ii. The other consequence of the finding by the Court on Issue No. I above is that the 1st Claimant was not registered with NSSF at all during the period of his employment whereas the 2nd Claimant was registered with NSSF in 2004.

In terms of Section 35(5);

“An employee whose contract of service has been terminated under Sub-Section (1)(c) shall be entitled to service pay for every year worked the terms of which shall be fixed.”

The exception to this rule is under Sub-section 35(6) which states;

“This Section shall not apply where an employee is a member of.....

c. The National Social Security Fund.”

33. Evidence by the 1st Claimant that he was not registered with NSSF is not controverted whereas the 2nd Claimant worked between the years 2000 to 2004 without NSSF registration.

The two are entitled to service gratuity and in the case of the 1st Claimant at the rate of 15 days salary for 10 completed years of service. Whereas the 2nd Claimant is entitled to 15 days salary for four (4) completed years of service without NSSF registration.

34. The Respondent did not offer any tangible defence to the claims.

35. With regard for the claim for underpayment by the 2nd Claimant, the Respondent did not offer any defence and the same is allowed as prayed.

36. In the final analysis, the court awards the 1st Claimant as against the Respondent;

a. one month salary in lieu of notice in the sum of Ksh.7,710.00;

b. twenty (21) days annual leave for 10 years in the sum of Ksh.53,970.00;

c. fifteen (15) days service pay for 10 completed years' service in the sum of Kshs.38,550.00;

Total award is Kshs.100,230.00

and in respect of the 2nd Claimant as follows;

- a. one (1) month salary in lieu of notice in the sum of Ksh.7,710.00;
- b. twenty (21) days salary in lieu of annual leave for seven (7) years and eleven (11) months in the sum of Ksh.42,726.00;
- c. Underpayment for the period 2000 to 2008 Kshs.23,983.00; and
- d. Service gratuity at 15 days salary for four (4) years in the sum of Ksh.15,420.00;

Total award is Ksh.104,359.00;

e. the Awards are payable with interest at court rates from date of filing the suit till payment in full;

The Respondent to pay the costs of the suit.

Dated and Delivered at Nairobi this 21st day of August 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE