



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 161 OF 2015**

**SIKUKU NZUVI NGII.....APPLICANT**

**VS**

**GACAL MERCHANTS LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent as a driver from 25.8.2007 earning kshs 700/= per day which was paid weekly in arrears. He worked continuously until 6.11.2014 when he was dismissed for alleged late reporting. He avers that the dismissal was unfair because he was not given any hearing before dismissal. He now brings this suit claiming declaration that his dismissal was unfair, unlawful and unjust and that he should be awarded terminal dues plus compensation for unfair dismissal.
2. The respondent has denied liability for the unfair dismissal of the claimant and avers that on the material date, the claimant recklessly drove the lorry and when he was stopped by the traffic police, he abandoned the lorry at the scene. She further avers that the claimant was only hired for a few days on casual basis and when the need arose and his wage was paid on daily basis.
3. The suit was heard on 8.7.2015 and 29.7.2015 when the claimant testified as Cw1 and the respondent called Mr. Ayub Yusuf Ali as Rw1. Thereafter the parties agreed to file written submissions but only the claimant filed.

**Analysis and Determination**

4. There is no dispute from the pleadings and evidence that the claimant was employed by the respondent on casual basis earning kshs. 700/= per day. There is also no dispute that the claimant worked continuously for more than one year before his dismissal. The issues for determination are:-
  - a. Whether the claimant's employment had converted from Casual to permanent employment.
  - b. Whether his dismissal was unfair and unjust
  - c. Whether the reliefs sought should be granted.

**Conversion from casual employment**

5. Claimant stated that he worked from September 2007 till 6.11.2014 continuously as a casual. That he considered himself as permanent employee entitled to protection of the law from unfair dismissal. Rw1 is 18 years old and contended that Cw1 was only employed as casual employee from September 2013. That he was not working daily but only as and when the need arose and he was being paid daily. That he never worked on holiday and never went for any leave. However Rw1 did not produce any attendance records to prove that Cw1 was not working continuously.
6. After careful consideration of the evidence adduced, the court is of the view, on a balance of probability that Cw1 worked for the respondent continuously for more than 3 months. Consequently his contract of service ought to have been in writing as required by Section 9 of the Employment Act. Without such written contract, the employer has burden of disproving the terms of contract verbally alleged by the employee in this court proceedings as provided by section 10 (7) of the Employment Act (EA).
7. It is further the considered view of the court that the claimant's employment had been converted from casual to permanent employee under section 37 (1) (a), (2) and (3) of the Employment Act. Section 37 (1) (a) provides that where a casual employee works for a period or a number of continuous working days which amount an aggregate to the equivalent of not less than one month, the contract of service shall be deemed to be one where wages are paid monthly and the contract cannot be terminated without securing a notice of 28 days in writing as provided by section 35(1) (c) of the Employment Act. Section 37 (3) of the Employment Act provides that if an employee whose contract has been converted in accordance with sub section (1) above, works continuously for 2 months or more from the date of employment as a casual employee, he shall be entitled to such terms and conditions of service as he would have been entitled under this Act had he not initially been employed as a casual employee. Consequently the court exercises the power given under section 37 (4) of the employment to declare that the claimant's terms and conditions of service had long converted from casual to permanent employment and the terms of the contract are hereby accordingly varied.

### **Unfair termination**

8. Under section 45 of the Employment Act termination of employment is unfair if the employer fails to prove that it was founded on a valid and fair reason and that the termination was done after following a fair procedure. In this case the person who dismissed the claimant is the father of Rw1. He never testified to prove that there existed a valid and fair reason to warrant the dismissal of the claimant's employment. The alleged drunkenness at work and abandoning of the lorry after being stopped by police was never proved. He also never testified to prove that he followed a fair procedure before dismissing the claimant.
9. The court is therefore left with the un rebutted evidence from the Cw1 which is to the effect that on night of 5.11.2014 he worked soberly and in the morning of 6.11.2014 he went home and reported back to work at 11.00am. That on arrival at the office Mr. Yusuf Ali Muhamed (Rw1's father) told him to go away because he was late for work. That the Mr. Muhamed never gave the claimant a chance to explain that he had worked overnight. Consequently Cw1 went to the Labour office to report the matter on 15.12.2014.
10. Under section 41 of the Employment Act, before an employer dismisses an employee for misconduct under section 44 (3) and (4) of the Act, he must explain to the employee the reason for the intended dismissal in a language the employee understands. That during such explanation, the employee has the right of being accompanied by a fellow employee or shop floor union representative of his choice. That the employee and his companion must be given a chance to tender their views for consideration before the decision is reached. In this case, that procedure was not followed and on a balance of probability, that default tendered the termination unfair.

### **Reliefs**

11. In view of the findings above, the court makes declaration that the dismissal of the claimant was unfair, unlawful and unjust as prayed. In addition the court awards the claimant Kshs. 18,200/= being salary in lieu of notice as prayed. He will also get accrued leave of 21 days per year for 3

years because of the time bar under section 90 of the Employment Act. The said provision limits any claim based on employment contract to 3 years. He is therefore awarded kshs. 44,100/= for 63 leave days at the rate of 700/= per day. He is also awarded service pay for 7 years at the rate of 15 days salary per year of service being kshs. 73,500/=. The claim for overtime and public holidays worked is dismissed for want of evidence and particulars. The claimant will however get 3 months gross salary for unfair and unjustified dismissal being kshs. 63,000/=. The reason for awarding the 3 months is because the claimant had worked for the respondent for 7 years. In addition the court has considered the fact that Cw1 can with due diligence secure alternative employment within 3 months.

**Disposition**

12. For the reasons stated above judgment is entered for the claimant declaring his dismissal unfair and unjustified and awarding him **kshs.198,800/=** plus costs and interest.

**Dated, signed and delivered this 11<sup>th</sup> day of December, 2015**

**ONESMUS MAKAU**

**JUDGE**