



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 21'A' OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 18th September, 2014)

MICHAEL O. ODONGO CLAIMANT

-VERSUS-

KENYA ELECTRICITY GENERATING CO. LTD RESPONDENTS

JUDGMENT

The claimant Michael Odongo filed his memo of claim on 20.2.2013 through the firm of Bruce Odeny & Co. Advocates. He claims that he worked for respondents as a Recruitment Officer with effect from 22.7.2005 at Sondu Miriu Power Project at a salary of Ksh 35,000/=. He initially worked on temporary basis and his employer kept extending his temporary contract for a continuous period for the next 6 years from the date of his appointment. All the temporary engagements were for periods of 3 months and in writing as per his **App 1**, to **40** at the same salary. **App 41** is a letter from the Senior Projects Engineer Sangoro Power Plant asking that the Chief Finance Officer Western Hydros to pay him his salary from 1st October 2011 to 31st October 2011 **App 42, 43, 44, 45, 46** and **47** is also a similar request to have his salary paid. Apparently vide **App 48**, he was invited for an interview by the respondent's conference room on 9.4.2010 at 8.30 am. **App 49** confirm he also worked as a Recruitment Officer at Sondu Miriu Power Project from 22.7.2005 to October 2007.

However **App 50** now states that the project he was working on was successfully wound up and handed over by 1st August 2012 and therefore his contract expired with effect from 31st August 2012. He attempted to consult the respondent for permanent employment and he failed. He states that he worked for respondents for a continuous period of years with no break in employment. He left employment on 31.8.2012 when his supervisor called him and told him not to report to duty the following day as they await communication from head office. No communication was forthcoming and he wrote a letter to the managing director of respondents complaining of being discriminated upon but there was no solution. He then committed his advocate to write to respondents to make good the mistakes. There was no response.

He now came to court seeking damages for wrongful termination, unpaid leave for 7 years, monthly house allowance, commuter allowance, medical allowances as other permanent employees were paid. House allowance was Ksh 25,000/=, commuter allowance Ksh 20,000/=, medical allowance Ksh 750,000/= for in-patient annually and out-patient Ksh 120,000/=, gratuity and dues on account of redundancy. He also seeks for costs of this case.

In cross-examination claimant told court that he was invited by projects engineer and before then he was committee member of the project representing the community and the youth. The technical committee recommended that he be employed as a permanent employee. He says he knew the project

was coming to an end in 2012. He said he was to do liaison work for respondents and for the project on casual basis. He said he does not have evidence of what other employees of Kengen were being paid.

The respondents on the other hand filed their reply to the claim on 25.4.2013 through the firm of Kibatia & Co. Advocates. They also called 1 witness. They aver that the claimant was first recruited and employed at Sondu Miriu Hydro Power Project on short term contracts from 22nd July 2005 to October 2007 and later at Sangoro Power Project from 1.11.2008 to 31.8.2012 when the project wound up. They also aver that as part of the contract contents, the claimant was not entitled to other benefits enjoyed by permanent employees. It is their position that they didn't employ the claimant as integrity issues came in as claimant had a children's case in court.

I have considered evidence of both parties, issues for consideration are as follows:-

1. **Whether claimant was an employee of the respondents and if so --.**
2. **Whether the claimant was a casual or permanent employee.**
3. **What dues was claimant entitled to.**
4. **Was termination of claimant's services unlawful.**
5. **Is claimant entitled to the prayers sought.**

On 1st issue, the claimant exhibited documents **App 1 to 40** which are short contracts of employment between claimant and respondents running for 7 years continuously with effect from July 2005 to 31st August 2012. All the contract letters were crafted on official letter heads of the respondents and signed for Chief Manager Human Resources. All these letters were to the effect that the claimant had been offered appointment as a Recruitment Officer in Projects Division -- and were signed.

Yours Faithfully

For: Kenya Electricity Generating Company Ltd

Signed

for the Chief Manager Human Resources.

To come and say that the claimant was not an employee of respondents but of some project is to deny the obvious. The projects were projects of Kengen, payable and supervised by Kengen staff and the back stops with Kengen. The court therefore finds that the claimant was an employee of respondents and not any other entity.

On 2nd issue, the claimant served on short term contracts of 3 months to 1 month. Under S. 37 of Employment Act 2007:-

“(1) Notwithstanding any provision of this Act, where a casual employee;

(a) works for a period or a number of continuous working days which amount in aggregate to an equivalent of not less than one month or

(b) perform work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where, wages are paid monthly and section 35(1)(c) shall apply to that contract of service.”

2. **In calculating wages ---**
3. **An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.**

4. **Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.**
5. **A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.**

In this case, the claimant worked for a continuous period of 7 years and by virtue of S. 37, this casual employment converts automatically to a permanent status which I declare as provided under S(4) above. It is therefore the finding of this court that the claimant ceased to be a casual employee after continuously serving for 3 months on the same job or same terms.

It therefore follows in answer to issue No. 3, that he was entitled to dues as other permanent employees in the establishment of respondents. It is however unfortunate that the claimant has not exhibited what other employees in his cadre were earning and his claim for payment of what others were earning cannot be granted without proof of the amounts payable.

The claimant ceased to be a casual worker after 3 months in the service. His termination in service was therefore to be governed by the provisions of the Law as provided for under S. 41 of Employment Act. He was to be given notice and accorded a hearing. He was denied both. His termination was therefore unlawful and unfair.

What then is the claimant entitled to? Given that the project under which claimant served ended, the respondents should have applied the termination under redundancy and pay claimant his dues. The law on redundancy is provided for under S. 40 of Employment Act 2007 and using this provision, I enter judgment for claimant as follows:-

1. **1 month salary as notice = Kshs 35,000/=.**
2. **Severance pay at 15 days for each year worked = 35,000 X ½ X 7 = Kshs 122,500/=.**
3. **Leave for the 7 years = 35,000 X 7 = Kshs 245,000/=.**
4. **House allowances at 15% of salary for 84 months = 5250 X 84 = Kshs 441,000/=.**
5. **12 months salary as compensation for unlawful termination = 12 X 35,000 = Kshs 420,000/=.**

TOTAL = KSHS 1,263,500/=

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Plus costs.

6. **Claimant should be issued with a certificate of service.**

HELLEN S. WASILWA

JUDGE

18th day of September 2014

Appearances:-

Odeny for claimant present

Ondego h/b Karanja for respondent present

CC. Wamache