



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 97 OF 2016

MICHAEL ALOO ACHIENG.....CLAIMANT

V

ANVI EMPORIUM LIMITED.....RESPONDENT

JUDGMENT

1. Michael Aloo Achieng (the Claimant) sued Anvi Emporium Ltd (the Respondent) on 15 April 2016, and he stated the Issues in Dispute as:

Unpaid salary for one month, compensatory leave allowance, terminal dues, damages for loss of employment, salary in lieu of notice, damages for unlawful termination and overtime worked.

2. The Respondent filed a Response on 17 June 2016, and the Cause was heard on 20 February 2019 when the Claimant testified and on 23 November 2020 when a director with the Respondent testified.

3. The Claimant filed his submissions on 12 January 2021 (should have been filed and served by 18 December 2020), while the Respondent filed its submissions on 16 February 2021.

4. The Court has considered the pleadings, evidence and submissions.

Overtime

5. The Claimant prayed for an award of Kshs 11,200/- on account of overtime worked without remuneration during the course of employment from 1 August 2013 to December 2015.

6. The Employment Act, 2007 leaves it to the parties to agree on the working hours.

7. However, specific Regulation of Wages Amendment Orders, however, prescribe working hours within prescribed sectors of industry.

8. The Claimant did not address the question of working hours in the filed witness statement, which was adopted as part of the evidence.

9. During testimony, he simply stated that he was not paid overtime pay for October to December 2015.

10. The Respondent's witness stated that overtime work would be paid for when worked.

11. The Claimant did not disclose which specific Regulation of Wages Order applied in the sector the Respondent operated in.

12. Without that disclosure, the Court finds that an evidential foundation for this head of the claim was not laid, and relief is declined.

Untaken leave

13. On account of leave, the Claimant sought Kshs 23,520/- said to be accrued leave for 42 days. The Claimant testified that he did not go on annual leave during the 2 or so years of employment.

14. Each employee is entitled to 21 days of annual leave on full pay.

15. The Respondent did not traverse the Claimants pleadings with respect to accrued leave. No leave records were produced.

16. In light of section 10(3) of the Employment Act, 2007, the Court will allow this head of the claim.

December 2015 wages

17. The Claimant's testimony that he was not paid earned wages was controverted by the production of pay records for 13 December 2015 to 19 December 2015 and which records show that he was paid and signed for the wages.

Unfair termination

18. The Claimant's case was that he worked until 21 December 2015, when his services were verbally terminated without reasons.

19. The Respondent, on the other hand, asserted that the Claimant deserted work (did not report back after 19 December 2015).

20. In terms of section 47(5) of the Employment Act, 2007, the Claimant had the burden of showing at the first instance that an unfair termination of employment occurred.

21. The Claimant's witness statement did not name the person who verbally terminated his employment. Even during oral testimony, he did not reveal the identity of the person who allegedly terminated his employment.

22. On the state of the record, the Court finds that the Claimant did not discharge the low threshold burden expected of him under section 47(5) of the Employment Act, 2007.

23. Salary in lieu of notice and compensation are therefore not available as remedies.

Conclusion and Orders

24. The Court finds that the Claimant did not prove an unfair termination of employment occurred.

25. The Court, however, finds that the Claimant is entitled to and is awarded Kshs 23,520/- on account of accrued leave.

26. Each party to bear its own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 3RD DAY OF MARCH 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Anyumba & Co. Advocates

For Respondent K'Owino & Co. Advocates

Court Assistant Chrispo Aura