



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1199 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

JACKSON MULEI NYAMAI **CLAIMANT**

VERSUS

SIMON KINGORI T/A ROADSIDE/FARMERS

CENTRE (ANIMAL FEEDS) **RESPONDENT**

JUDGMENT

On 16th July 2012, the Claimant filed this claim seeking the following reliefs-

- i. A declaration that the Claimant's termination from his employment was unlawful and unfair.
- ii. The Claimant be paid his terminal benefits amounting to Kshs.695,599.15 as particularized herein below-
 - a. 1 month's salary in lieu of notice at Kshs.9,732.45.
 - b. Leave (9,732.45 x 6) amounting to Kshs.58,394.70.
 - c. House allowance (1,269.45 x 12 x 6) amounting to Kshs.91,400.40.
 - d. Overtime (3 x 6 x 72 x 47) amounting to Kshs.243,646.00.
 - e. Public holiday ({10 days x 6 x 374.325} = 24,705 x 2) amounting to Kshs.49,410.90.
 - f. Service gratuity (4866.255 x 6) amounting to Kshs.29,197.35.
 - g. Off duty (4 x 12 x 6 x 374.325) amounting to Kshs.107,805.60.
 - h. Salary underpayment
({8,463 – 6,000} = 2,463 x 71) amounting to Kshs.174,873.00.
April (8,463 – 7,000) amounting to Kshs.1,463.00.
 - i. 12 months compensation due to unfair termination (9,732.45 x 12) amounting to Kshs.116,789.40.
 - j. Certificate of service.
- iii. The Respondent be ordered to compensate the Claimant for wrongful termination at the equivalent of 12 months' gross salary.
- iv. The Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- v. The Respondent to pay the costs of this claim.

vi. Interest on the above at court rates.

vii. The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of section 51 of the Employment Act 2007.

The Claimant avers that on 6th June 2006, the Respondent employed him as a night guard earning a salary of Kshs.4,500.00. His salary was increased from time to time. In April 2012 he was earning a salary of Kshs.7,000.00 exclusive of house allowance. He also avers that on 24th December 2009, he was transferred to Farmers Centre in the same capacity and terms.

It is his case that he diligently worked for the Respondent until 4th May 2012 when his services were unlawfully terminated. He avers that he was never given a notice to show cause, a fair hearing or a termination notice. In addition, he avers that the Respondent refused to pay his terminal dues.

During examination in chief, the Claimant testified that he worked from 6 pm to 6 am and on public holidays but was not paid for the extra hours and days. He denied absconding duty and further denied that he was ever issued with a warning letter before his employment was terminated. It was his testimony that he worked until 4th May 2012 when he arrived at work 15 minutes late and was summarily dismissed.

During cross examination, he testified that he had no document to prove that his salary had increased to Kshs.7,000. It was his testimony that he was entitled to house allowance but denied having any document to prove that he was entitled to house allowance. It was his testimony that he did not take his leave days as his leave applications were rejected. He maintained that he was paid monthly. He conceded that he did not have a contract to justify an award for service gratuity.

The Respondent filed a defence on 23rd August 2012 contending that the Claimant was engaged as a watchman in February 2008, on a casual basis.

It is the Respondent's case that the Claimant was required to report to work at 6:00 pm but arrived as late as 9:00 pm and 10:00 pm on numerous occasions and would leave in the middle of the night. Further, the Claimant would sometimes absent himself for a day and sometimes for 2 weeks, forcing the Respondent to find someone to stand in for him.

The Respondent states that the Claimant was discontinued about 4 times for absconding duty. That the Claimant was discontinued on 6th April 2011 and 4th May 2012. The Respondent contends that the claimant's services were not terminated but rather, he just stopped showing up.

SIMON KARORI KINGORI testified as RW1. It was his testimony that he engaged the Claimant in February 2008 at a daily wage of Kshs.180.00, paid weekly. He stated that the Claimant was to work from 6 pm to 6 am. It was his testimony that on the days the Claimant absconded duty and RW1 failed to find a replacement, he slept in the premises. He stated that the Claimant was given several warnings.

It was his evidence there was no agreement to pay house allowance and overtime. He testified that there was no day the Claimant sought an off and he declined to give him.

