



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 251 OF 2017
WILSON KIPCHIRCHIR BORETCLAIMANT
VESUS
KIMILILI HAULIERS LIMITED.....RESPONDENT
JUDGMENT

1. Wilson Kipchirchir Boret (the Claimant) sued Kimilili Hauliers Ltd (the Respondent) on 9 June 2017, alleging unfair employment termination and breach of contract.
2. The Respondent filed a Response and Notice of Preliminary Objection on 20 July 2017, and the hearing commenced on 4 December 2018 when the Claimant testified.
3. The Respondent's case was taken on 7 October 2019.
4. The Court thereafter directed the parties to file and exchange submissions.
5. The Claimant filed his submissions on 13 November 2019 (should have been filed within 21 days of 4 December 2018), while the Respondent filed its submissions on 26 August 2020.
6. On 19 November 2020, the parties agreed that this Court should proceed to prepare and deliver judgment.
7. The Court has considered the pleadings, evidence and submissions and will adopt the Issues as set out by the Claimant in his submissions.

Unfair termination of employment

8. The Claimant was employed as a heavy commercial driver by the Respondent in September 2012.
9. On the circumstances leading to the separation, the Claimant testified that on 13 December 2016, a Manager called Shem called him and told him that since he was not a luhyia and he had not recruited him, his services were no longer required.
10. The Claimant asserted that apart from the reference to his tribe, he was not given the reasons for the termination of employment but that he was paid terminal dues of Kshs 65,287/- upon which he signed a discharge voucher.

11. On re-examination, the Claimant admitted that he did not collect a letter terminating his employment on account of redundancy.

12. The Respondent's witness on his part testified that the Claimant's, as well as other positions, were declared redundant because the Respondent was not performing well.

13. According to the witness, all requisite procedures under section 40 of the Employment Act, 2007 were followed. The witness testified that the Labour office was informed of the redundancy through a letter dated 7 November 2016.

14. On the terminal dues paid to the Claimant, the witness stated that same comprised salary in lieu of notice of Kshs 27,000/- and severance pay of Kshs 57,600/- making a gross total of Kshs 84,600/- and further that the Claimant was paid before the Labour Officer.

15. The Respondent paid the Claimant his terminal dues, including severance pay. A notice of intended redundancy was sent to the Labour Officer. The Court finds the termination of the Claimant's employment was because of redundancy.

16. Section 40(1) of the Employment Act, 2007 places a duty on the employer to give written notice of 30 days to the employee (or to the Union where applicable).

17. The Claimant herein was not served with the 30-day written notice. The notice to the Labour Officer could not substitute notice to the Claimant.

18. In the circumstances, the Court finds that the termination of the Claimant's employment on account of redundancy was unfair.

Compensation

19. The Claimant was paid salary in lieu of notice and severance pay.

20. In consideration of the same, the Court will not award compensation for the unfair termination of employment.

Breach of contract

House allowance

21. A copy of the Claimant's contract was not produced in Court to enable the Court to determine whether the remuneration consisted of house allowance.

22. Section 31 of the Employment Act, 2007 requires an employer to provide housing and/or an allowance to cover rent.

23. With the state of the record and in consideration of sections 9 and 10(7) of the Employment Act, 2007, the Court will allow the head of claim for house allowance in the sum of Kshs 259,200/-.

Leave

24. The Claimant admitted that he took leave in 2013 and also testified that at the time of separation in December 2016, he had been on leave and was recalled.

25. In the witness statement, the Claimant contended that he had a balance of 12 days, but in the Statement of Claim, he pleaded that he never went on leave for the 4-years of employment.

26. On the state of the inconsistent pleadings and evidence, the Court is satisfied that it is more probable

that the Claimant used to go on leave and relief is declined.

Overtime

27. The Employment Act, 2007 does not prescribe minimum working hours beyond which overtime pay becomes due.

28. The prescription of working hours is left to specific Regulation of Wages (Amendment) Orders. The Claimant did not disclose which specific Order applied to the sector the Respondent operated in, and the Court declines to grant any relief on account of overtime.

Conclusion and Orders

29. The Court finds and declares that the termination of the Claimant's employment on account of redundancy was unfair but compensation is denied.

30. The Court further finds that the Respondent was in breach of contract in respect to house allowance.

31. The Claimant is awarded

(i) House allowance Kshs 259,200/-

32. Claimant to have costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 24th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Chepkwony & Co. Advocates

For Respondent Omwenga & Co. Advocates

Court Assistant Chrispo Aura