



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 228 OF 2013

MAUMAU NDIMIRO GHADAMCLAIMANT

VERSUS

BLUE CAT PORT SERVICES LTDRESPONDENT

J U D G M E N T

BACKGROUND

The claimant has sued the respondent alleging unlawful or unfair termination of employment and claiming accrued employment benefits plus compensation for unfair termination. The defence has denied liability and she described the claimant as a casual employee who was not entitled to any termination notice and accrued terminal dues. The case was heard on 14/11/2013 when the claimant testified as CW1 and called Mr. Safari Kiti as CW2. On the other hand the defence called Mr. John Muchibi as RW1.

CLAIMANT'S CASE

CW1 stated that he was employed by the respondent on 15/2/2000 and worked continuously until 3/1/2013 when he was dismissed by SMS from the director of the respondent. The reason for his termination was the demand for better wages. His salary was ksh.405 per day but starting 2009 the daily wage was drastically and unilaterally reduced by the respondent to as little as 40/= per day. CW1 also accused the respondent of illegally deducting from his salary and that of the other workers ksh.500 per month to finance harambees in Western Kenya where the director of the respondent was contesting for a parliamentary seat in 2007 and which he eventually won in 2013.

He further accused the respondent of deducting NSSF contribution but refusing to remit to the NSSF. On cross examination, he contended that he worked as the head loader. He confirmed that he was paid weekly. He confirmed that in 2009, the wages per day was ksh.270. A day was 8 hours shift but in January 2009 the attendance card showed that he worked for 12 hours.

He could not produce any documents to prove that he was working for the respondent since 2000 or to prove that the respondent was doing work for the Grain Bulk Ltd. He confirmed from NSSF statement that his NSSF remittances by the respondent began from 2010. He maintained that he worked until 2/1/2013 when he was dismissed.

CW2 worked with the claimant from 15/2/2000 upto 2013. His wage was ksh.405 payable end of the week. He contended that the respondent started to deduct NSSF money and later in 2007 she started to deduct ksh.500 per month for harambee while the boss was contesting a parliamentary seat. In 2009

the boss said that he would start paying whatever he wished and at times he paid as little as ksh.20 per day after deducting NHIF and NSSF. There was no rest day, or leave except sick off for a maximum of 2 days.

CW1 and other workers were dismissed for demanding better pay. He also contended that the respondent deducted NSSF money from 200 workers and only remitted for 50 people. He produced his NSSF statement for 2003 to 2013 as exhibit 1. On cross examination he confirmed that in 2009 some workers left employment demanding for better pay but he and CW1 remained until 3/1/2013. He demonstrated by NSSF statement that his NSSF remittances commenced in 2007 although deductions started in 2003. He maintained that there was clearing work through out and denied that there were times when work ceased.

DEFENCE CASE

RW1 is the supervisor for the respondent. He has worked for 8 years for the respondent. He confirmed that the respondent has provided labour to Grain Bulk Ltd for about 10 years and has no other client. He contended that the claimant worked for the respondent as casual loader on daily basis since 2003. He also contended that the claimant disappeared for some time and then reappeared. He denied that the claimant served continuously thereafter because the work depended on the client's order. He denied the possibility of having an employee for many years as claimed by the claimant because the work is seasonal. He denied that the claimant was a gang leader but a mere casual.

From 2010 the mode of payment changed from daily wages to piece rate per bag. Consequently the more the bags loaded or off loaded based on Ksh.2.30 per bag the more the pay one get. He admitted that the claimants last day of work was in January 2013 but denied ever dismissing him. He also denied the alleged underpayment and harambee deductions from his salary. He admitted that with the advise of NSSF the respondent remitted NSSF contributions only to 40 workers including the claimant of which the employee contributed 200 and the respondent equal amount.

On cross examination RW1 confirmed that Mr. Johnson Naika is the MD for the respondent. He contended that the period when NSSF was not remitted, the claimant was not working. He contended further that the fact that NSSF was remitted for 2011 and 2012, did not mean that the claimant worked continuously. He stated that he had records in the office to prove his allegation.

On being showed SMS send by the MD to the claimant on 3/1/2013, he said that he did not know the context in which it was send. He admitted that the claimant was among the workers who complained about low pay and left employment. He maintained that the only deductions done on the workers wages other than NSSF was ksh.50 for welfare in case a staff member died or fell sick and it was done with consent of all the workers as and when the need arose.