Upon cross examination, RW1 stated that the Claimant did not go on off days. It was his evidence that the Claimant's daily wage of Kshs.180.00 was reviewed to Kshs.250.00. He conceded that he did not remit NHIF or NSSF payments on behalf of the Claimant neither did he pay overtime.

He stated that the Claimant was not paid terminal dues because he was paid according to the contract. It was his evidence that the Claimant was not issued with a Certificate of Service. He admitted that save for the arrows that went missing, his property was never stolen while the Claimant was at work.

RW2, GEOFFREY WARUTERE, testified that RW1 would call on him to stand in for the Claimant whenever he was absent. He stated that the longest he had worked in the Claimant's absence was 2 weeks. Further, the Claimant was not dismissed, rather, he absconded duty.

He led evidence to the effect that he was not paid house allowance as a casual employee as he was not entitled to the same.

On cross examination, he testified that he was not Mr. Kingori's employee and would only work for him when the Claimant was absent.

Submissions by the Parties

The Claimant submits that the Respondent failed to involve him in the termination process by failing to adhere to the procedure outlined in section 41 of the Employment Act.

The Claimant submits that he is entitled to house allowance and notice pay because the same was never paid to him. He submits that he is entitled to service gratuity pursuant to section 35 (6) as he had worked for the Respondent for 5 years. He urges that he is entitled to compensation for working overtime, during public holidays and on his off days.

The Claimant also submits that he is entitled to 6 years leave pay as he never took his leave days; and salary underpayments as he was paid below the minimum wage.

The Claimant submits that he is entitled to 12 months' compensation having been unfairly terminated. The Claimant prays to be awarded costs of the suit.

The Respondent submitted that the applicable law is the Repealed Employment Act since the Claimant was employed in February 2008. Consequently, the Claimant was not entitled to a fair hearing as employers had the discretion to terminate employment. He relies on the case of *Kenya Revenue Authority vs. Festus Kipkorir [Civil Appeal No. 1 of 2004]*.

The Respondent further submits that the reason for terminating the Claimant's employment was justified because he absconded duty on numerous occasions.

The Respondent submitted that the Claimant is not entitled to notice pay as he absconded duty. He submits that the Claimant is not entitled to the reliefs sought.

Analysis and Determination

I have considered the pleadings filed by the parties, their evidence and the written submissions filed and find that the following are the issues for determination before this Court-

- (a) The law applicable to this suit.
- (b) Whether the Claimant was a casual.
- (c) Whether the Claimant's employment was unfairly terminated by the respondent.
- (d) Whether the Claimant is entitled to the reliefs sought.

The Applicable Law

The claimant having worked up to 2012, the applicable law is the Employment Act, 2007.

The Nature of the Claimant's Employment

The Claimant's evidence that he worked for the Respondent continuously until the time of his termination was not controverted by evidence from the Respondent.

The Respondent admitted in both his pleadings and testimony that he employed the claimant from 2008 but intermittently. He however failed to produce records as required under Section 10(6) as read with Section 10(7) of the Employment Act which provides as follows-

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

Further, the Respondent and George Warutere gave evidence that George would replace the Claimant whenever he absconded duty. This clearly shows that the nature of the employment relationship between the Claimant and the Respondent was not casual as he had worked longer than 30 days and his employment had converted to a regular contract of service pursuant to Section 37(1) of the Employment Act.

Termination

It was the Respondent's evidence that the Claimant absconded duty, never to return. He however conceded that he never issued the Claimant with a letter for absconding duty. Further, the Respondent admitted to terminating the Claimant's services. In his evidence he stated –

“... I told him he was not keen on the job and it is better for him to leave. He left and never came back.”

This is a clear demonstration that the Claimant was summarily dismissed without notice and without being subjected to a disciplinary hearing. As such, the termination of his employment was unfair in terms of Section 45(1) and (2) of the Act.

Reliefs

The Claimant sought payment of house allowance, payment in lieu of leave, salary underpayment, overtime, compensation

for the public holidays and off days worked.

I will deal with the issue of house allowance and underpayments together. The respondent denied both prayers and testified that he paid the claimant according to their contract.

Under Section 3(6) and 26 of the Employment Act, any contract to employ on terms inferior to those provided for in the Act is illegal, null and void. And under Section 48(1) of the Labour Institutions Act the court is required to read into a contract the statutory minimum terms of employment. The statutory minimum wages in 2008 were those under the Regulation of Wages (General) Order 2006, the same having not been amended until 2009. The basic minimum wage for a night watchman in 2006 was Kshs.5,796 with house allowance of 15% per month being Kshs.869.40. The consolidated minimum monthly wage was therefore Kshs.6,665.40. This is what the claimant was entitled to from February 2008 when he started working up to April 2009 when the same was amended to Kshs.6,839 with 15% house allowance of 1,026 making a gross of Kshs.7,865. The minimum wage for 2010 was Kshs.7,525 (basic) and house allowance of Kshs.1,129 and 8,652 gross. Basic minimum wage for 2011 was Kshs.8,463 with house allowance of Kshs.1,270 being a gross of Kshs.9,733 which was payable up to 30th April 2012. The claimant was dismissed on 4th May 2012.

The underpayments of both minimum wages and house allowance was therefore as follows –

(i) From 2006 to April 2009 (Kshs.6,665.40 – 4,500) = 2,165.40 x 35 months = Kshs.75,789.

(ii) From May 2009 to April 2010 (Kshs.7,865 – 7,000) = 865 x 12 = Kshs.10,380

(iii) From May 2010 to April 2011 Kshs.8,655 – 7,000) = 1,655 x 12 = Kshs.19,860

(iv) From May 2011 to April 2012 (Kshs.9,733 – 7,000) = 2,733

x 12 =Kshs.32,796

Total underpayments of basic wage and house allowance was **Kshs.138,825**.

The claimant further testified that he never went on leave. This was admitted by the respondent. Leave is provided for under the Employment Act at 21 days per year. Having worked from June 2008 to 4th May 2012, he is entitled to leave for 4 years being 84 leave days. This works out at **Kshs.31,445** which I award the claimant.

He further prayed for overtime. The respondent admitted that the claimant worked from 6 pm to 6 am without off days thus he worked a total of 84 hours per week instead of 52 being the prescribed maximum hours per week under the Regulation of Wages (General) Order which provides that any hours over 52 per week is paid for as overtime. He thus worked 32 overtime hours per week out of which 12 hours are payable at double the minimum rate of pay (rate for off days and public holidays) and the remaining 20 at (1.5 time) being overtime rate for normal working days. For 52 weeks in a year, this being a continuing injury, the claimant is entitled to 1040 hours at 1.5 rate and 624 hours at double rate. I award him the same as follows –

Normal overtime **Kshs.243,646**

Public holidays and off duty **Kshs.157,215**.

I have awarded what was prayed for by the claimant although my workings would amount to a much higher rate using the formula provided at Rule 6 of the Regulation of Wages (General) Order which provides as follows –

6. Overtime

(1) Overtime shall be payable at the following rates—

(a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;

(b) for time worked on the employee's normal rest day or public holiday at twice the normal hourly rate.

(2) For the purpose of calculating payments for overtime in accordance with subparagraph (1), the basic hourly rate shall, where employees are not employed 'by the hour, be deemed to be not than one two-hundred-and-twenty-fifth of the employee's basic minimum monthly wage.

(3) Notwithstanding subparagraphs (1) and (2) of this paragraph «ml paragraph 5, overtime plus time worked in normal hours per week shall not exceed the following number of 'hours in any period of two consecutive weeks—

(a) one hundred and forty-four hours for employees engaged in night work;

(b) one hundred and sixteen hours for all other adult employees.

The claimant is entitled to pay in lieu of notice at **Kshs.9,733**. The claimant is also entitled to service pay at **Kshs.22,460.80**.

Having been unfairly terminated and taking into account all the circumstances of the claimant's case as well as the relevant factors under Section 49(4) of the Employment Act, I award him 6 months' salary as compensation being **Kshs.58,398.00**

I thus award the claimant a total sum of Kshs.661,723/=

The respondent shall also issue a certificate of service to the claimant and pay claimant's costs of the suit. Interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE