



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.121 OF 2018**

**GILBERT ISANDULA SHIKALO.....CLAIMANT**

**VERSUS**

**BERNARD NJOROGE T/A CREATIVE METRO SERVICES.....RESPONDENT**

**JUDGEMENT**

The claimant is a mail adult and the respondent is an individual operating as Creative Metro Services and operating a garbage collection from in Nakuru.

The claimant was employed by the respond ton 30<sup>th</sup> June, 2008 as a loader at a salary of ksh.250 per day all being ksh.1,500 per week and Ksh.6,000 per month which he earned until 12<sup>th</sup> February, 2018 when his employment was terminated.

The claim is that the work hours were 6am to 7pm all being 13 hours and without compensation.

On 12<sup>th</sup> February, 2018 the claimant together with other colleagues was informed that on 10<sup>th</sup> February, 2018 they failed to collect garbage at Merica Hotel and the respondent had decided to terminate their employment. The claimant tried to explain that the failure to collect the garbage was occasioned by breakdown of the garbage collection truck whereof they arrived at Merica hotel at 7pm where they were turned back as it was late.

The claimant had diligently worked for the respondent for 10 year. There was no notice, hearing or payment of terminal dues.

The claimant is claiming his dues as follows;

- 1a) Underpayment of wage ksh.397,671.24;
- b) Off duty Ksh.244,214.24;
- c) Public holidays ksh.121,408.62;
- d) Notice pay Ksh.13,029.60;
- e) Annual leave pay Ksh.99,077.79;overtime Ksh.948,615.28;
- f) Service pay/severance pay Ksh.71,214.37;
- g) Compensation; and
- h) Certificate of service.

The claimant testified that he started work with the respondent from the year 2007 in the business of collecting garbage from the estates, central business district of Nakuru and on 30<sup>th</sup> June, 2008 he was employed on full time basis and allocated motor vehicle KAH 335J. it was oral terms and conditions to offload waste bins and paid a daily wage of ksh.250.

The claimant also testified that his manager was Gachara.

Work hours were 6am to 7pm and had to look for a time to take lunch. total work days 6 each week but remained at work during public

holidays. No annual leave was allocated.

On 12<sup>th</sup> February, 2018 the respondent dismissed the claimant without a hearing or notice of being paid terminal dues. on 10<sup>th</sup> February, 2018 the allocated vehicle developed mechanical problems and only started work at 4pm and not able to collect garbage at Merica Hotel at 6pm and were denied access as they said it was late. On 11<sup>th</sup> February, 2018 was a Sunday and 12<sup>th</sup> a Monday when the claimant was dismissed.

The claimant also testified that the respondent did not keep any work records and all communications were oral.

The defence is that the claimant was employed as a casual worker when there was work in the garbage collection department. The claim that there was unlawful termination of employment is not true as the claimant deserted his duties. Garbage would be collected from 8am to 5pm without overtime work.

The defence is also that on 10<sup>th</sup> February, 2018 the claimant refused to collect garbage at Merica Hotel without any reasonable cause and which occasioned the respondent great loss.

There was no underpayment or work during public holidays. The workers had an 8 hours shift in a day and when work was available. The suit was filed prematurely and before the labour officer could address. The claims made should be dismissed with costs.

No witness was called.

No work records were filed.

Both parties filed written submissions.

The claimant submitted that under section 9(2) and 10(6) and (7) of the Employment Act, the employer is required to file work records which the respondent has failed to address. The claims made by the claimant have not been disapproved as held in the case of **David Kipkosgei Muttai versus Green Palms Academy [2014] eKLR**.

The claimant also submitted that there was unlawful termination of employment as there was no notice, hearing or payment of terminal dues in underpayments, annual leave, off days, public holidays and notice pay. The claimant relied on the cases of

**Stanley Onchwari versus Board of management Nakuru YMCA Secondary School [2005] eKLR; Dickson Matingi versus DB Scheker limited [2016] eKLR.**

The respondent submitted that the claimant failed to attend to his duties on 10<sup>th</sup> February, 2018 and which occasioned the respondent losses. Efforts to trace the claimant failed as after such date he failed to attend work and the matter as reported to the labour officer on 26<sup>th</sup> February, 2018 but the claimant failed to attend. Section 41 of the Employment Act, is not applicable. Leaving the work station and not returning is repudiation of contract as held in **Daniel Mueke versus Bhogals Auto World [2014] eKLR**. no notice pay is due or compensation. The claimant is not entitled to gratuity as claimed. The claimant was not working on a daily basis to earn annual leave, overtime is not due as work shift was 8 hours and the employees were not working on public holidays. The alleged underpayment is not true as the claimant was a casual worker and paid a daily wage when at work.

The failure by the respondent to call any witness, file any work records and keep the employment terms of the claimant verbal leaves this court with the evidence of the claimant. As submitted by the claimant, section 10(6) and (7) of the Employment Act, 2007 is in mandatory terms. Upon the filing of the claim, the employer has the statutory duty to file all work records with regard to the employee to enable the court assess the claims made.

Without any work records, the respondent as the employer, whether casual worker or full time worker is left without any evidence. the court must believe the claimant was in the continuous service of the respondent from the 30<sup>th</sup> June, 2008 to 12<sup>th</sup> February, 2018 when his employment was verbally terminated.

It is not contested that on 10<sup>th</sup> February, 2018 the claimant was not able to collect garbage at Merica Hotel as required of his employment with the respondent. the claimant's reasons are that the allocated vehicle developed mechanical problems. The respondent asserts that the claimant failed to attend to his duties are allocated for no good or reasonable cause.

The claimant testified that he was managed in his duties by a Mr Gachara. When the allocated vehicle developed mechanical problems he does not state what he did to alert his manager. Where his daily wages were paid at the office, he had a chance to alert such office once faced with a work challenge which as a reasonable employee he failed to attend.

The claimant also testified that when he reported to work on 12<sup>th</sup> February, 2018 he was called and sent home. The operations of the respondent were fundamentally oral. At such time the claimant knew he had not collected garbage at Merica Hotel on 10<sup>th</sup> February, 2018 and although he had his own explanations, he had not addressed such matter with the employer until after two (2) days.

Summary dismissal is allowed under the provisions of section 44(4) read together with section 41(2) of the Employment Act, 2007. Where the employee commits acts of gross misconduct, the employer has the right to dismiss the employee upon short notice and after notifying the employee of the matter leading to such dismissal.

In this case, the claimant having failed to attend to his allocated duties, with two days to bring this to the attention of the employer and which he failed to address, the sanction of summary dismissal is hereby found justified.

Compensation and notice pay is not due in a case where summary dismissal is found justified.

The claimant also testified that he worked for 6 days each week. I take it he had a day of rest. The claim for pay for untaken rest days is therefore not justified.

Without the respondent filing any work records the claims for underpayments shall be assessed based on the applicable wage orders.

On the evidence, the claimant worked continuously and without stoppage from July, 2008 to 10<sup>th</sup> February, 2018. Where the respondent treated the claimant as a general worker or a casual employee, by application of section 37 of the Employment Act, 2007 the continuous service converted to full time employee with benefits under the Employment Act, 2007. See **Rashid Mazuri Ramadhani & 10 others versus Doshi & Company (Hardware) Limited & another [2018] eKLR;**

*... Section 37 is the one which empowers the Employment and Labour Relations Court (ELRC) to convert a contract of service of an employee engaged on a casual basis, to one where such an employee is deemed to have been engaged under a contract of service and thereby entitling him/her to monthly wages and other benefits such as leave and certificate of service.*

Annual leave is due for the period of 18 months not taken in accordance with section 28(4) of the Employment Act, 2007 and in the context of the Court of Appeal findings in the case of **E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR.**

For work during public holidays, this shall is also not challenged in the absence of any work records.

On the claim for overtime, the claimant testified that he would report for work at 6am and depart at 7pm. He would get time within his day for lunch. In the Memorandum of claim the claimant has laid the basis of his claim for overtime at 13 hours with 5 hours overtime work for 6 days each week. With the lunch hour removed, the tabulation of overtime work should be for 4 hours only for 6 days each week.

Without evidence of the respondent's compliance with section 35 (5) of the Employment Act, 2007 service pay is due to the claimant for the 9 full years served based at the rate of 15 days.

A certificate of service should issue in accordance with section 51 of the Employment Act, 2007.

**Accordingly, the matter is hereby referred to the Labour Officer, Nakuru for tabulation of dues owing to the claimant in the following terms;**

- a) Leave days owing for a period of 18 months only and based on the last basic wage as at 10<sup>th</sup> February, 2018;**
- b) Underpayments from 1<sup>st</sup> July, 2008 to 10<sup>th</sup> February, 2018;**
- c) Payment for public holidays dues for the period (b) above;**
- d) Overtime pay for 4 hours for 6 days each week;**
- e) Service pay at the rate of 15 days for 9 full years served;**
- f) The dues above shall be subject to the provisions of section 49(2) of the Employment Act, 2007;**
- g) The claimant shall be issued with a Certificate of Service within the provisions of section 51 of the Employment Act, 2007;**
- h) Mention in 45 days to confirm the Labour Officer tabulations; and**
- i) Costs of the suit.**

Delivered at Nakuru this 23<sup>rd</sup> day of January, 2020.

**M. MBARU**

**JUDGE**

In the presence of: .....