



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1889 OF 2011

RICHARD OKEMWA NYAKWARA.....CLAIMANT

VERSUS

CAPITAL FISH (K) LTD.....RESPONDENT

JUDGMENT

1. The claimant in the suit avers that he was employed by the respondent in May, 2007 as an off-loading and store supervisor at a monthly salary of Kshs.7,600. According to him on or about end August, 2010 the factory manager, one Mr. Idan Flek without any reasonable cause, verbally dismissed him and ordered him to leave the company's premises. He further avers that upon dismissal, the respondent never paid him for the month of August and part of September 2010. He also claimed that he was never given any notice of termination or payment in lieu.
2. The claimant further pleaded that despite following the matter through the Ministry of Labour and his advocates, the respondent has refused to pay him.
3. The respondent on its part denied that the claimant was its employee. The respondent further stated that the alleged certificate of service exhibited to show the claimant was its employee was a forgery. The respondent therefore prays that the claimant's suit be dismissed.
4. The respondent, through its witness statement made by a Mr. Samuel Musyoka however states that the claimant became known to him serving as a casual worker in the off-loading and stores department. Mr. Musyoka attached a copy of the casuals daily attendance and wages payment sheet to vouch for this. According to Mr. Musyoka, the claimant was paid all his wages and the respondent did not owe him any money.
5. During the hearing the claimant testified that he was employed by the respondent initially as a casual worker but later as a supervisor. As a casual he was earning Kshs.700/= per day payable weekly. According to him on 4th September, 2010 he was told not to come back to work next day. He was not given hence he reported the claim to the Labour Office.
6. In cross-examination he admitted signing the attendance wages payment sheet for casuals. He further stated that the signature on the certificate of service and one on Michel Serour's contract were different. Respondent's witness Mr. Samuel Musyoka stated that casuals were hired based on volume of fish stock and were paid daily but if there was no petty cash, they would be paid the next day or latest after 5 days.

7. In cross-examination Mr. Musyoka stated that he was stationed at Nairobi but occasionally visited Homabay. He further stated that he did not prepare the wages attendance sheet and did not know the claimants signature. Regarding certificate of service, it was his evidence that these could only be issued by General Manager and not Mr. Serour.

8. In his closing submissions Mr. Ochako for the claimant submitted that though initially hired as a casual in the year 2007, the claimant having continuously worked thereafter ought to have been employed on permanent terms and upon termination he ought to have been issued with a termination notice and other procedures regarding termination should have been followed after which he should have been paid terminal dues.

9. Counsel therefore submitted that the termination of the claimant's service without notice was therefore unlawful.

10. Respondent's Counsel on the other hand submitted that the claimant admitted that he was a casual worker and was earning Kshs.300/= per day.

11. This according to casual contradicted the claimant's averments in the pleading that he was an off-loading and stores supervisor earning Kshs.7,600 per month. Regarding contract of service, counsel submitted that it was strange that despite the fact that the claimant stated that he worked continually since May, 2007 he was never issued with a written contract of employment and yet after termination he was issued with a certificate of service.

12. Regarding compensation if any Counsel urged the Court to award only one month's salary in lieu of notice, unpaid leave for three years and service pay equivalent to 15 days pay for every complete year of service.

13. I have reviewed the pleadings evidence and submissions in this matter and the issue seems to me to be the status of the claimant after having continuously worked for the respondent for approximately three years. Although the claimant states that he initially started working as a casual worker and later promoted to off-loading and stores supervisor, he did not state or lead evidence that upon the alleged promotion his pay increased or whether the position of off-loading and stores supervisor was also not on casual basis. What is not disputed however is that the claimant worked continuously for the respondent for an aggregate period exceeding one month hence benefited from the protection accorded to regular workers under section 37(1) of the Employment Act.

14. In terminating the claimants services therefore, he was entitled to at least 28 days notice, leave days and service pay where he was not a member of NSSF.

15. The Court therefore awards the claimant as follows:-

Kshs.

- (a) One month's pay in lieu of notice.....7,600.00
- (b) Unpaid leave for 3 years.....22,800.00
- (c) Service pay for 3 years.....11,400.00

41,800.00

16. The claimant shall have costs of the suit.

17. It is so ordered.

Dated at Nairobi this 23rd day of October 2015

Abuodha J. N.

Judge

Delivered this 23rd day of October 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge