



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1439 OF 2016

CALVINCE OMONDI OWINO.....CLAIMANT

VERSUS

ESSENTIAL MANAGEMENT CONSULTANCY SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. Through his statement of claim filed herein dated 18th May 2016, the claimant seeks for the following orders and reliefs: -

- (i) That the respondent be ordered to pay the claimant his terminal and consolidated dues amounting to Kshs. 412,166.6.
- (ii) Costs of this claim and interest thereon at court rates.
- (iii) A declaration that the termination of the claimant's employment was unfair and unjust.
- (iv) Any other relief that this court may deem just and fit to grant.

2. This matter came up before me for formal proof on the 20th of September 2021, when due to network challenges that the claimant was experiencing, this court got prompted under its inherent jurisdiction, and pursuant to its overriding objectives, directed that the contents of the claimant's witness statement, be transferred into and get encompassed in an affidavit, thereby becoming affidavit evidence for purposes of the matter.

3. An affidavit sworn by the claimant on the 20th September 2021 has since been filed.

4. The directions I gave as herein expressed, were also informed by the fact that, the respondent having not even entered appearance in this matter, it won't have a right to cross-examine the claimant or present any form of evidence.

5. The claimant stated that he came into the employment of the respondent at the beginning of the year, 2013 as a machine operator. He was deployed to Trufoods industry along Jogoo road Nairobi. That his starting salary was Kshs. 8500 which rose over time to Kshs. 10,954.70 per a month as at the time he was parting with the respondent – 17th February, 2016.

6. The claimant stated that on the 16th February 2016, one Ms. Patricia his immediate supervisor, got to his office and instructed him with others to power off their machines, informing them that they needed to record a statement over some lost goods. The specifics of the goods were not given.

7. That true on the 17th February 2016, they recorded statements. Thereafter, they were directed to go home and wait for a communication from the respondent regarding the way forward.

8. The claimant waited for the communication, it never came, causing him to believe that the allegation that goods had been lost was a crafted ingenious reason to pump him and others from their employment. The company is still running with a few others.

9. The claimant takes a position that his employment was unfairly terminated, and his fundamental rights under section 45 of the Employment Act, 2007 and particularly section 45 (1) and (2) thereof grossly violated. The respondent had no valid reason to terminate his employment.

Determination

10. From the material placed before me by the claimant, I have no difficulty in concluding that he was an employee of the respondent and that as at the 17th February 2016, when the alleged termination occurred, he was earning Kshs. 10,954.70 per a month.

11. The claimant asserted that he got prompted to file this matter when it dawned on him that the communication was not forthcoming. The period from the time he was told to go home and wait for a correspondence, and the time that he decided to come to court, was long enough to justify the action.

12. The question that comes up and which this court must answer is, was the contract of employment terminated? There is no doubt that the employer-employee relationship here was not expressly terminated. I am of the view however, that where an employer without reason fails to supply work for an employee to undertake, for that is the core business of an employee in the relationship, termination of employment can be inferred.

13. In determining whether a termination of employment was fair, court has to interrogate both procedural and substantive fairness. Section 45 of the Employment Act, dictates that no employer shall terminate the employment of an employee unfairly.

14. Section 45 (2) (c) provides the foundation for insistence on engagement of a fair procedure, if a termination of employment were to be considered fair.

15. The answer as to what constitutes fair procedure is found in the provisions of section 41 of the Employment Act, 2007 which provides: -

“subject to section 42 (1) an employer shall, before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any chosen by the employee within subsection (1) make.”

16. This provision would be looked at not in isolation from, but in conjunction with, the provisions of the Constitution of Kenya 2010, regarding the right to fair hearing, and the Fair Administrative Actions Act, as was held by this court in **Lydia Maraa Obara =vs= Tusker Mattresses Limited [2021] eKLR**.

17. In the circumstances of this matter, I hold that the mandatory procedure provided for in the Act was not engaged. The termination was therefore procedurally unfair.

18. Section 45 of the Employment Act stipulates: -

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment is unfair if the employer fails to prove –

a) That the reason for the termination is valid.

b) That the reason for the termination is a fair reason –

c) Related to the employee’s conduct, capacity or compatibility; or,

d) Based on the requirements of the employer.

e)”

19. Substantive fairness requirement flows from this provision.

20. Section 43 of the Employment Act, places upon the employer an obligation to prove the reason or reasons for the termination, failing of which the termination shall be deemed to have been unfair within the meaning of section 45. The respondent never defended this cause. In the circumstance, it cannot be said that it discharged the obligation.

