



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
CAUSE NO. 104 OF 2013

KASSIM AL.....1ST CLAIMANT

JACKSON MUNGA.....2ND CLAIMANT

v

OPERA (E A) LTD.....RESPONDENT

JUDGMENT

1. The Claimants' filed a Memorandum of Claim against Opera (EA) Ltd (Respondent) on 9 May 2013 and the issues in dispute were stated as *salary in lieu of notice, unlawful termination of employment and compensation*.
2. The Respondent was served on 22 May 2013 and an affidavit of service sworn by Timothy Kiringi Kitsao on 31 May 2013 filed in court on the same day. The Respondent's Accountant one Abel Odhiambo had signed and stamped a copy of the Notice of Summons which was exhibited in the affidavit of service. The Respondent had 14 days within which to file a Response, i.e. by 5 June 2013.
3. On 4 June 2013, the Cause was mentioned before Makau J. and he fixed a hearing date for 17 July 2013. By this date the Respondent had not filed a Response.
4. On 5 June 2013, the Claimants' served a hearing notice upon the Respondent and the same was acknowledged by Jimmy Opera, a Director of the Respondent on the same date. An affidavit of service sworn by Timothy Kiringi Kitsao on 16 July 2013 and filed in Court on the same day confirmed the service of the hearing notice.
5. When the Cause was called up for hearing on 17 July 2013, only the Claimants' and their Advocate were present and there was no representation for the Respondent. The Cause proceeded as an undefended Cause. Both Claimants' gave sworn testimony.

Case for 1st Claimant

6. The 1st Claimant was employed as a welder on 21 September 2011 and was not issued with a letter of appointment. He testified he was being paid a daily wage of Kshs 1,500/-, though in the pleadings he stated he was being paid a monthly salary of Kshs 45,000/-. He also stated he was not a member of the National Social Security Fund and was not getting a pay slip.
7. The 1st Claimant further testified that he used to work Monday through to Friday from 7.00 am to 6.00 pm and that on 4 February 2013 his services were terminated without any reasons.
8. The 1st Claimant sought legal advice and a demand letter was written to the Respondent on 21 February 2013 to which the Respondent replied on 12 March 2013. The reply stated that the Claimants' were employed on a daily basis and were not regular employees.
9. The 1st Claimant therefore seeks one month salary in lieu of notice of Kshs 45,000/-, service pay

of Kshs 22,500/-, 8 days pro rata leave of Kshs 12,000/- and 12 months compensation of Kshs 540,000/-.

Case for 2nd Claimant

10. The 2nd Claimant was employed by the Respondent as a fitter on 13 September 2011 but was not issued with a letter of appointment. He testified he was earning Kshs 1,200/- per day for which he would sign in a register and was not getting a pay slip.
11. The 2nd Claimant stated he was terminated on 4 February 2013 and no reasons were given after which he sought legal advice from Kituo cha Sheria.
12. The 2nd Claimant seeks pay in lieu of notice of Kshs 36,000/-, service pay of Kshs 18,000/-, 8 days pro rata leave of Kshs 9,600/- and 12 months compensation of Kshs 495,600/-.

Issues for determination

13. From the pleadings and testimony the main issues for determination are the employment status of the Claimant, whether the termination of the Claimants' were unlawful and if so appropriate remedies.

Evaluation

Employment status of Claimants'

14. By virtue of section 37 of the Employment Act where a casual employee works for more than one month the contract is deemed to be a term contract terminable by written notice pursuant to section 35(1)(c) of the Employment Act.
15. It was the Claimants' case that they were employed in September 2011 until 4 February 2013. That is a period of nearly one year and six months.
16. According to the Respondent's letter in reply to the demand notice, the Claimants' were paid on a daily basis and were not permanent employees. Section 9 of the Employment Act decrees that a contract of service for a period or a number working days amounting in aggregate to more than three months shall be in writing.
17. It is an obligation upon an employer under section 10(7) of the Employment Act to produce in legal proceedings a written contract of service to prove or disprove a term thereof. The Respondent was served but did not participate in the proceedings.
18. In the absence of any evidence or records from the Respondent, I do find that both Claimants were on term contract.

Unlawful termination

19. The statutory obligation upon an employee in a complaint of unfair termination of employment or wrongful dismissal is found in section 47(5) of the Employment Act. The burden upon an employee is to prove that an unfair termination of employment or wrongful dismissal has occurred.
20. I have already made reference to the Claimants' testimony that no reasons were given for the termination.
21. No written notice or reasons were given. There is also no evidence that the Respondent complied with the procedural fairness provisions in section 41 of the Employment Act and therefore the terminations were unfair.

Appropriate relief

Pay in lieu of Notice

22. Both Claimants' should have been given written notice before termination. This was not done. By

- virtue of section 36 of the Employment Act they would be entitled to pay in lieu of notice.
23. In testimony, the 1st Claimant stated he was earning Kshs 1,500/- per day. In the pleadings it was stated he was earning Kshs 45,000/- per month. It appears the Claimant multiplied Kshs 1500/- by 30. No explanations were given on why this formula was used.
24. Claimants' should not just throw figures at the Court or leave gaps and leave the Court to fill those gaps. Considering the sector in which the Claimants' were serving, I would use the minimum wage set as set out in the Regulation of Wages General (Amendment) Order, 2011 to determine the monthly wage for both Claimants'.
25. The 1st Claimant was a welder while the 2nd Claimant was a fitter. The monthly basic minimum wage for a general labourer was fixed at Kshs 7,586/- exclusive of house allowance. With 15% house allowance of Kshs 1,137/- the total monthly earnings would be Kshs 8,723/-.
26. I would award each Claimant Kshs 8,723/- as one month pay in lieu of notice.

Service pay

27. By virtue of my finding above and section 35(5) of the Employment Act, each of the Claimants' would be entitled to service pay, the terms of which shall be fixed. The Claimants' did not address me on this aspect and therefore I decline to make any award under this head.

Pro rata leave

28. The pleadings made reference to pro rata leave. No mention was however made in the testimony of the Claimants' regarding this head of Claim. I have already made reference to parties leaving gaps in their cases which they would expect the Court to fill. That is not the responsibility of the Court especially where parties have the benefit of legal representation. I decline to make any award in this regard.

12 months' compensation

29. The award of compensation is one of the primary remedies for unfair termination. The award is discretionary and where the Court considers making it, the discretion must be considered against any one, some or all of the thirteen factors set out at section 49(4) of the Employment Act.
30. In my considered view, and bearing in my mind that the Claimants' did not even attempt to make any submissions in this regard and considering the thirteen factors set out in section 49(4) of the Employment Act, I would award each Claimant the equivalent of one month's gross wages of Kshs 8,723/- as compensation. A party, especially one who has legal representation should lay before the Court the basis for awarding the maximum or any lesser compensation.

Conclusion and Orders

31. In conclusion I do find and hold that the Claimants' were on term contract and their termination was unfair and award them each
- a. One month pay in lieu of notice Kshs 8,723/-.
 - b. One month gross wages compensation Kshs 8,723/-

32. There will be no order as to costs.

Delivered, dated and signed in Mombasa on this 30th day of August 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Nyange instructed by Kituo Cha Sheria for Claimants'

Respondent served but did not file Response or appear at hearing