



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 316 OF 2013

BENARD CHEGE

CLAIMANT

v

MAWE MBILI LIMITED

RESPONDENT

JUDGMENT

1. The issues for determination in this judgment, arising from the pleadings, testimony and submissions of the parties are, whether the Claimant was a general labourer, store keeper or a casual labourer, whether the Claimant's services were terminated and if so unfairly, whether notice of termination was necessary and was given, whether Claimant was entitled to annual leave, whether the Claimant was underpaid and whether Claimant is entitled to a certificate of service.

2. The Memorandum of Claim was filed in Court on 17 September 2013, the Response was filed on 25 November 2013 and the Claimant filed a Reply to Response on 7 November 2013. The Claimant's testimony was taken by Ongaya J on 15 May 2014, and I took the Respondent's testimony on 12 November 2014.

3. The Claimant filed his submissions on 19 November 2014 while the Respondent filed its submissions on 26 November 2014. The Court has duly considered the submissions and authorities cited therein.

Whether Claimant was a general labourer or storekeeper

4. In testimony, the Claimant stated that he was employed by the Respondent in 2007 initially as a cleaner/general worker and later from 2008 he served as a store keeper for 4 years, maintaining inventory of goods/records taken from the store. Building materials were kept in the store. He also stated that he worked with the Foreman and that he was not given an employment letter.

5. For the Respondent, Ms. Jacqueline Ruth Damon testified, and she stated that the Claimant was employed in 2008 but she did not know what the Claimant was engaged to do. She stated that there was a Store Keeper called Charles Kamau and that the Respondent did not have a store but a shed.

6. Respondent's second witness stated that the shed was used for storing equipment such as wheelbarrows and slashes and that a foreman, Charles Kamau would instruct the Claimant to remove required items from the shed. The Respondent's third witness corroborated the testimony of the second witness.

7. Pursuant to section 9(1) of the Employment Act, 2007, an employer is under a statutory obligation to issue an employee with a written contract if the contract is for more than three months or if

the work to be performed cannot be completed within three months.

8. Section 10 of the Act on its part requires the contract to have certain prescribed particulars including the job description of the employee.

9. The Employment Act, 2007 commenced on 2 June 2008. Within three months of the commencement date, the Respondent was under a duty to issue the Claimant with a written contract stipulating the prescribed particulars. This was not done.

10. Section 10(7) of the Employment Act, 2007 provide that

If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

11. In the instant case, the Respondent did not issue a written contract to the Claimant. The Respondent's first witness stated she did not know what the Claimant was engaged to do. The second witness stated the Claimant was assisting the foreman in having items removed from the store.

12. In the view of the testimony, and applying the provisions of section 10(7) of the Employment Act, 2007, the Court finds that the Claimant was not a general labourer but was carrying on the responsibilities of a store keeper, and was thus a store keeper.

Was Claimant a casual?

13. Casual employee has been defined in section 2 of the Employment Act. The Claimant was engaged from either 2007 or 2008 to 2012.

14. The Claimant was engaged to perform specific work (construction of a lodge) but which contract was not reduced into writing.

15. These types of contracts raise difficult conceptual questions when put into the Kenyan context. Many ordinary citizens in this country desirous of putting up a residence in *nyalgunga* require labour intermittently, as funds may allow.

16. In a great percentage of cases, these workers are not issued with written contracts even for a fixed period. Funds usually dry up within days if not weeks. Should these workers be considered term contract employees who are entitled to notice and other employment rights such as leave?

17. These types of questions will need scrutiny by the Courts before the legislative arm makes statutory provision putting into context the realities of this country.

18. But for now, I find that the Claimant was not a casual employee because of section 37 of the Employment Act, 2007. He was on term contract.

Whether Claimant's services were terminated

19. The Court has reached a conclusion the Claimant was on term contract by operation of law. The Respondent's second witness stated that they were informed that after completion of the swimming pool, work would cease.

20. Considering this evidence, and the nature of the work which was being done, the Court finds that the separation was involuntary on the part of the Claimant and therefore it was a termination of services.

Whether termination was unfair/notice was necessary

21. The Claimant and other employees were engaged in construction of a lodge. He was not issued with a time bound contract. He was not on a fixed term contract. The contract depended on completion of the construction.

22. The Claimant should have been given notice or pay in lieu of notice. No notice was given.

23. On this ground, the termination was unfair.

24. The Claimant would therefore be entitled to one month pay in lieu of notice. The monthly prescribed wage for a store keeper at time of termination was Kshs 12,081/-. The Court would award the Claimant Kshs 12,081/-.

Whether Claimant was underpaid

25. The Court has made a finding that the Claimant was a storekeeper. The Claimant pleaded that he was underpaid and made reference to Legal Notices No. 98 of 2010, No. 64 of 2011 and No. 11 of 2012.

26. The Respondent's contention in response was that the Claimant was a general labourer. That line of defence has been rejected.

27. The Claimant sought Kshs 87,680/- under this head. The Court would award him the same.

Whether Claimant was entitled to annual leave

28. The Court has reached the conclusion that the Claimant was on term contract. He was thus entitled to the statutory employment entitlements such as leave.

29. The Respondent's first witness testimony was that due to financial reasons the construction was done in phases. There were breaks.

30. The Claimant did not challenge this evidence on breaks. In the circumstances the Court is unable to make a finding on the basis of the material placed before it that the Claimant is entitled to outstanding leave commuted into cash of Kshs 31,424/-.

Certificate of Service

31. This is a statutory right pursuant to section 51 of the Employment Act, 2007. The Claimant is entitled to one.

Conclusion and Orders

32. The Court finds and holds that the Claimant was a store keeper and was underpaid, and that his termination was unfair for failure to give written notice and the Court awards him and orders the Respondent to pay him

(a) One month pay in lieu of Notice	Kshs 12,081/-
(b) Underpayments	Kshs 87,680/-
TOTAL	Kshs 99,761/-

33. The claim for leave is dismissed.

34. Respondent to issue Certificate of Service to Claimant.

35. Claimant awarded costs of Kshs 15,000/-.

Delivered, dated and signed in Nakuru on this 11th day of December 2014.

Radido Stephen

Judge

Appearances

For Claimant Mirugi Kariuki & Co. Advocates

For Respondent Ochieng Opiyo & Co. Advocates