21. In the upshot, I conclude that the termination was not substantively fair.

22. Having found that the termination was not substantively and procedurally fair, I now turn to the reliefs sought by the claimant.

a) One month’s salary in lieu of notice

23. The claimant seeks to be given Kshs. 10,254.70, under this head. There is no doubt that the contract was terminated without notice. Consequently, I award the claimant Kshs. 10,954.70.

b) Underpayment

24. The claimant contends that during the currency of his relationship with the respondent, he was underpaid.

25. On the exact date, when the employer-employee relationship between the respondent and the claimant commenced, the material before me is egregious. Contrary to all expectations a specific date is not given. One cannot be able to pick the date from any of the documents presented.

26. However, one sure thing is, there are documents on record furnished by the claimant from where it can be discerned that the claimant was in the employment of the respondent from the month of April 2015, till the time of the alleged termination. If one were to consider whether or not there was an underpayment of salary for a certain period, then the period could be the one proved by the Claimant. In this matter, April 2015 to February 2016.

27. Section 48 of the Labour Institutions Act provides: -

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

a) The minimum rates of remuneration or conditions of employment established in the wages order constitutes 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 employment to who whom a wages order applies provides for payment of less remuneration than the statutory minimum remuneration or does not provide for the conditions of employment presented in a wages regulation order or provides for a less favourable condition 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: -

(5) the powers given by this section for the recovery of the sums due from an employer to an employee shall be in addition to and not in derogation of any right to recover such sums by civil proceedings.

28. For the period I have identified hereinabove, the Regulation of Wages (General) Amendment Order, 2015, that was courtesy of legal notice No. 117, is relevant and applicable save for the month of April 2015. The wages order provided Kshs. 14,785.70 as the minimum wage for machine operators, working within Nairobi. Therefore, for purposes of this matter, the claimant was underpaid by Kshs. 3,831.70. monthly throughout the period. Cumulatively therefore, the Claimant was underpaid by a sum of Kshs. 34,485.30.

29. For the period relevant to the month of April 2015, the applicable Regulation Wages Order provided for Kshs. 10,911.70 as the minimum wage. There was no underpayment therefore.

30. In the upshot, under this head I award the claimant Kshs. 34,485.30.

House allowance

31. Regarding house allowance, I have taken into consideration the provisions of section 31 of the Employment Act and the Regulation of Wages (General) Order Regulation 4 and conclude that the claimant is entitled to compensation for unpaid house allowance at 15% of the monthly remuneration. However, the compensation shall be limited only to 10 (months). Therefore, an award of Kshs. 16,432.05.

Unpaid leave for 3 years

32. It is express, that the court cannot make and award for a period that the claimant never proved. It is clear that the court has taken a position that the claimant has only managed to prove 10 (ten) months of work for the respondent. I can only award leave pay prorated to the ten (10) months. Therefore, Kshs. 5,750.86.

Service pay

33. Considering that the working period has been taken to be ten (10) months, severance pay is awarded at Kshs. 7,373,275.

Wages for days worked for February 2016

34. There is no prove that the claimant was paid his dues for the days that he worked in February 2016. He is consequently awarded Kshs. 7,162.61.

Compensation under section 49 (1) (c) of the employment Act

Section 49 (1) (c) of the Employment Act, 2007, bestows upon this court authority to make a compensatory award to an employee, whom it finds has been unfairly terminated. Of course, the award is subject to the discretion of the court. Considering the uncaring manner in which the termination of the claimant's employment was done, and the given non-compliance of the law by the respondent, I make an award under

this head to an extent of nine (9) months gross salary, amounting to Kshs. 98,592.30.

In the upshot, Judgment is hereby entered in favour of the claimant for: -

- a) One month's salary in lieu of notice – Kshs. 10,954.70
- b) Salary underpayment – Kshs. 34,845.30
- c) Unpaid house allowance – Kshs. 16,432.65
- d) Unpaid leave allowance – Kshs. 5,750.85
- e) Service pay – Kshs. 7,373.275
- f) Wages for days served in February 2016 – Kshs. 7,162.61
- g) Compensation pursuant to section 49 (1) (c) of the Employment Act. – 98,592.30
- h) Interest at court rates from date of filing suit.
- i) Costs.

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

OCHARO KEBIRA

JUDGE

Delivered in presence of

Mr. Kariuki for the claimant

No appearance for the respondent