



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 2 of 2011

ALFRED OCHUKI.....CLAIMANT

VS

UNILEVER (K) LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 5th January and filed in Court on 10th January 2011 the Claimant sued the Respondent for failure to pay redundancy dues. At the interlocutory stage, the Respondent filed a Preliminary Objection on the ground that the issues raised by the Claimant in this case had been heard and determined in Constitutional Reference Number 463 of 2006 and that the matter was therefore *res judicata*. The Court heard and overruled the Preliminary Objection. With leave of the Court, the Respondent filed a Memorandum of Defence on 15th November 2012.

2. The main suit was heard on 18th February 2013 with the Claimant appearing in person and Mrs. Mutisya instructed by Kaplan and Stratton Advocates appearing for the Respondent. The Claimant testified on his own behalf while the Respondent did not call any witness but filed written submissions.

The Claimant's Case

3. According to the Memorandum of Claim the Claimant was employed by the Respondent in 1996 on temporary basis. The Claimant however testified that the effective date of his employment was August 1995. He worked for three months after which his employment was terminated without notice but with a promise that he would be re-engaged after a period of three months. The Respondent honoured its promise and re-engaged the Claimant for a further three months. It was the Claimant's case that a pattern whereby he would work for three months and break for three months was established. The Claimant worked in accordance with this pattern until 2006. The Claimant testified that he worked for seven days per week and was paid Kshs. 500 per day.

4. The Claimant claimed the following:

- a) Redundancy pay
- b) Leave
- c) Notice pay
- d) Service pay

e) Costs

The Respondent's Case

5. In its Statement of Defence the Respondent stated that the Claimant was employed as a casual labourer on temporary basis from time to time on terms agreed upon and accepted by the Claimant. The Claimant's pay per hour was Kshs. 43.10 per hour.

6. The Claimant was last engaged by the Respondent between August and October 2005. The Claimant was paid wages based on an hourly rate payable at the end of the day but paid fortnightly or on completion of each specific task. The Respondent did not promise the Claimant permanent employment. The Claimant was therefore not entitled to any terminal benefits.

7. In view of the casual work available at the Respondent Company which was manual in nature, the Respondent had set the age limit of 40 years as a cut off age for engagement of casual labourers. The Claimant was therefore not engaged in the year 2006 as his records showed that he had attained the age of 40 years. The Respondent therefore denied that the Claimant had been declared redundant. The Respondent also denied that the Claimant was entitled to leave.

Findings and Determination

8. The main issue for determination in this case has to do with the status of the Claimant's employment with the Respondent. It was common cause that the Claimant was last engaged by the Respondent in 2006. His employment was therefore governed by the Repealed Employment Act (cap 226).

9. The Respondent produced a letter of employment on casual terms dated 22nd August 1995 indicating the Claimant's engagement at the rate of Kshs. 43.10 per hour payable at the end of each day but paid at the end of each week or at the end of each specific task.

10. The Respondent also produced two letters dated 29th March 1999 and 13th January 2000 addressed to the Employment Officer, Ministry of Labour and Manpower Development asking the Ministry to send men for consideration for employment on casual basis. It was therefore the Claimant's case that its intention was to engage casual employees, an intention that was well understood by the Claimant.

11. Section 2 of the Repealed Employment Act defined a casual employee as:

“an individual 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.”

12. Section 14(5)(i) provides that such a contract is terminable by either party at the close of any day without notice.

13. Unlike the Employment Act, 2007 the repealed Employment Act did not make provision for conversion of casual employment to a term contract. I therefore find that the Claimant was a casual employee within the meaning of Section 2 of the Repealed Act and that he was therefore not entitled to notice. This claim therefore fails and is hereby dismissed.

14. With regard to the claim for redundancy dues I find that the manner of the Claimant's exit from the Respondent did not fall under redundancy within the meaning of Section 2 of the Trade Disputes Act (now repealed). This claim also fails and is dismissed. Having found that the Claimant was a casual employee, he is not entitled to leave. However, the Respondent failed to show that the Claimant took a paid rest day. I therefore invoke Section 8 of the Repealed Employment Act and award the Claimant pay for 1 rest day per week for his entire period of service with the Respondent. In making this award I am fully aware that the Claimant did not specifically plead this prayer. I am however persuaded that Article

159 (2) (d) of the Constitution of Kenya, 2010 as well as Rule 24(5) of the Industrial Court (Procedure) Rules, 2010 give me the required latitude to make this Award.

I make no order for costs.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF MAY
2013**

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....*Respondent*