



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NYERI
CAUSE NUMBER 806 OF 2013

BETWEEN

BENJAMIN MUKUVI.....CLAIMANT

VERSUS

JAY SCRAP DEALERSRESPONDENT

JUDGMENT

1. The Claimant in this suit seeks compensation for unlawful termination of employment by the Respondent. According to his memorandum of claim filed on 28th May, 2013, he states that he used to work for the Respondent as a loader earning Kshs.10,000 per month. He states that he worked from 2nd February, 2007 until about 29th October, 2012 when according to him his services were orally terminated.
2. He further averred that it was well within the Respondent's knowledge that he sustained injuries hence his dismissal from work on account of absence without leave was unfair.
3. The Respondent on the other hand, by a memorandum of response filed on 17th June, 2013 denies the Claimant was his regular employee and avers that he was together with others, a casual employee whose services were engaged whenever need arose and would be paid on a daily basis.
4. The Respondent further averred that the injuries if at all were sustained by the Claimant, took place away from the Respondent's employ. The Respondent further pleads that even after the alleged injury the Claimant continued to be engaged on casual basis until 15th December, 2012 when he jumped off the Respondent's lorry which was transporting scrap metal in his attempt to steal some of the scrap metal consignment which was foiled by the diver. As a consequence the Respondent avers that he was justified in dismissing the Claimant.
5. At the trial the Claimant gave very brief evidence stating in the main that he was employed by the Respondent on 2nd February, 2007 as a loader. It was his evidence that he initially worked as a loader but later became a regular employee. His salary was Kshs.10,000 per month which he stated was paid through the bank. The claimant further reiterated his averment that he was injured while at work and was absent for two days. When he resumed on 29th October 2012, he was dismissed at lunch time without any reason being given to him.
6. In cross examination he stated he was a casual worker for one year and that their names were recorded daily as they reported to work. He further stated that he used to be paid weekly.

7. The Respondents on his part called Mr. Nzomo Wambua who stated he was the sole proprietor to the Respondent and confirmed that he knew the Respondent who used to work for him as a loader. He further stated that he worked between 2007 and 2012. According to him work was not regular and there were times when scrap metal was not available. It was his evidence that he used to keep a record of his casual workers and when they worked. He therefore testified that the Claimant was not at work on 29th October 2012 when he claimed he was dismissed. Mr. Wambua however, stated that the claimant came to work thereafter.

8. He further testified that on 15th December, 2012 he sent the Claimant together with others to collect scrap metal but on their way back the Claimant and his colleagues attempted to steal part of the consignment but were thwarted by the driver. The incident was reported to the police and the claimant and his colleagues were arrested and were under prosecution.

9. The issue for this Court to determine is whether or not the Claimant was a casual or a regular worker. Second where the Respondent taking into account their status complied with the law in ending the relationship.

10. A casual employee is defined in the Employment Act as a person the terms of whose engagement 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.

11. The Respondent attached to the memorandum of response extracts of entries showing what he called his casual workers from 27th September 2012 to 21st December, 2012. Mr. Wambua for the Respondent further testified that he utilized the services of the Claimant and others between 2007 and 2012. He however did not produce extracts of the entries from the muster roll except for the period between 27th September, 2012 and 21st December, 2012. He further did not produce any schedule of payments for his casual employees nor did he testify to that effect. To this extend the testimony of the Claimant and the Respondent conjoined yield the results that the two were in a relationship that extended beyond that of a casual employee contemplated under section 2 of the Employment Act.

12. Section 37 of the employment Act provides that where an employee works for a period or a number of continuous working days which amount in the 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) shall apply to that contracts of service. Section 35(1) (c) prescribes the mode of terminating a contract of service whose payments of wages or salary is in intervals of or exceeding one month. It provides that such contracts are terminable by either party at the end of the period of twenty eight days next following giving of notice in writing.

13. From the foregoing provisions of the law, it would not be unreasonable to deem the relationship between the Claimant and Respondent as being the one of those cases contemplated by Section 37(1) of the employment Act. To this extent the Court finds that the termination of the Claimant services ought to have followed the provisions of section 35(1)(c) of the Employment Act. That is to say the Claimant was entitled in a regular case to 28 days' notice or equivalent pay in lieu of notice and further he would upon termination be entitled to service pay for every year worked at a fixed rate.

14. The Respondent has contended that it was justified in terminating the Claimant's services after finding them involved in theft of part of the consignment of the Respondents' scrap metal. Mr. Wambua testified that at the time of the hearing of this suit the criminal prosecution was on going.

15. Whereas the allegations of theft were yet to be proved against the Claimant, the nature of employment relationship is such that it is based on trust and confidence of the parties. It is a personal contract which cannot be imposed on unwilling parties.

16. To this extent and considering the size and structural composition of the Respondent's business it would have been untenable for the Claimant and his colleagues to undergo criminal prosecution while continuing to work for the Respondent. The Court therefore upholds the termination of the Claimant's services but order that the termination be reduced to normal termination of services as contemplated under section 35(1) (c) of the Employment Act. That is to say the claimant shall be paid by the Respondent,

(a) one months' salary in lieu of noticeKshs.10,000

(b) Service pay at the rate of 1 months' salary for each,

complete year of service at 4 years.....Kshs.40,000

TOTAL.....Kshs.50,000

17. This award is subject to applicable taxes and statutory deductions. The Claimant shall have costs of the suit.

18. It is so ordered.

Dated at Nairobi this 25th day of November 2014

Abuodha J. N.

Judge

Delivered this 25th day of November 2014

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge