



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NO. 393 OF 2013

BENSON OMUYONGACLAIMANT

VERSUS

LAXMANBHAI CONSTRUCTION LTDRESPONDENT

ISSUE IN DISPUTE; UNFAIR AND UNLAWFUL TERMINATION

(Coram)

Rika

J,

C/A – B.

Kombe

Mr. Nyange for Claimant

Mr. Momanyi for

Respondent

AWARD

[RULE 27(1) (a) of the Industrial Court (Procedure) Rules 2010

1. Mr. Benson Omuyonga filed his Statement of Claim on 20th November 2013. He claims to have been employed by the Respondent as a Labourer on 25th February 2008. His contract was terminated by the Respondent on 22nd July 2013. He states termination was unfair and unlawful, and seeks the following Orders:

(a) A declaration that termination was unlawful.

(b) He is paid 14 days pro-rata leave of ksh.13,039; 12 months salary in compensation at ksh.157,116- total ksh.176,319.

- (c) Certificate of Service.
 - (d) Any other suitable relief.
 - (e) Costs of the Suit.
2. The Respondent filed its Statement of Response on 11th February 2014. Its position is that it is engaged in the construction industry. Its business volume is determined by the number of contracts availed by Clients. Once a Project is over, it hands over to the Client. The Respondent had one such contract in the year 2008, known as Vipingo Project. It was completed in Mid July 2013, and handed over to the Client. The Claimant was a General Labourer engaged on 27th September 2012. He deserted duty in June 2013. He had been notified by the Respondent before desertion, that the Project was closing in July 2013. He is not entitled to the prayers sought.
 3. The Parties were heard and rested their respective cases, on the 6th October 2014. The Claimant gave evidence to support his Claim, while the Respondent testified through its Human Resource Assistant Mr. Charles Mochage, and Clerk Mr. Paul Chege Mburu.
 4. The Claimant testified he worked for the Respondent from 2008 to June 2012. He was bereaved. He left employment for burial. The Respondent did not offer him financial assistance, instead lending him ksh.10,000. He was paid service for 3 years completed in service, and recalled to work later in 2012.
 5. He was injured while at work, on 16th May 2013. His Employer confiscated his medical records and attempted to compel him to execute a discharge voucher. He sought the assistance of KITUO CHA SHERIA [Legal Aid Centre] who issued demand before the filing of the Claim, to the Respondent. The Respondent answered alleging work had diminished. He had never been warned during his time in employment.
 6. On cross-examination, the Claimant stated his Employment identification card was not available in Court. He still experienced headaches from his factory accident. He used to do scaffolding and building of ladders. He was not formally trained. He was based at Vipingo Site, where the Respondent was building a Silo.
 7. In 2008, he worked at the Agakhan Ferry. In 2010, he worked at Bamburi before reverting to Agakhan in 2011. He did not know if work at Agakhan ended. He also did not know if work was finished at Bamburi and Vipingo.
 8. He did not have problems with the Employer from 2008. He worked diligently. The Employer recalled him to work. The Claimant had written the letter dated 25th February 2009 resigning. He was paid ksh.23,272 and released in October 2012, to return Mid-November 2012.
 9. He worked daily after being injured, performing light duties. He was injured on 16th May 2013 and worked in the whole of June 2013. The Doctor recommended bed rest. He was paid for June 2013. He worked for 10 months from the date he was recalled.
 10. The voucher he was required to sign was blank. No such requirement had been made to him before. The letter from the Respondent replying to the one from KITUO advised the Claimant that the Project was coming to an end. It is not correct that the Claimant left on his own volition because he did not wish to acknowledge the redundancy payment. He was not issued with any notice of redundancy. He prays the Court to allow his claim.
 11. Charles Mochoge conceded the Claimant was employed by the Respondent in 2008. He worked for 3 years and resigned. He was a General Labourer, doing scaffolding. The Respondent was contracted to build and hire Workers, who remained in the given Site, until the work ended.

Those Workers with skills could be re-hired.

12. Vipingo was a short-term Project, lasting about 1 year. It ended Mid-2013. The Respondent laid off unskilled Labourers. The Head Office sought guidance from the Site-in-Charge on how to deal with these Labourers.
13. Terminal dues were computed from the Head Office in Nairobi. The Claimant was given a notice of redundancy showing he had worked for 10 months. He did not sign the notice. It was signed by the Director, Site Manager and Project Manager. It was a valid redundancy notice.
14. The Claimant resigned from the Respondent in the first phase of his employment, and left at the end of the Project after failing to sign the redundancy notice. There was no further communication to the Respondent from KITUO, after the Respondent replied to the KITUO demand letter. The Witness stated the Respondent did not have anything against the Claimant, and would re-employ him if he went back and there was available work to be carried out.
15. He was to be paid pro-rata annual leave and 1 month salary in lieu of notice if he signed the redundancy notice. He did not merit service pay, as he had not completed 1 year in service. He is not entitled to compensation having deserted employment, and should instead pay to the Respondent notice pay the equivalent of 1 month of the Claimant's salary.
16. Mochoge testified on Cross-examination that he had worked from 2003 a total of 11 years for the Respondent. The Claimant refused to sign the redundancy notice. The notice did not show how much the Respondent intended to pay to the Claimant. There was no letter from the Respondent indicating the Claimant deserted. His performance was good. His disappearance surprised the Respondent. No notice of redundancy was sent to the Labour Office or the union. Selection criteria was based on the skills.
17. Mburu testified he found the Claimant working at Agakhan Site in August 2010. The Claimant was re-employed at Vipingo and Bamburi Cement. Mburu prepared the redundancy notice. He asked the Claimant to sign, but the Claimant refused, saying he would sign on 13th July 2013 when the notice became effective. Mburu served the Claimant with the notice personally.
18. Mburu acted on the instructions of his Senior who was the Foreman. He told the Court there were no blank vouchers. The Claimant never mentioned to Mburu that he had any disagreement with the Foreman. Disagreements were dealt with through the Respondent's Grievance Procedures. Mburu emphasized on cross-examination that he delivered the notice to the Claimant, and that the Claimant refused to sign. The Respondent urges the Court to reject the Claim with costs and allow its Counter-Claim.

