



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 743 OF 2010
(Before D.K.N. Marete)
**KENYA UNION OF EMPLOYEES OF VOLUNTARY
AND CHARITABLE ORGANISATIONS (KUEVACO).....CLAIMANT**

versus

**NATIONAL JUA KALI DEMONSTRATION
AND TRAINING CENTRE – KARIOBANGI.....RESPONDENT**

JUDGEMENT

By a Memorandum of Claim dated 14th June, 2010 and filed on 28th instant this matter saw the light of the day. The issue in dispute as cited therein is;

Verbal termination/redundancy of Mr. William Odhiambo Oduor

The respondent by a respondent's statement of response dated 18th February, 2011 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that the grievant one, William Odhiambo Oduor was employed by the respondent as a night guard with effect from 8th July, 1997 but on 27th February, 2008 his employment was terminated through the words – "there is no work... go". This, to him was a declaration of redundancy within the meaning of the law. It was unprocedural, unlawful and wrongful and therefore the grievant's right of action under redundancy and compensation.

The claimant further submits that when he was terminated, the services of Moses Wafula were engaged therefore raising issues on his redundancy. He was not given any notice of termination. Further, the respondent chose to pay the grievant at the end of the month but calculated this on a daily basis favorable to him under regulations 3 and 4 of the Regulation of Wages (General Order), Legal Notice No. 12 of 1982 as subsequently revised.

The claimant prays for;

- | | |
|---|----------------|
| a. Six (6) months salary in lieu of a reasonable notice | Ksh.39,993.00 |
| b. Unpaid salary as at paragraph 8:01(b) | Ksh.180,715.00 |
| c. 6,086 hours of days of work overtime at 38.64 | Ksh.235,163.05 |
| d. 7,620 hours of public and rest day overtime at 51,52 | Ksh.392,582.40 |
| e. 254 days of annual and prorate leave | Ksh.56,433.70 |

f. Employers' NSSF contributions for 128 months	Ksh.25,600.00
g. 10 years severance pay at 15 days per year	Ksh.33,327.00
h. Maximum compensation @ 6,665.40 per month	<u>Ksh.79,984.80</u>

Grant total

Ksh.1,043,799.45

- i. Certificate of Service issue to the Grievant.

The respondent denies the claim and submits that claimant was a casual employee and therefore was not capable of being terminated. The respondent further submits that during the transfer of the respondent from the UNDP to the Government in 1997 the department of Micro and Small Enterprises inherited three casual workers, two of whom were security officers and the other a workshop technician. These casual workers retained their status until 2006 when the management hired a security firm to undertake security services thereby laying off the claimant. He was however granted residential accommodation which he still enjoys.

When issues arose as to payment of terminal benefits for *inter alia*, the claimant, the management explained that the claimant was not terminated, he never having been a permanent employee and that in any event he had stopped reporting for duty with effect from 26th February, 2005 but still resided at the centre's premises. The employee was still willing to negotiate the matter but the claimant was not available.

The respondent also submits that the claimant was a night watchman who worked on agreed terms of daily rates and timing. The issue of overtime therefore would not arise. The respondent therefore denies liability *in toto*.

The issues for determination are;

1. Was there a termination of the claimant employment and if so, was this lawful?
2. Was the claimant a casual or permanent employee?
3. Is the claimant entitled to the relief sought?
4. Who shall bear the costs of this cause?

The first issue for determination is whether the claimant's employment was or was not terminated.

The respondent denies this and submits that the claimant left employment on his own. He was never told that not to work or there is no work. There was no testimony to this extent. He absconded. I would hesitate to take this submission by the respondents hook and sinker. This is because it contradicts clause 7 of the respondent's statement of response which provides as follows;

That in the course of their management period the Asian Foundation hired a security firm to take up the security services and laid off the claimant who was on casual engagement.

I hold that the grievant was not terminated because for all this time, he was a casual employee. Inasmuch as there is no demonstration of the clear terms of departure by the respondent, the claimant does not either bring out this clearly in evidence. I would also agree with the submission of the respondent that in the absence of a termination, its legality or otherwise would not arise.

The other pertinent issue for determination is whether the claimant union has the capacity to represent the grievant. As is curiously observed by the respondent, the grievant has not in any way featured as a party. One is doubtful as to whether he has instructed the claimant to appear for him. These are substantive issues which the court cannot take for granted. The circumstances of this case point out to an absentee grievant and therefore validates the *ratio decidendi*, in **Williams and Kennedy Limited Vs Post Bank Credit Limited (in liquidation) through Deposit Protection Fund Board-Liquidator and 2 others (2011) eKLR**, where it was held that courts ought not to ignore evidence of lack of authority either to

bring or defend an action and give judgement in favour or against a party, who, *ex hypothesi* is not in court. To tackle this issue he would have to answer the other issue as to whether the claimant was a casual or permanent employee. These two issues are intertwined and must be handled contemporaneously.

The respondent in her submissions raises a side issue as to whether the claimant union was the capacity to sue on behalf of the grievant. The respondent submits that the claimant is non-existent and if otherwise, he has not issued instructions to the claimant union to act on his behalf. Firstly, the claimant was not called to testify at the hearing herein and the verifying affidavit of the claim is executed and sworn by Odin Boaz Otieno an official/agency of the union. This it is submitted is irregular as there is no evidence of authority for the claim in court. The claim therefore becomes a non-starter.

As to whether the alleged grievant was a casual or permanent employee, the applicable law is the Employment Act, Chapter 226, Laws of Kenya (now repealed) as this was in force at the time of the alleged termination. Section 2 of the Act defines a casual employee as;

... means an individual the terms of whose engagement provides for his payment at the end of each day and who is not engaged for a longer period than 24 hours at a time.

That the grievant was a casual employee is clearly demonstrated by annexures A, C, E and F of the claim. Annexures D and F are indicative of the daily mode of payment for security guards and the nature of terms of service for the claimant which were temporary.

The grievant did not demonstrate a contrary position on this. He did not adduce any evidence in support of permanent employment or any continuous employment even when this was denied.

The claimant states that he was verbally terminated and or declared redundant. Redundancy under Section 2 of the Employment Act, 2007 is defined as;

...means the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

The wholesome effect of the above expose is a case against the claim and I so find. The claimant is not entitled to the relief sought as this would be against the parameters of just determination of disputes as per the law.

I am therefore inclined to dismiss the claim with no order as to costs.

It is worth of note that initially, this matter was heard *ex parte* and an award for Ksh.766,689.05 made in favour of the claimant but this was reviewed and overturned on application by the respondent.

Dated, delivered and signed this 7th day of June, 2013.

D.K. Njagi Marete

JUDGE

Apperances

1. Janitor Odin Boaz Otieno instructed by Kenya Union of Employees of Voluntary and Charitable Organisations for the claimant.
2. Culent Simiyu Lunyolo instructed by the Honourable the Attorney General for respondent.