



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE. NO.389 OF 2015

JOB WANYONYI SIMIYU.....CLAIMANT

VERSUS

SHAYONA STATIONERS (AFRICA) LTD.....1ST RESPONDENT

KIRAN PATEL.....2ND RESPONDENT

JUDGMENT

1. By a Memorandum of Claim filed on 16th March, 2015 the claimant alleges that the Respondent did not pay him his terminal dues, overtime and that he was underpaid throughout his employment at the 1st Respondent company. He therefore seeks the following Orders:

- a) **The grievant is entitled to be paid service pay for 3 years 45 days.**
- b) **Salary underpayment from May 2012 to April, 2013 OF Kshs.69, 804.**
- c) **Salary underpayment from May 2013 to February, 2014 of Kshs.80,188**
- d) **Salary underpayment from May 2014 to February, 2015 of Kshs.49,338.**
- e) **Overtime for Saturdays for the 3 years' work of Kshs. 58,752.**
- f) **Any other award or benefit which this Honourable Court may deem fit to grant in the circumstance of this case.**

2. The respondents entered Appearance and filed a response to the claim on the 13th April, 2015 conceding that they employed the claimant but it averred that he was a general labourer and not a shop assistant as alleged. They further averred that the claimant was earning a salary of Kshs.9700 which was within the prescribed statutory limits for a general labourer. They also averred that the claimant left employment without giving prior notice but they still called him to collect his terminal dues being Kshs. 24,228 but he refused and instead filed this claim.

Claimant's Case

3. This suit proceeded for hearing on the 22th June, 2021 where the claimant testified as CW-1 and adopted his witness statement dated 11.6.2018. In his testimony the claimant avers that he was employed on the 15.1.2012 as a shop assistant at a monthly salary of Kshs.7500 which was later raised to Kshs. 9700. He resigned from the respondent's employment in order to pursue his studies full time. He contended that he gave the respondent a three months' notice before the said resignation.

4. He further testified that the 2nd Respondent was his immediate Boss and also the owner of the 1st respondent company. He maintained that he was not a general laborer but a shop assistant since his duties entailed serving customers at the counter, issue cash sales receipts for goods sold and then give the 2nd Respondent to issue ETR receipts.

5. He confirmed that he went for his annual leave but he also stated that he used to work on Saturdays upto 1pm and on busy days, work could extend till 3pm. He testified that he was paid salary after serving the termination notice. He contended that there was no master roll during his employment but he used sign in a book.

6. Finally, he testified that he now works for another company as an agent.

7. Upon cross-examination, CW-1 testified that apart from serving at the counter, he could clean the shop, load and offload goods and arrange goods on the shelves. These duties, he says, were done mainly by another employee by the name Jared who was elderly and he was mostly called upon when the goods were heavy.

8. On further cross examination, CW-1 testified that he issued the resignation Notice on 19.12.2014 which was to take effect on 2.3.2015. After resigning the Respondent refused to pay him his terminal dues despite several follow up leaving him with no option but to inform his union who served the Respondent the letter dated 28.2.2015 which also did not elicit any response.

9. On re-examination he testified that there was no contract to give 3 months' notice but upon serving the resignation letter the Respondents directed him to calculate his expected dues which he did vide the letter of 28.2.2015 but the Respondents only paid him his February salary.

Respondent's Case.

10. The 2nd Respondent, Mr Kiran Patel testified on his behalf and on behalf of the 1st Respondent as RW-1. He confirmed that he is the manager of the 1st Respondent and adopted his written statement dated 12.4.2015 together with documents filed on even date as his evidence in chief. The documents were marked as Respondent's Exhibits D-1-5.

11. RW-1 testified that the claimant was employed as a general laborer whose duties included cleaning the shop, loading and offloading, arranging goods in the shop. The other employee by the name Jared was a shop assistant whose duties included writing of the prices of the goods requested by the customers and preparing the list for the claimant to remove from the shelf and load for the customers. As the manager, RW1 had the role of issuing receipts and collecting money from its customers.

