



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 46 of 2013

NGAO ELIJAH MVOYI.....CLAIMANT

v

ATHI RIVER MINING LIMITED..... RESPONDENT

JUDGMENT

1. Ngao Elijah Mvoyi (the Claimant) filed a Memorandum of Claim against Athi River Mining Limited (the Respondent) on 7 March 2013 and the issue in dispute was stated as *non-payment of salary in lieu of notice, leave, unlawful termination and compensation*.
2. The Respondent was served with Summons and Memorandum of Claim on 12 March 2013 and a person who identified himself as Josephat accepted service by signing and stamping at the back of the Memorandum of Claim. Going by the rules of this Court, and as indicated in the summons, the Respondent had 14 days within which to file a Response. The Respondent should have filed its Response on or before 26 March 2013.
3. The summons had a return date of 15 April 2013, but because the Court was not sitting on the return date due to official engagements elsewhere, the Deputy Registrar notified the parties to instead appear in Court on 12 April 2013 for mention to give directions.
4. On 12 April 2013, only the Claimant appeared and he informed me that the Respondent had been served through post. This was contrary to what was deposed to in the affidavit of service filed in Court on 12 April 2013 and I therefore directed the process server who had served the summons to appear before me to clarify the position.
5. On 22 April 2013 the process server, Michael Otieno appeared before me and I directed him to file a proper and appropriate affidavit of service. I further directed that the hearing be held on 16 May 2013 and the Claimant to serve a hearing notice and file an affidavit of service.
6. On 16 May 2013 when the Cause was called out for hearing only the Claimant appeared. The Claimant informed me that he had served a hearing notice and filed an affidavit of service. Indeed an affidavit of service had been sworn by one Michael Otieno on 8 May 2013 and it annexed a copy of a hearing notice signed and stamped as received by the Respondent's Human Resources Manager on 8 May 2013. Having satisfied myself that the Respondent had been served I directed that the hearing do proceed.

Claimant's case

7. The Claimant gave sworn testimony and he stated that he was employed by the Respondent on 15 May 2004 as a welder and that he was not issued with an appointment letter.

8. He further testified that on 12 August 2011 the Respondent terminated his services. As to why his services were terminated, the Claimant stated that he had been involved in an accident in the workplace as a result of which he successfully sued the Respondent and was awarded Kshs 38,000/-. And that when his Advocates on record in the injury case wrote a demand to the Respondent, the Respondent's Personnel Manager, a Mr. Kariuki called him to the office and informed him that he was being terminated until the injury case was sorted out.

9. As at the time of termination the Claimant stated that he was earning Kshs 650/- per day or Kshs 3900/- per week. He was being paid through a voucher. He stated that he was not given any notice or hearing before the termination except that the Respondent issued him with a recommendation letter dated 13 September 2011 confirming that he worked with the Respondent from 15 May 2004 to 12 August 2011.

10. In terms of relief, the Claimant stated that he was seeking a declaration that he was a permanent employee, a declaration that his termination was unlawful, a declaration that he was entitled to leave after every 12 months, salary in lieu of notice, severance pay, house allowance and leave as set out in the Memorandum of Claim all totaling Kshs 508,950/-.

11. The Claimant produced two documents, a Daily Casual Attendance/Payment Voucher for part of July and August 2010 and a letter of recommendation dated 13 September 2011.

Issues for determination

12. From what I have narrated above, the issues which emerge for determination are

- (i) Whether the Claimant was a casual or permanent employee
- (ii) Whether the termination of the Claimant was unfair/unlawful
- (iii) If the answer to (ii) is in the positive, appropriate remedies

13. I intend examine each of the issues individually.

(i) Whether the Claimant was a casual or permanent employee

14. The Daily Casual Attendance/Payment Voucher produced by the Claimant appears to suggest that he was a casual employee. The said document in fact states that he was on a daily rate of Kshs 650/-. The recommendation letter or Certificate of service issued to the Claimant by the Respondent indicate that he was in the employ of the Respondent from 15 May 2004 to 12 August 2011. That is a period of 7 years and some 3 odd months.

15. At the time of termination of the Claimant, the applicable statute was the Employment Act, 2007 and I will rely primarily on it in my analysis and also briefly on the Labour Institutions Act.

16. Section 37 of the Employment Act is quite clear that where a casual employee works for a period or continuous number of days amounting in the aggregate to not less than one month or performs work which by its nature cannot be completed within a number of working days amounting in the aggregate to three months, then the nature of the employment will be converted to a term contract.

17. The documents said to be authored by the Respondent produced in Court leave me with no other alternative except to reach the conclusion and finding that the Claimant, by operation of section 37(1)(a) and (b) of the Employment Act was not a casual employee but on a term contract where wages are payable monthly and therefore section 35 of the Employment Act is implicated.

(ii) Whether the termination was unfair/unlawful

18. Where an employee establishes that his services were terminated, the burden shifts to the employer to demonstrate that the termination was carried out in compliance with the procedural requirements of section 41 of the Employment Act and also to prove the reasons for termination pursuant to the requirements of section 43 of the Act and ultimately to prove that the reasons for the termination were valid and fair reasons as contemplated by section 45 of the Employment Act.

19. The Claimant through his testimony, and that is all I have, has satisfied me that the Respondent terminated his services. Unfortunately, the Respondent despite and in spite of being served with the summons, Memorandum of Claim and hearing notice failed to file a Response and equally failed to appear for the hearing to prove the reasons for the termination or that the reasons for the termination were valid and fair reasons.

20. In the circumstances and based on the unchallenged testimony of the Claimant, I do find that his termination was not in compliance with both the procedural requirements of section 41 and the substantive requirements of sections 43 and 45 of the Employment Act. I do find that the termination was unfair and unlawful.

(iii) Appropriate remedies
Salary in lieu of Notice

21. Having found the termination devoid of both procedural and substantive fairness, I would invoke the provisions of sections 35(1)(c) as read with section 49(1)(a) of the Employment Act and award him the equivalent of one month salary in lieu of notice.

22. The Claimant used the sum of Kshs 19,500/- as the equivalent of his monthly salary. It appears what he did was to multiply the daily rate with 30 days of an average month. But the practice as I know it is different. In cases of employees paid by the day, the correct formula to arrive at the equivalent of the monthly rate is to multiply the daily rate with 22. This is because normally an employee is entitled to one legal rest day per week, averaging five rest days per month. Again in practice, on Saturdays employees in the type of industry the Claimant was employed in would work half day. That would also give another four or so days. That gives about 9 rest days in a month. If the 9 nine days is subtracted from 31 calendar days, one is left with about 22 days.

23. I would therefore assess the monthly equivalent of the Claimant's salary by multiplying the daily rate with 22 which gives a figure of Kshs 14,300/-. I do find that the Claimant is entitled to an award of Kshs 14,300/- as one month salary in lieu of Notice.

Severance pay

24. Severance pay is paid only in case of redundancy. It was not the case of the Claimant that he was declared redundant and therefore he is not entitled to severance pay. I am not sure whether by severance pay the Claimant meant service pay as provided for in section 35(5) of the Employment Act.

House Allowance

25. Within the framework of the Labour Institutions Act and the Regulation of Wages Orders made pursuant to it, daily rates of pay include a house allowance element and for this reason I would not make a finding in this respect for the Claimant.

Leave

26. In his testimony, the Claimant stated that he never went on leave during the period of his employment. Under section 28 of the Employment Act, an employee is entitled to as a minimum, at least 21 days leave with full pay after 12 months consecutive service.

27. The Claimant's testimony on this score is also unchallenged. The Employment Act has placed an

obligation upon employers to keep leave records and produce them in legal proceedings.

28. Working with what I have, I do find that the Claimant has made a case for payment of accrued leave which I assess by using the salary of Kshs 14,300/- multiplied by 7 months (full pay for each leave year) which I assess at Kshs 100,100/-.

Compensation

29. The Claimant was a lay person with no legal training, knowledge or skills. He therefore did not plead for compensation as provided for in section 49(1)(c) of the Employment Act. The compensation has been provided as a statutory remedy for unjustified and or unfair termination. If he had legal representation I would have exercised my discretion as regards compensation differently. The Statute has set out some 13 factors to consider before awarding compensation. Considering these factors and that I have declined to award any severance pay or service pay for reasons set out in paragraph 24 herein above, it is my considered view that the Claimant merits an award of the equivalent of 6 months' gross pay as compensation for unfair termination. I assess this sum as Kshs 85,800/-.

Unfair labour practices at Respondent

30. Before concluding, I believe it is necessary for me to say a word or two about what appears on the face of my findings to be unfair labour practices at the Respondent. Documents produced by the Claimant indicate he served the Respondent for over 7 years. Part of that period fall under the time when the Employment Act, 2007 came into operation. Section 9 obligates an employer to draw up a written contract of service where the contract is for more than three months'. The Claimant testified that he was not issued with any written contract. Section 37 on the other hand is clear on conversion of casual employment into term contracts. The Claimant appears to have been kept as a casual employee for more than the statutorily allowed period.

31. In my considered view, it is suitable and just that I order that Commissioner for Labour through the County Labour Officer, Mombasa or such Officer as the Commissioner for Labour may designate do move in with dispatch to examine and inspect the records, terms and conditions of employment at the Respondent's factory situated within Kaloleni to confirm that they meet the minimum thresholds set out in the Employment Act, Labour Institutions Act and other relevant statutes that govern the work environment and file a report with this Court within the next 30 days.

Conclusion and Orders

32. In conclusion I do find and declare that

- (a) The Claimant was a term contract and not casual employee
- (b) The termination of the Claimant was unfair and unlawful.

33. I do award and order the Respondent to pay the Claimant

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| (aa) One month salary in lieu of Notice | Kshs 14,300/- |
| (bb) Accrued leave for 7 years | Kshs 100,100/- |
| (cc) 6 months' compensation | Kshs 85,800/- |

TOTAL

Kshs 200,200/-

34. The Deputy Registrar to notify/furnish the Commissioner for Labour/County Labour Officer, Mombasa to enable the officer carry out the inspection/examination referred to in paragraph 31 herein above.

35. There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 31st day of May 2013.

Justice Radido Stephen

Judge

Appearances

Ngao Elijah Mvoya

Claimant in person

No appearance

for Respondent