



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 2293 OF 2012

TRANSPORT WORKERS UNION.....CLAIMANT

VS

HAJJI ISSA ADAMS & SONS LIMITED.....RESPONDENT

AWARD

Introduction

1. On 14th November 2012, the Claimant filed a Memorandum of Claim vide which it sued the Respondent for unfair termination of and failure to pay terminal benefits to Kevin Otieno Adipo, the grievant herein. The Respondent filed a Defence but made no appearance at the hearing in spite of due notification. The matter therefore proceeded *ex parte* on 9th July 2013, with Mr. Nasib Makuwa appearing for the Claimant.

The Claimant's Case

2. The grievant, Kevin Otieno Adipo was employed by the Respondent as a Spray Painter on 11th September 1999. The grievant worked as such until 17th December 2007, when he proceeded on an unpaid leave to attend to a family land matter. The Claimant asked the Respondent to advance him a loan of Kshs. 50,000 to assist him in resolving the issue at hand. The Respondent declined the Claimant's request but paid him the equivalent of 12 days' pay.

3. Upon his return, the grievant was notified verbally by the Respondent that his employment, which according to the Respondent was causal in nature, had terminated and that the 12 days' pay paid to him prior to his proceeding on unpaid leave constituted his final payment. At the time of termination of his employment, the grievant was paid a daily rate of Kshs. 280.

4. It was the grievant's case that he had worked with the Respondent for a continuous period of 8 years. Upon termination the grievant reported the matter to the Claimant Union which in turn reported a trade dispute to the Minister for Labour. The Respondent failed to attend conciliation meetings and the matter was therefore escalated to the Industrial Court.

5. The Claimant claims the following:

- a. Pay in lieu of notice.....Kshs. 9,441.80
- b. Pending leave (56 daysx337.20).....18,883.20
- c. Service pay (@ 15 days' pay per year).....40,464.00
- d. Salary underpayment (effective 1.5.2006).....17,847.40
- e. 12 months' salary in compensation for unfair termination....105,206.40

f. Certificate of service

The Respondent's Case

6. In its Defence dated 14th January 2013, the Respondent stated that the grievant was represented by two unions; Transport Workers Union (the Claimant herein) and Labour Caucus Association and that this had compromised the conciliation process. According to the Respondent, the grievant was paid a daily rate of Kshs. 289 which was above the applicable rate of Kshs. 249.90 for a general labourer. The Respondent denied the grievant's claim in its entirety.

Findings and Determination

7. The first issue for determination in this case has to do with the status of the grievant's employment. According to the Claimant, the grievant was in continuous employment for 8 years. It was common ground that the grievant's employment with the Respondent came to an end in 2007. This date is instructive. The Employment Act, 2007 commenced on 2nd June 2008. The applicable employment law in this case would therefore be the repealed Employment Act (Cap 226).

8. 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.”

9. Section 14(5)(i) of Cap 226 provides that such a contract is terminable by either party at the close of any day without notice.

10. Unlike the Employment Act, 2007 the repealed Act did not make provision for conversion of casual employment to a term contract. It is not in contest that the grievant was paid a daily rate. I therefore find that the grievant was a casual employee within the meaning of Section 2 of the Repealed Employment Act and that he was therefore not entitled to notice. The claim for notice therefore fails and is hereby dismissed. Having found that the grievant was a casual employee, he is not entitled to leave. The claim for service pay also fails.

11. The claim for underpayment in the sum of Kshs. 17,847.40 succeeds. The Respondent is directed to issue the Claimant with a Certificate of Service.

I make no order for costs.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2013

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*