



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1719 OF 2011
ROSEMARY KHATONDE MULAMA.....CLAIMANT
VS
INDU FARM (EPZ) LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by way of Memorandum of Claim dated 28th September 2011 and amended on 11th December 2012 seeks general damages and terminal dues. The Respondent's defence is contained in a Memorandum of Defence amended on 18th January 2013. The Claimant testified on her own behalf and the Respondent did not call any witnesses. Both parties filed written submissions.

The Claimant's Case

2. The Claimant states that she was employed by the Respondent as a grader from September 2003. She was paid a weekly rate of Kshs.1,500.00. From October 2010, the Claimant developed chest and spinal injury complications due to harsh working conditions including extreme cold. She was attended at Kenyatta National Hospital where the doctor recommended that she ceases working for the Respondent on medical grounds. The Claimant subsequently issued a notice to the Respondent indicating her inability to continue working due to ill health. Her request to be paid terminal dues was declined.

3. The Claimant contends that she is entitled to compensation under the Employment Act and the Work Injury Benefits Act. She further claims overtime compensation and annual leave allowances.

4. Her claim is as follows:

- a) A declaration that she is entitled to redundancy dues, leave allowances and overtime compensation;
- b) Kshs.1,176,000.00 being redundancy dues ;
- c) An order compelling the Respondent to pay the Claimant redundancy dues for the years served and for the remainder of the period up to the expected date of retirement;
- d) An order compelling the Respondent to pay the Claimant unpaid weekend, holiday and extra allowances;

e) General damages for pain and suffering and loss of future earnings resulting from the Claimant contracting an occupational disease;

f) Costs and interest.

The Respondent's Case

5. In its Memorandum of Defence as amended on 18th January 2013, the Respondent admits having employed the Claimant on casual basis at daily rate of Kshs.328.00 from July 2004. According to the Respondent, the Claimant did not work continuously. Her employment commenced in July 2004 and not 1st September 2003 as pleaded by the Claimant.

6. On 5th October 2010, the Claimant stopped reporting for work and on 5th November 2010, she wrote to the Respondent giving notification that the doctor had recommended that she stops working due to ill health. In her letter, the Claimant requested to be paid her terminal dues.

7. In January 2011, the Claimant returned to the Respondent's premises accompanied by a Mr. Samuel Kahiga, who presented an unsigned form stating the Claimant's claim against the Respondent. On 23rd May 2011, the Respondent received a letter from Calendar Industrial Relations Services demanding payment on behalf of the Claimant in respect of:

- a) Notice pay
- b) Annual leave
- c) 12 months' sick leave
- d) 12 months' salary in compensation

8. The Respondent denies that the Claimant was unfairly terminated and submits that it was the Claimant who suddenly stopped going to work, later advising the Respondent that she had been advised by the doctor not to continue working.

9. The Respondent further submits that the Claimant was employed on a daily basis as a casual labourer. In addition, once the Claimant failed to report to work from 5th October 2010, the Respondent was entitled to treat the contract as terminated and the Respondent had no further obligation towards the Claimant.

10. It is the Respondent's case that the Claimant cannot claim compensation either for unfair termination or under redundancy as she was neither terminated nor declared redundant. Further, the Respondent denies that the Claimant worked every day from the date she was employed until 5th October 2010. The Respondent also denies the Claimant's claim for weekend allowances, holiday allowances and extra working hours. Her claim under the Work Injury Benefits Act is also denied.

Findings and Determination

11. The issues for determination in this case are as follows:

- a) The nature and status of the Claimant's employment with the Respondent;
- b) The mode of termination of the Claimant's employment;
- c) Whether the Claimant is entitled to the remedies sought.

Nature and Status of the Claimant's Employment

12. Part of the Respondent's defence to the Claimant's claim is that she was a casual employee and is therefore not entitled to the remedies sought. The Claimant on the other hand maintains that she worked continuously from the date of employment until the termination date.

13. Section 2 of the Employment Act, 2007 defines a casual employee as:

“a person the terms of whose engagement provides 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”

14. The Claimant's employment was not documented and it is therefore left to the Court to interpret the terms and conditions of her employment. The Respondent states that the Claimant was paid a daily rate of Kshs.328.00 and the Claimant states that she was paid on weekly basis. The question then is whether the Claimant was a casual employee as defined in law. In support of her claim, the Claimant produced National Social Security Fund (NSSF) provisional statements from 2003 to 2010 showing regular standard contributions made by the Respondent as her employer.

15. Moreover, the Claimant was issued with a duly authorised staff identity card which she produced before the Court. From these documents, the Court arrived at the conclusion that the Claimant was a regular employee of the Respondent and the defence that she was a casual employee is rejected.

The Mode of Termination

16. Having established that the Claimant was a regular employee, I will now address the issue of her separation from the Respondent's employment. The account by the parties on the circumstances under which the Claimant stopped working are not materially different. The Respondent states that the Claimant stopped reporting to work from 5th October 2010. While conceding that she had indeed stopped working in October 2010, the Claimant states that this was necessitated by her ill health as confirmed by doctors at Kenyatta National Hospital.

17. The issues are whether there is evidence that the Claimant's illness was an occupational illness as defined in the Work Injury Benefits Act and whether her termination amounts to retirement on medical grounds. The Court was referred to the Claimant's discharge summary notes which carried the following outcome:

“I therefore recommend her not to work until otherwise”.

18. It is not in contest that at the time she left employment, the Claimant was unwell. However, retirement on medical grounds is preceded by an elaborate procedure where the target employee appears before a medical officer or a medical board with the aim of determining whether the employee is fit to continue working.

19. No such procedure was followed in the Claimant's case and her discharge summary notes do not qualify as a medical report for purposes of determining her capacity to work. It cannot therefore be said that she retired on medical grounds. With regard to the claim that the Claimant's illness was an occupational disease as defined in the Work Injury Benefits Act, the only thing I will say is that no evidence was led to create the necessary nexus for claims of this nature. From the foregoing, I have reached the conclusion that the Claimant's separation from the Respondent's employment was a normal termination at the Claimant's instance.

Remedies

20. In her prayers, the Claimant seeks payment of redundancy dues. However, no basis was laid for this claim which therefore fails and is dismissed. Similarly, the claims for overtime compensation, unpaid weekend, holiday and extra allowances were not proved and are dismissed. In light of the finding that there was no proof that the Claimant's illness was an occupational disease, the claim for general damages also fails and is dismissed.

21. In the final analysis, the only claims that succeed are the ones for leave pay and service pay as admitted by the Respondent in their final submissions which I proceed to tabulate as follows:

a) Leave pay (21*328*6).....	Kshs.41,328.00
b) Service pay (15*328*6).....	<u>29,520.00</u>
Total.....	70,848.00

21. Each party will bear their own costs.

22. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF NOVEMBER 2015

LINNET NDOLO

JUDGE

Appearance:

Mr. Mageto for the Claimant

Miss Kamau for the Respondent