



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 651 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 25th September, 2018)

CHRISTOPHER BARAZA WASIKE.....CLAIMANT

VERSUS

PEMCO AGENCIES LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed a Memorandum of Claim on 16th April 2014 and later Amended Claim on 3rd April 2017 through the firm of Karanja & Partners Advocates seeking damages for unprocedural, illegal and unconstitutional dismissal and refusal by the Respondent to pay him his terminal dues.
2. He avers that at all material time he was employed by the Respondent as a Carpenter from October 2011 until 28th May 2013 earning a salary of Kshs.16,800 per month.
3. He states that at the time of employment there was no contract of employment that was issued and in 2013 he was instructed to work at Ramata Green Projects in Ruaraka where he was issued a contract of employment that was to subsist for 11 days and after expiry of 11 days another contract for another 11 days would be issued but he refused to sign the contract saying that the contract was rejected by the other employees.
4. He further states that on or about March 2013 the Human Resource and Administrative Manager called for a meeting and after the meeting a notice was issued that the salary was inclusive of the service charge.
5. Thereafter the Respondent served the Claimant with a letter advising that the Ramata Green site was now closed and that they would be called to resume work after the re-opening of the site, which was never done.
6. He further avers that the Kenya Building Construction, Timber and Furniture Industries Employees Union to which he is a member wrote to the Respondent demanding for payment of dues, which elicited no response on the part of the Respondent. He avers that together with the other employees, they went to Kituo Cha Sheria and were issued with letters to take to the Respondent but the Respondent refused to pay.
7. He states that at all material times he committed himself to fulfilling his duties over and above the expectation making his summary dismissal from employment unlawful and unconstitutional. Demand has been made and notice of intention to sue given but the Respondent has refused to pay the same.
8. The Respondent filed their Amended Response to the Claim where they denied each and every averment of law and fact set out in the Amended Memorandum of Claim. They state that at all material times the Claimant was a casual labourer hired on need basis and as such there existed no employment contract between the parties at all.
9. They aver that the notice given was addressed to all casual laborers, concerning the closure of the construction site and that they owed no money to the Claimant as alleged at all as all laborers were paid on two weeks basis and all the monies he worked for was paid to him. Therefore, they aver that his claim is baseless and farfetched since there was no employment in the first place.

Submissions

10. The Claimant filed his submissions where he submits that the Respondent alleged to have terminated his employment on grounds of

redundancy, however as clearly stipulated under Section 40 of the Employment Act no notification of impending termination of employment through redundancy was given. The Respondent did not inform the labour office of the redundancy making the termination illegal. He relied on the case of **Mary Mutanu Mwendwa Vs Ayudi Ninos De Africa-Kenya (2013) eKLR.**

11. He states that he worked for the Respondent from October 2011 until 28th May 2013 hence he is entitled to service pay. He avers that he is entitled to reliefs sought as no records were availed by the Respondent in support of the allegation that the Claimant was a casual employee or any records to the effect that he used to be stopped from his employment service.

12. He avers that prior to instituting this suit he sought the intervention of Kituo Cha Sheria to have his dues paid which the Respondent declined and/or ignored. He avers that he served the Respondent with a demand notice hence submits that he is entitled to costs.

13. The Respondents have not filed their submissions.

14. I have examined all the averments of both parties. I note that the Claimant's contention is that he served the Respondent for 2 years and 4 months with effect from October 2011 to May 2013 when the Respondent terminated his services apparently on account of redundancy.

15. The Respondents on their part contend that there was actually no employment contract between them and the Claimant but that the Claimant was a casual worker and the site where he was working was closed and so they had to let him go.

16. The Claimant was employed without any appointment letter. The Respondent have however admitted employing the Claimant as a casual labourer in October 2011 and used to pay him every two weeks and the employment went on intermittently until the month of May 2013 when the Claimant's services were no longer needed.

17. Section 9(1) of the Employment Act 2007 states as follows:-

1) "A contract of service:-

a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

18. Under this provision, an employment relationship that existed between the Claimant and Respondent exceeded the 3 months. It went on for over 2 years.

19. Under Section 9(2) of Employment Act, the Respondent was under duty to ensure the contract was reduced into writing coupled with Section 9 above, Section 37 of the Employment Act 2007, states as follows:-

1) "Notwithstanding any provisions of this Act, where a casual employee:-

a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.....".

20. In the circumstances, though the Respondent assumed the Claimant was a casual worker, he worked for over 2 years and by virtue of Section 37 above, he became a permanent worker.

21. The assertion by the Respondent that the Claimant was a casual employee is thus refuted by the above provisions of the law and thus I find that the Claimant was an employee on permanent terms of employment.

22. Being an employee on permanent terms, the Claimant could not be dismissed or terminated for whatever reasons without following due process.

23. The Claimant aver that they terminated the Claimant as the site where he was working closed. The reason thus falls under the category of redundancy which is defined under Section 2 of Employment Act as follows:-

“Redundancy 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”.

24. In this respect, the provisions of Section 40 of Employment Act 2007 were to be adhered to before termination. Section 40 of Employment Act 2007 states as follows:-

(1) “An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-

(a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) The employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

25. Given that the above process was never followed, I return the verdict that the dismissal of the Claimant was unfair and unjustified. That being the case, I find for the Claimant in the following terms:-

1. 1 month salary in lieu of notice =16,800/=.

2. Severance pay at the rate of 15 days pay for each year worked = 16,800 x ½ x 2 = 16,000/=.

3. 8 months salary as damages for unfair redundancy = 16,800 x 8 = 134,400/=

TOTAL = 168,000/=

4. Issuance of a certificate of service.

5. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 25th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Maina holding brief for Okeyo for Respondent – Present

Claimant – Absent