After the close of the hearing the parties filed written submissions which the court has considered herein.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings, evidence and submissions are:

- a) **whether the claimant was a casual employee or not.**
- b) **Whether the claimant's employment was unfairly terminated by the respondent.**
- c) **Whether the claimant is entitled to the reliefs sought.**

Was the claimant a casual or permanent

The answer to this question lies in Section 37 of the Employment Act 2007 and the NSSF statement

produced by the claimant and admitted by the RW1. The claimants evidence is that he served continuously from the year 2000 until 3/1/2013 and contended that he was deducted NSSF but it was never remitted until 2009 when remittance was made till December 2012. The above evidence was corroborated by the CW2 and it shows that CW1 worked continuously for over one month. RW1 however contended that the days the NSSF remittances were not made for the CW1 are for the period he was not working. He did not however produce any documentary evidence to contradict CW1 and CW2's evidence that they used to work together and they never deserted the employment until the dismissal on 3/1/2013. Instead the RW1 blundered by admitting that they had colluded with some government or NSSF officials to have the respondent to remit NSSF contributions for only a few of the employees.

Section 37 of the Employment Act provides that where a casual employee works for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1) (c) of the Act shall apply to that contract of service. Section 35(1) (c) *supra*, basically entitles an employee to a termination notice of 28 days.

Section 37(4) grants power to this court to convert a casual employment into a term contract. Consequently, and in view of the facts presented by the evidence before the court on continuous service and the interpretation of Section 37(1) (a) and Section 35(1) (c) of the Employment Act, the court is satisfied that the contract of employment between the parties herein qualified to be a term contract and it is hereby declared as such.

Was the said contract unfairly terminated

The answer is yes. The claimant demanded better terms of employment along with his colleagues but the respondent's MD dismissed him by SMS. The SMS was shown to court and the RW1 did not contest it but only said that he could not tell the context under which it was made. The MD never testified to deny the SMS. Consequently the court finds that the claimant was unfairly dismissed. The reason for dismissal was the claimant's demand for better terms of service. The SMS referred to such demands as foolishness and required that the claimant should leave the respondent's employment.

The defence argument that the claimant deserted work is therefore dismissed as it had been outweighed by the claimants evidence. Section 45 of the Employment Act bars employers from dismissing their employees unless there is a justifiable reason and that a fair procedure is followed. The reasons for dismissal under Section 44 include gross misconduct while fair procedure for dismissal under Section 41 of the Act demands that the employee be accorded a hearing before the dismissal. That was not done in this case and as such the dismissal was unfair.

RELIEFS AVAILABLE

The court makes declaration in terms of prayer 1, 2 and 3 of the claim in view of the finding made above. Prayer 4 is vague as it does not state who should do the investigation on the issue under payment. There is no evidence to prove that the claimant was entitled to 3 months termination notice. Consequently the court will follow its interpretation of Section 37 (1) (a) *supra* to award the claimant one month salary in lieu of notice. The claimant pleaded salary of Ksh. 405 per day which equal to ksh.12,500 per month. He is therefore awarded ksh.12500 as one month salary in lieu of notice.

The claimant has prayed for leave for 13 years before the filing of this suit. The court finds that only the claim falling within the limitation period of 3 years will be available. The suit was filed on 26/7/2013 meaning that any claim for period earlier than 26/7/2010 date would be dismissed. The court will therefore award leave for the period between 26/7/2010 and 3/1/2013 which is about 2 ½ years. In the absence of any evidence of written contract the court awards 21 leave days as provided for under Section 28(1) of the Employment Act. The foregoing formula entitles the claimants to 52.5 accrued leave days. The pay in lieu of leave works to $52.5/30 \times 12500 = 21,262.50$.

The claim for severance pay is dismissed since the dismissal was not redundancy.

The claim for refund of ksh.500 per month for harambees is dismissed for lack of evidence. Instead the court believes the defence explanation that only occasional and consensual deduction of ksh.50 was deducted towards staff welfare whenever there was a case of death of an employee or sickness. The claim for house allowance is also dismissed. The claimant is raising the claim as an afterthought after dismissal.

DISPOSITION

Judgment is entered for the claimant against the respondent as follows;

1. **Declaration in terms of prayer 1,2 and 3 of the claim.**
2. **Payment of ksh.33,762.50**
3. **Costs and interest from the date of filing this suit.**

Orders accordingly.

Signed, Dated and delivered this 28th day of February 2014.

O.N. Makau

Judge