The Court Finds and Awards:-

19. The Respondent is a Construction Company. It is contracted by Clients to undertake Building and Construction Projects. Once finished, it hands over the particular Projects to its Clients, and moves on to procure other Projects.
20. The Claimant worked for the Respondent as a General Labourer from 25th February 2008. He carried out the duty of scaffolding, and building ladders at the Respondent's Construction Sites.
21. He was engaged in different Projects up to 22nd July 2013, when he stopped working. These Projects included the Agakhan Site, Vipingo and Bamburi Cement. At the time of his departure, he earned a basic monthly salary of Ksh.10,816 and house rent allowance of ksh.2,277. Pay slips indicate he also earned variable overtime pay.
22. He wrote a resignation letter received by the Respondent on 20th March 2012. He gave notice that

- his last day of duty would be 20th May 2012. He explained that he resigned due to family problems. He was later recalled by the Respondent, and worked for 10 months up to 22nd July 2013.
23. The parties disagree on the circumstances leading to the Claimant's departure. The Claimant says he was injured on 16th May 2013 while at work. The Respondent confiscated his medical reports, and attempted to compel him to sign a voucher. He did not know why he was being forced to sign the voucher.
24. According to the Respondent the Claimant refused to sign the redundancy notice and left at the end of the Project. He had completed 10 months, and the Respondent was ready to pay terminal dues comprising pro-rata leave and 1 month salary in lieu of notice. He deserted, and dis-entitled himself to the notice pay. The respondent would be willing to re-employ him when and if there is sufficient work.
25. The Court is unable to agree with the Claimant that his contract of employment was unfairly and unlawfully terminated.
26. He had worked with the Respondent from February 2008 to 20th May 2012 when he resigned citing domestic obligations. The Respondent recalled him. He worked for 10 months, after which he was required to sign redundancy notice. He was offered terminal dues for the 10 months. He did not agree with the Respondent, and left on his own volition.
27. Being a Project Employee, with years of experience working at different Sites for the Respondent's clients, the Claimant would know that his contract was to end with the completion of the Project.
28. The Construction Industry is based on Projects with specific beginning and specific ending. Employees are contracted to work for the duration of the Project. Unless termination is premature, carried out before end of the Project, there is no justification in the employee demanding notice or pay in lieu of notice.
29. The Claimant does not dispute that the Project he was working at was coming to an end in July 2013. He was informed by his legal team at KITUO that the Project was coming to an end. His contract would lapse with the Project, unless, as explained by the Respondent, he was deemed to be a skilled Labourer and new Projects were in the offing. The Claimant was a General Labourer who left employment at the end of a Project.
30. The arrangement between the Parties was to treat end of the Project as a redundancy situation, and pay out terminal benefits. The Claimant testified about his injuries while in the course of work; the confiscation of his medical records; and the compulsion to sign blank voucher. Unfortunately the court is unable to relate these pieces of evidence to the Claim for unfair termination. There was no link between these events and the alleged termination. The Respondent testified it is ready to re-employ the Claimant depending on the availability of work. This is not an unreasonable Employer, who can be said to have acted unfairly and unlawfully
- 31. *The claims for notice pay and compensation have no basis and are declined.***
32. The Service Record Card attached to the Response, indicates the Claimant took 25 days off-duty between November 2012 and June 2013. There is no reason to warrant the claim for pro-rata leave in the 10 months period.
33. The Counter-Claim by the Respondent, for notice pay equivalent to the Claimant's 1 month salary, has no foundation and is rejected. The Claimant left employment in the last month of the Project. Both Parties knew the completion of the Project would bring mutual obligations between the

Employer and the Employee, to a close. There would be no reason to order the Claimant to pay notice to the Respondent, while the Claimant left just some few days to the end of the Project. The counter-claim is rejected.

In sum, IT IS ORDERED:-

- a. ***The Respondent shall release the Claimant's certificate of Service to him forthwith.***
- b. ***Other prayers in the Claim and the Counter -Claim are rejected***

Dated and delivered this ...5thday ofDecember.....2014

James Rika

Judge