



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 349 OF 2017

ATHUMANI SALIM SWALEH.....CLAIMANT

VS

ALPESH KHIMJI T/A KHIMJI'S FARM.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim brought by a Memorandum of Claim dated 25th April 2017 and filed in court on 3rd May 2017 is for compensation for unlawful termination and payment of terminal dues. The Respondent filed a Reply on 19th June 2017.

2. At the trial, the parties testified on their own behalf. The Claimant also called Jeremiah Katana, a Labour Officer in Mombasa County. Both parties further filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 1st January 2009 as a farm worker and herdsman, earning a weekly salary of Kshs. 1,130. He claims to have been promoted to the position of Foreman in the year 2015, a position he held until 7th March 2017, when his employment was terminated.

4. The Claimant's case is that the termination of his employment was unlawful and unfair as there was no justifiable reason for it and due procedure was not followed. He states that on 31st August 2016, he raised the issue of underpayment of workers, with government health workers who had visited the farm.

5. The Claimant was advised to go to the Labour Office, which he did and on 26th September 2016, the Labour Office wrote to the Respondent, upon which the Claimant's employment was terminated.

6. The Claimant lodged another complaint at the Mombasa County Labour Office and a letter dated 10th March 2017 was sent to the Respondent, giving him a chance to settle the matter amicably. There was however no response from the Respondent.

7. The Claimant claims that throughout his employment with the Respondent, he was not allowed to go on leave. He adds that he worked during public holidays.

8. The Claimant further claims that the Respondent did not remit his National Social Security Fund (NSSF) dues and that he was underpaid.

9. The Claimant tabulates his claim as follows:

- a) One month's salary in lieu of notice.....Kshs. 4,842.00
- b) Leave pay for 8 years.....38,736.00
- c) Public holidays.....26,469.60
- d) Service pay for 8 years.....38,736.00
- e) Underpayment.....342,836.00

f) 12 months' salary in compensation.....58,104.00

g) Certificate of service

h) Costs plus interest

The Respondent's Case

10. In its Reply dated 13th June 2017 and filed in court on 19th June 2017, the Respondent denies the Claimant's claim and states that he is not aware of any complaint made to the County Labour Office.

11. The Respondent denies that the termination of the Claimant's employment was unlawful or unfair.

12. The Respondent states that he was not bound to accord the Claimant the right to fair administrative action or pay him dues as there was no written or implied employment contract between the parties.

Findings and Determination

13. There are two (2) issues for determination in this case:

a) Whether the Claimant has made out a case of unlawful termination of employment;

b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

14. In his Reply and witness statement filed in court, the Respondent cast doubt as to the existence of an employment relationship between him and Claimant. When he appeared in court however, the Respondent confirmed that the Claimant had been employed by his farm manager and was therefore his employee. The issue of the existence of an employment relationship between the parties is therefore moot.

15. Regarding the termination, the Respondent told the Court that he learnt that the Claimant's employment had been terminated after the Claimant lodged a complaint at the Labour Office. This testimony accords with the Claimant's own testimony that his employment was terminated.

16. Section 47(5) of the Employment Act provides as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

17. The Claimant's testimony, which was corroborated by a Labour Officer from Mombasa County was that his employment was terminated after he had lodged a complaint at the Labour Office. In his own testimony, the Respondent conceded that the Claimant had indeed made a complaint at the Labour Office.

18. The Respondent did not give his own version of the circumstances leading to the termination of the Claimant's employment. This Court therefore has no difficulty adopting the Claimant's account regarding the termination. Consequently, I find and hold that the termination was without justifiable cause as required under Section 43 of the Employment Act and was also in violation of the mandatory procedural fairness requirements set out in Section 41 of the Act.

Remedies

19. Pursuant to the foregoing findings, I award the Claimant eight (8) months' salary in compensation for unlawful and unfair termination of employment. In making this award, I have considered the Claimant's length of service as well as the unlawful manner in which the termination was executed.

20. I further award the Claimant one (1) month's salary in lieu of notice.

21. In the absence of leave records to show that the Claimant was granted annual leave, the claim for leave pay succeeds and is allowed.

22. There being no evidence that the Claimant was a contributing member of NSSF, he is entitled to service pay.

23. The claims for public holidays and underpayment were not proved and are dismissed.

24. Finally, I enter judgment in favour of the Claimant as follows:

a) 8 months' salary in compensation.....Kshs. 38,736

b) 1 month's salary in lieu of notice.....4,842

c) Leave pay for 8 years (4,842/30*21*8).....27,115

d) Service pay for 8 years (4,842/30*15*8).....19,368

Total.....90,061

25. This amount will attract interest at court rates from the date of judgment until payment in full.

26. The Claimant is also entitled to a certificate of service plus the costs of the case.

27. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY SEPTEMBER 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Iddi h/b for Mr. Tolo for the Claimant

Mr. Khatib for the Respondent