



REPUBLIC OF KENYA

Industrial Court at Nairobi

Cause 1053 of 2012

ESTHER MUNGWELE MWENDWA.....CLAIMANT

VS

INSIGHT MANAGEMENT CONSULTANTS LTD.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 20th June 2012 and filed in Court on even date, the Claimant sued the Respondent for unfair termination of employment. The Respondent filed a Memorandum of Response on 16th October 2012. When the matter came up for hearing on 23rd April 2013, there was no appearance for the Respondent in spite of due notification.

2. The matter therefore proceeded *ex parte* with Mr. Maingi instructed by Musili Mbiti & Associates appearing for the Claimant. The Claimant testified on her own behalf and her Advocate filed written submissions.

The Claimant's Case

3. According to the Claimant, she was employed by Hi-plast Limited in August 2005 as a Machine Attendant at a monthly salary of Kshs. 9,450, which was paid daily. In her sworn evidence, the Claimant testified that her daily rate was Kshs. 315 per day.

4. Subsequently, Hi-plast Limited entered into an agreement with the Respondent in which the Claimant and other employees were placed under the employment and management of the Respondent. The Claimant and her colleagues were to retain their terms and conditions of employment.

5. In April 2011, the Claimant was notified by the Respondent that her name was not in the Respondent's data base and that she should stop reporting to work until she was called back. She was never called back.

6. The Claimant claimed the following:

- a) One month's salary in lieu of notice.....Kshs. 9,450
- b) Severance pay @ half month's pay per year.....33,076
- c) Pay in lieu of leave (147 days).....46,305

- d) Pay for public holidays and weekends worked.....251,370
- e) 12 months' salary in compensation.....113,400
- f) Costs and interest
- g) Any other relief the Court may deem just to grant

The Respondent's Case

7. In its Memorandum of Response, the Respondent denied the Claimant's claim and stated that the Claimant was engaged as a casual employee from time to time. The Claimant was therefore not entitled to the reliefs sought.

Findings and Determination

8. The first question for determination is whether there was an employment relationship between the Claimant and the Respondent. In its Memorandum of Response, the Respondent admitted that it had employed the Claimant but on causal basis. Further, the Claimant produced a Provisional Member Statement of Account from the National Social Security Fund showing the date of her employment as 1st August 2005 with the Respondent as her employer. The Respondent did not controvert this evidence. The Court therefore came to the conclusion that there existed an employment relationship between the Claimant and the Respondent.

9. Having established the existence of an employment relationship between the Claimant and the Respondent the next question has to do with the nature and status of that relationship. The Respondent took the position that the Claimant was a casual employee from time to time.

10. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define a casual employee as:

“a person the terms of whose employment 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. Although the Respondent pleaded that the Claimant was a casual employee from time to time, it did not produce any particulars of the dates and times when the Claimant was engaged as such. The Claimant was engaged as a Machine Attendant, a job that by nature is not consistent with casual employment. Moreover the fact that the Claimant was a contributing member of the National Social Security Fund suggests longevity of employment. I therefore find that although the Claimant was paid on a daily basis, her employment exceeded the one month period set for casual employment. I therefore invoke Section 37 of the Employment Act and convert the said employment to term contract.

12. I will now deal with the issue of termination of the Claimant's employment. The Claimant's evidence was that she was told to stop working because her name did not appear in the Respondent's data base.

13. Section 45 (2) of the Employment Act, 2007 provides that:

A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid.

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer and

(c) that the employment was terminated in accordance with fair Procedure.

14. Apart from the averment that the Claimant was a casual employee, the Respondent did not give any reason for termination of the Claimant's employment. In addition, there was evidently no procedure adopted by the Respondent in terminating the Claimant's employment. I therefore find that the termination of the Claimant's employment was unfair within the meaning of Section 45 of the Employment Act and award her 3 months' salary in compensation. I also award her one month's salary in lieu of notice. The Claimant is also entitled to annual leave at the rate of 21 days per year. There was no evidence that the Claimant was declared redundant and the claim for severance pay therefore fails and is dismissed. The claim for overtime was not proved and is also dismissed.

15. The final effect of this Award is as follows:

- a) Three months' salary in compensation for unfair termination.....Kshs. 28,350
- b) One month's salary in lieu of notice.....9,450
- c) Annual leave ($\frac{9,450 \times 21}{30}$ days x5 years) +

(Kshs.315X1.75 days x 9 months)

.....37,485

Total.....75,285

The Respondent will pay the cost of this case.

Orders accordingly.

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

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**