



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1344 OF 2011

FRANCIS MAINA KAMAU.....CLAIMANT

VS

LEE CONSTRUCTION.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 4th August 2011 and amended on 25th June 2013, the Claimant brought a claim against the Respondent for unfair termination of employment and failure to pay terminal dues. The Respondent filed a Memorandum of Reply on 21st August 2012 which was amended on 26th July 2013.
2. The matter was heard on 28th October 2013 with Mr. Mbutia appearing for the Claimant and Mr. Kinyanjui for the Respondent. The Claimant testified on his own behalf and the Respondent called its Site Agent, Kabui Wang'ombe. Both parties filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Check Clerk in January 2006 and was later promoted to the position of Machine Operator, a position he held until August 2008 when his employment was terminated. His salary as at the time of termination was Kshs. 10,400.
4. It was the Claimant's case that the Respondent abandoned him at its road construction site in Kangema and relocated the roller he was using to Nairobi ostensibly for major repairs. The roller was however immediately put to use at another site.

5. The Claimant claims the following:

- a. 12 months' salary in compensation for unfair termination....Kshs. 124,800
- b. Notice pay.....10,400
- c. Leave pay for 2.5 years.....21,000
- d. House allowance @ 15%.....46,800
- e. Service gratuity @ 15 days' pay.....13,000

The Respondent's Case

6. In its amended Memorandum of Reply, the Respondent stated that it had engaged the Claimant on casual basis for a project in Kangema and that the engagement terminated once the

project was completed. Upon completion of the project, the roller previously used by the Claimant was moved to another site. The Claimant was paid all his accrued weekly wages.

7. The Respondent denied issuing the certificate of service annexed to the Claimant's Memorandum of Claim as it was signed by an unauthorised officer. It was the Respondent's case that the Claimant having been engaged on casual basis was not entitled to annual leave, house allowance, service gratuity or notice pay.

Findings and Determination

8. The first issue for determination in this case has to do with the applicable employment law. In the submissions filed on behalf of the Respondent, it was submitted that since the Claimant's engagement with the Respondent began before enactment of the Employment Act, 2007 the applicable law was the repealed Employment Act (Cap 226).

9. According to the Claimant, he worked for the Respondent between January 2006 and August 2008. The Respondent's witness, Kabui Wang'ombe testified that at the time of joining the Respondent's employment in February 2007, he found the Claimant already working for the Respondent. When Wang'ombe left the Kangema site in May 2008, the Claimant was still on site. Wang'ombe told the Court that at the time he left Kangema, the project was substantially complete but he did not know when the Claimant eventually left the site.

10. It is not in contest that the Claimant's employment with the Respondent was not documented. The law places the responsibility of documenting an employment relationship on the employer and where there is divergence of evidence in cases of an oral contract of employment, the Court will adopt the testimony of the employee.

11. I therefore adopt the date of August 2008 given by the Claimant as the date of separation from the Respondent's employment. That said, the logical conclusion is that when the cause of action arose, the Claimant's employment was governed by the Employment Act, 2007 which came into effect on 2nd June 2008. The Claimant's claim therefore falls within the new law and not Cap 226 as submitted by Counsel for the Respondent.

12. The next issue for determination relates to the nature and status of the Claimant's employment. It was the Respondent's case that the Claimant was a casual employee and was therefore not entitled to any of the reliefs sought. Wang'ombe told the Court that the Claimant who worked on a daily basis remained a casual for the entire period of his employment by virtue of the nature of his work.

13 A casual employee is defined in Section 2 of the Employment Act, 2007 as:

“a person the terms of whose employment provide 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. As held by Maureen Onyango J in the case of ***Wilfred Bukachi Opwaka Vs Ready Consultancy Company Limited (Industrial Court Cause No 471 of 2012)*** under Section 37 of the Employment Act, 2007, the employment of a casual employee who works continuously for at least one month is deemed to be converted to a term contract by operation of law. It is not in dispute that the Claimant worked continuously for a period longer than the threshold set by the law and he could not therefore be said to be a casual employee. Further, from the evidence adduced in Court, the Claimant was initially paid on a weekly basis and later on monthly basis.

15. I now turn to the Claimant's claim for unfair termination of employment. According to the Respondent, the Claimant's employment was terminated because the project in which he was working had come to an end. In my view, that form of termination would fall under what is commonly known as redundancy.

16. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

17. Section 40 of the Employment Act, 2007 sets the conditions to be met by an employer before terminating an employee's employment on account of redundancy as follows:

- a. ***Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***
- b. ***Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
- c. ***the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***
- d. ***where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;***
- e. ***the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***
- f. ***the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and***
- g. ***the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.***

18. There is no evidence that the Respondent complied with any of the conditions set out in Section 40 of the Employment Act, 2007 and I therefore find the termination of the Claimant's employment to have been unfair within the meaning of Section 45 of the Act. Consequently, I award the Claimant the equivalent of 3 months' pay in compensation. I also award him one month's salary in lieu of notice. The Respondent admitted that the Claimant did not go on leave and that he was not a member of the National Social Security Fund. The claims for leave pay and gratuity are therefore allowed.

19. With regard to the claim for house allowance, Section 31(1) of the Employment Act provides that:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

20. There was no evidence that the salary paid to the Claimant was inclusive of house allowance and I therefore award the Claimant house allowance at the rate of 15%. The resultant figure of Kshs. 11,960 will be used as the Claimant's salary for purposes of this claim.

21. On the whole, I make an award in favour of the Claimant in the following terms:

a) 3 months' salary in compensation for unfair terminationKshs. 35,880

b) One month's salary in lieu of notice.....11,960

c) Leave pay (11,960x42) +(11,960 x1.75x 8).....21,325

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d) Service pay for 2 completed years of service.....11,960

e) House allowance for 32 months.....49,920

Total.....Kshs.131,045

I further award the Claimant the costs of this case.

This Award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF FEBRUARY 2014

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*