12. He stated further that when the claimant resigned he paid him his February salary only as there were no other dues owed to him having worked for only 3 years. He further testified that he remitted NSSF and NHIF deductions when due throughout the time he employed the Claimant. He also contended that he paid him Kshs.9700 as per legal Notice number 97 of 2013 in force then. Finally, he contended that the claimant never worked on any Saturdays since he was going to school.

13. Upon cross examination, he admitted that the claimant worked on some Saturdays as shown in the muster roll. He further admitted that the only time the claimant issued receipts for cash sales are on instances where he was out of the shop. He conceded that he never issued the claimant with an employment contract. He also admitted that the claimant served the respondent with a resignation notice that was to take effect on 2.3.2015 and the computation of the Claimant's terminal dues was done on 3.3.2015 after his exit.

14. On re-examination he confirmed that he received the letter from the union and responded vide a letter dated 3.3.2015

Claimants Submissions.

15. It was submitted for the claimant that he was a shop assistant and not a general labourer because the duties performed by the claimant were those performed normally by a shop assistant. Further, the receipt produced as exhibit by the Claimant affirmed that indeed he was a shop assistant and that the failure by the Respondent to produce an employment contract showing the terms of engagement as envisaged under section 9 of the Employment Act should be construed against them because they are the custodians of the employment records.

16. Finally, it was submitted that the claimant who resigned by notice as admitted by RW-1 is entitled to payment of his terminal dues, together with salary underpayment and overtime as prayed for in the claim.

Respondents' Submissions.

17. It was submitted for the Respondents that the claimant was a general worker and not a shop assistant as pleaded. It was argued that general workers perform all kinds of non-skilled tasks, and they include cleaners, gardeners, sweepers, ayahs, house servants and messengers. It was argued that the claimant performed tasks such as cleaning, loading, offloading and arranging goods on shelf and therefore that he was a general laborer and not a shop assistant. Further it was argued that the muster roll produced in Court indicated that the Claimant was a general labourer. The Respondent relied on the case of **Industrial Court case number 43(N) OF 2009 Between Crispol Ngigu Kimani & 24 others V Yako Supermarket Company Limited & Another[UR]**

18. It was then argued that the mere fact that the Claimant produced receipt alleging to have issued to the customer does not necessarily promote him to the position of a shop assistant. Further that the receipt he produced was not signed and therefore it cannot be ascertained the person who issue the said receipt. Therefore, he contended that the said receipt is not conclusive evidence of employment status of the Claimant.

19. On whether the claimant is entitled to service pay, the Respondent submitted that the same is not payable for the reason that the claimants NSSF dues were remitted on a monthly basis and also because the Claimant resigned from employment and not terminated on redundancy as envisaged under section 40 of the Employment Act.

20. With regard to the underpayment sought, it was submitted that the claimant was paid above what the legal notices as provided for payment of a general laborer. Therefore they contended that the prayer for underpayment is misplaced.

21. As regards the prayer of overtime, it was submitted that the respondents' employees work from 9am to 5pm with a one hour break thus the number of hours per week were 35 hours. They contended that during weekends the respondent employees could work from 9 to 1pm clocking 4 hours each weekend, bringing the aggregate time to 39 hours which is below the statutory 52 hours per week. For emphasis, they cited the case of **Isaiah Gathogo Kamau V Board of Management St Anthony Schools and another [2021] eKLR.**

22. The Respondent thus urged this court to dismiss the claim with costs.

Analysis and determination.

23. Issues for determination.

a) Whether the claimant was a general laborer or a shop assistant

b) Whether the claimant is entitled to the reliefs sought.

Was the claimant a general labourer or an office assistant?

24. The Respondent verbally entered into an employment contract with the claimant and never reduced the employment terms in writing. Under section 9 of the Employment Act, the employer is obliged to draw the contract of employment and to explain the terms thereof to the employee.

25. In his pleadings and testimony, the Claimant contended that his duties were those of a shop assistant. He stated that he used to serve customers at the counter, issue receipts, arrange goods at the shelf, cleaning, load and offload the Respondents goods. The Respondent on the hand submitted that the claimant was tasked with unskilled duties such as cleaning, loading, offloading and arranging goods on the shelves. The Respondent maintained that the claimant never served customers at the counter as alleged as that was work reserved for the 2nd Respondent and that the only receipt produced by the claimant on alleged sale was never signed.

26. The Wholesale and Retail Distributive Trades Order Legal Notice No. 249 of 1973 has defined a shop assistant as

‘any person wholly or mainly employed for the purpose of transacting business with customers in that department of an undertaking to which customers have access but who is not in charge of such department.’

27. Having considered the foregoing definition, I am of the view that, the duties carried out by the Claimant do not qualify him as a shop assistant. He did not prove that he was responsible for sales. The one receipt produced did establish that he was a shop assistant. He only performed that role whenever Rw1 was away. He did general duties including cleaning, arranging goods on shelves, loading and offloading. The said duties primarily did not, involve transacting business with customers/shoppers. Consequently, the Court finds that the Claimant was a general labourer and not a Shop Assistant.

Whether the claimant is entitle to the reliefs sought.

28. The resolution of this question turns on the finding above, that the Claimant was a general labourer.

29. Section 26 provides as follows –

“26. Basic minimum conditions of employment

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favorable to an employee than the terms provided in this Part and Part VI, then such favorable terms and conditions of service shall apply.”

30. On the other hand, Section 48(1) of the Labour Institutions Act provides as follows;

“48. Wages Order to constitute minimum terms of conditions of employment

(1) Notwithstanding anything contained in this Act or any other written law—

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.”

31. Guided by the above provisions, the minimum salary/wages applicable to this suit are the ones prescribed by the Regulation of Wages (General) (Amendment) Order, 2012 for the period between 1st May, 2012 and 30th April, 2013 and the Regulation of Wages (General) (Amendment) Order, 2013 for the period between 1st May 2013 and 2nd March, 2015, when the Claimant exited.

32. Pursuant to Legal Notice No. 71 of 2012, the minimum wage exclusive of house allowance from 1 May 2012 to April 2013 was kshs. 8579.80. The claimant was entitled to house allowance which I assess at 15% equaling to Kshs. 1,286.94 making a gross of Kshs 9867/-. Consequently, between 1st may, 2012 to 30th April, 2013 being 11 months in total, the claimant was paid Kshs.7500 per month representing an under paid by Kshs.2367 X 11 months which equals to Kshs. 26,037.

33. As per legal Notice number 197 of 2013, the minimum wage inclusive of house allowance increased to Kshs. 11,248 as from 1st may 2013. Between 1st May, 2013 and February, 2014 being 10 months, the claimant was paid Kshs 8500 per month instead of Kshs. 11,248 representing an underpayment of Kshs 2748 x 10 months = 27,480.

34. Finally, between March, 2014 to February, 2015 the claimant was paid Kshs. 9700 per month instead of Kshs 11,248, representing an underpayment of Kshs. 1548 x 12 Months=18,576.

35. Having considered the above matters, I find that the claimant is entitled to Kshs.72,093 as salary arrears arising from salary underpayment.

36. As regards the claim for overtime, the Claimant contends that he used to work 4 extra hours every Saturday day. The Claimant did not lead any evidence on this claim but he confirmed during cross examination that on Saturdays he used work up to 1 pm except on a busy day when they could extend. He, did not indicate the number of Saturdays he worked extra time, and the hours extended.

37. In light of the foregoing, the Court is unable to ascertain the overtime allegedly worked by the claimant and the claim for overtime thereof must fail. This view is fortified by the fact that the muster rolls filed by the Respondent only indicates that the claimant worked on some Saturdays but it does not show that he worked any extra hours.

38. With regard to the prayer for payment of service pay, Section 35(6) of the Employment Act provides that an employee who is a member of NSSF is not entitled to service pay. The Respondent submitted that they submitted all NSSF deduction for the claimant, which fact was not contested by the claimant. Accordingly, the claimant having been a member of NSSF he is not entitled to service pay.

39. In conclusion, judgment is entered for the claimant as against the Respondent as follows: -

a) Underpayment of Kshs 72,093.

b) The respondent will issue claimant with a certificate of service.

c) The respondent will pay costs of this suit plus interest at court rates from the date of filing the suit.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF JANUARY 2022.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE