



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Cause 1296 of 2012

EVANS MUHAMBE ORENZE.....CLAIMANT

VS

JOSEPH KIRIMI.....1ST RESPONDENT

IRENE KIRIMI.....2ND RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 4th May 2011 the Claimant sued the Respondent for wrongful termination of employment and failure to pay terminal dues. The Respondents filed a Reply on 23rd November 2012 and the matter was heard between 30th November 2012 and 12th February 2013. The Claimant testified on his own behalf and the 1st Respondent Joseph Kirimi as well as Nicholas Maina testified for the Respondents. The Claimant filed written submissions on 28th May 2013 but the Respondent did not file any submissions.

The Claimant's Case

2. According to the Claimant he was employed by the Respondents as a gardener in or about 2002 at a monthly salary of Kshs. 4,500 which was later increased to Kshs. 6,000. He was not issued with a letter of appointment and was paid in cash upon signing a voucher which was retained by the Respondents. In addition to his job as a gardener, the Claimant was required to feed several birds and take care of 8 dogs. The Claimant claimed to have worked overtime without compensation.

3. On 7th December 2008, the Respondents left their Nairobi home for their rural home in Muran'ga and left the Claimant and a security guard by the name Kimanzi in charge. In the afternoon of the same day, a young lady who was in the Respondents' Nairobi home left through the small gate. After a short while, the young lady came back and upon the Claimant opening the gate for her, 4 armed men came in and attacked the Claimant. The Claimant claimed to have been thoroughly beaten by the robbers and left for dead.

4. The Claimant was later arrested and charged with robbery with violence contrary to Section 296(2) of the Penal Code. He was placed in custody at Kamiti Maximum Prison for one year. The criminal case proceeded to hearing and the Claimant was acquitted under Section 210 of the Criminal Procedure Code. He then went back to the Respondents' home to seek re-employment. He was not re-employed.

5. The Claimant claimed the following:

- a) 2 months' salary in lieu of notice.....Kshs. 12,000
- b) Underpayment
- c) Leave for 6 years.....36,000
- d) House allowance @ 15% of basic salary.....64,800
- e) Severance pay.....18,000
- f) Salary for 7 days worked in December.....1,400
- g) NHIF and NSSF contributions
- h) Certificate of service
- i) Any other relief the Court may deem just to grant

The Respondents' Case

6. In their Reply, the Respondents denied that the Claimant was their employee from the time alleged by the Claimant. The 1st Respondent, Joseph Kirimi testified that he first met the Claimant in 2007 after settling in Karen in 2006. Kirimi further testified that the Claimant was employed as a casual. The Claimant was offered permanent employment but he declined. He was therefore paid weekly.

7. The Respondents denied that the Claimant's salary had risen from Kshs. 4,500 to 6,000 and that the Claimant was required to feed any birds and/or take care of any dogs. The Respondent also denied the Claimant's claim that he worked overtime.

8. With regard to the termination of the Claimant's employment, the Respondents pleaded that the Claimant went missing after a robbery in the Respondents' home. Joseph Kirimi told the Court that while at his rural home he was informed that robbers had raided his Nairobi home. The robbers took away money and other valuables. He was told that the Claimant had let in the robbers. The Claimant and the guard were arrested for interrogation by the police from Hardy Police Station.

9. It was the Respondents' case that the Claimant absconded duty and was therefore not entitled to a termination notice. The Respondents averred that the Claimant's acquittal of the criminal offence did not exonerate him from the allegation of connivance with armed robbers to rob the Respondents.

Findings and Determination

10. The first issue for determination in this case has to do with the status of the Claimant's employment with the Respondents. According to the Claimant, he was employed by the Respondents in 2002. The Respondents on the other hand maintained that the effective date of the Claimant's employment was in 2007. The Respondent did not issue the Claimant with any form of employment letter. They stated that the Claimant was a casual employee.

11. 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”

12. The Respondents stated that the Claimant was paid weekly and the Respondents' 2nd witness Nicholas Maina who performed accounting duties for the Respondents told the Court that the Claimant worked for either 6 or 7 days per week. Even assuming that the Claimant's effective date of employment was in 2007, the duration of his employment had clearly passed the threshold for causal employment as envisaged under Section 37 of the Employment Act, 2007.

13. In the case of **Harrison Meshack Lusimbo & Another Vs Mareba Enterprises [2013 eKLR]** Lady Justice Maureen Onyango held that an employee paid at the end of the week was not a casual employee and that Section 37 of Employment Act provided for conversion of a casual employee to monthly contract of employment after working continuously for 1 month or intermittently for 3 months. By virtue of Section 37 (3) such an employee would be entitled under the Act to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee. Such terms and conditions of service included annual leave, termination notice and service pay. I agree with the learned Judge and therefore hold that the Claimant's employment in this case was converted to term contract by operation of the law.

14. With regard to the actual length of service, Counsel for the Claimant in the written submissions filed on 28th May 2013, referred the Court to handwritten proceedings in criminal case number 3840 of 2008 in which the 2nd Respondent, Irene Kirimi is recorded to have testified that the Claimant who was the accused in the criminal case had worked for her for over five years. These proceedings were however uncertified and the Court could not therefore rely on them in this regard.

15. Joseph Kirimi's testimony on the effective date of the Claimant's employment was corroborated by Nicholas Maina. The Court has therefore adopted the date given by the Respondents, being the year 2007 as the effective date of the Claimant's employment with the Respondents. Since no month was given, the Court has assigned the month of January.

16. On the question of the Claimant's salary as at the time of his leaving employment, the Respondents failed to provide the employment particulars set out in Section 10 of the Act. I have therefore invoked Section 10(7) and adopted the testimony of the Claimant in this respect.

17. I will now deal with the specific claims by the Claimant. The Claimant claimed 2 months' salary in lieu of notice. The Court however found no basis for this claim and awards 1 month's pay under this head.

18. With regard to the claim for house allowance, Section 31(1) of the Employment Act provides that:

An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

19. Joseph Kirimi testified that the Claimant had declined an offer for housing but Nicholas Maina clarified that the Claimant could not be accommodated together with his family. It was therefore not in contest that the Claimant was neither housed nor paid a housing allowance. I therefore award him house allowance at 15% of his basic salary. In view of my finding on the status of the Claimant's employment, he is entitled to leave at 21 days per year and service pay at 15 days pay for each year of service. The claim for underpayment was not proved and is hereby dismissed. In tabulating this Award, the Court will adopt the figure of Kshs. 6,000 plus house allowance at 15% as the Claimant's monthly salary.

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

- a) One month's salary in lieu of notice.....6,900

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|---|---------------|
| b) House allowance for 23 months and 7 days..... | 20,910 |
| c) Leave ($\frac{6,900 \times 21 \times 2}{30}$)..... | 9,660 |
| c) Service pay for 2 years..... | 6,900 |
| d) Salary for 7 days worked in December 2008..... | <u>1,610</u> |
| Total..... | 45,980 |

The Respondents are directed to issue the Claimant with a Certificate of Service and pay the costs of this case.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF JUNE 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**