



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

CAUSE NUMBER 477 OF 2013

SEBASTIAN GITHAIGA MWANGI.....CLAIMANT

VERSUS

**COMMISSION FOR THE IMPLEMENTATION OF THE
CONSTITUTION.....RESPONDENT**

JUDGMENT

1. The claimant in this suit avers that by a letter dated 13th January, 2011 from the Principal Secretary, Ministry of National Cohesion and Constitutional Affairs, he was employed as a driver in accordance with the terms and conditions set out in circular Ref. No. OP.CAB/2/12/A dated 22nd June, 2005 from Head of public Service.
2. By a letter dated 12th February, 2013 the Secretary/Chief Executive of the Respondent terminated the claimant's employment with effect from 15th February, 2013.
3. The claimant averred that upon termination he was never paid his terminal dues hence he seeks an order of this Court that they be paid.
4. The respondent in his memorandum of response avers that the claimant was employed by Ministry of Justice, National Cohesion and Constitutional Affairs to serve as a driver on for the respondent on casual basis drawing a daily wage of Kshs.2000/= in accordance with the circular from the Head of Civil Service. The said deployment was renewable from day to day and terminable without notice.
5. According to the respondent, it was a material term of the contract that the claimants would be paid daily based on the number of days worked. The respondent averred that it paid and settled all the wages due to the claimant. The respondent further denied terminating the claimant's services and averred that his contract lapsed. The respondent therefore denied that the claimant was entitled to any terminal dues as claimed.
6. At the hearing of the suit, the claimant in his brief testimony informed the Court that he used to work for the respondent as a driver on temporary basis. He stated that he was paid monthly and used to receive a payslip. The payslips were attached to his memorandum of claim from pages 9-10 of his bundle of documents. He further stated that he never went on leave during the time he worked for the respondent and that he used to report to work at 8.00 a.m. and leave at around 9.00 p.m.

7. In cross-examination he stated that he was paid consolidated daily allowance at the end of month for days worked. He further stated that he never signed any contracts with the respondent. He admitted being informed that his employment as a temporary driver had ended and that he was paid up to 15th March, 2013.

8. The respondent called as witness a Mr. Howard Olumbe who stated that he was the head of Human Resource at the respondent. Although he was not in respondent's employment by the time the claimants left, but he stated that he had since familiarized himself with the issue. According to his evidence, the claimant was employed by the respondent as a driver on temporary basis. The claimant's employment came to an end because the activities in his area had reduced hence the respondent could not continue keeping him. It was his evidence that upon termination the claimant was paid all his benefits. He further paid an equivalent of 15 days wage by the respondent as a token of appreciation. He further stated that the claimant was not entitled to overtime since the government does not have policy for paying for overtime since where one works overtime, he would be allowed to have time off.

9. The claimant worked for the respondent as a driver on temporary basis for a period of approximately two years. It was not in dispute among the parties that the claimant was on a daily wage but payable monthly. The claimant was therefore a casual worker within the meaning of section 2 of the employment Act and his services would under normal circumstances be terminable at the end of the day without notice. However the claimant served the respondent for an aggregate period exceeding one month. In such a scenario section 37(1) of the employment Act deems the contract of the casual employee to be one where wages are paid monthly and section 35(1) (c) shall apply to the contract of service. That is to say, in terminating the contract of such employee he shall be entitled at least 28 days' notice of termination or payment in lieu thereof. Further, section 37(3) of the Act provides that where a contract of service of a casual employee has been converted in accordance with subsection 1, such employee shall be entitled to such terms and conditions of service as he would have been entitled if he was hired on as a regular employee.

10. From the forgoing provisions of the law, and whereas it was not in dispute that the claimant's appointment was on temporary basis and could end any time, the claimant was entitled to benefit from the exit arrangement which ordinary employees of his cadre were entitled to as per the respondent's human resource manual or policy if any or in the absence thereof, as provided in the Employment Act.

11. The claimant was therefore entitled to one month's notice of termination or payment lieu thereof.

12. The Court has not come across any complaint that the claimant's services were unfairly terminated. Apart from claiming for compensation for unfair dismissal, the claimant did not lead any evidence to support this claim. The same goes for the claim for leave and overtime. Besides the respondent ably demonstrated that it was not the Government's policy to pay for overtime as a matter of course and that any leave untaken would be forfeited.

13. In conclusion the Court awards the claimant as follows:-

Kshs.

(a) One month's salary in lieu of pay.....42,148.00

(b) Salary for 15 days worked in

February 2013.....21,074.00

63,222.00

(c) Costs of the suit

14. This award will be less statutory deductions and any terminal benefit already paid to the claimant on

the above account.

15. It is so ordered.

Dated at Nairobi this 2nd day of October 2015

Abuodha J. N.

Judge

Delivered this 2nd day of October 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge