



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.137 OF 2017

NICHOLAS CHUNGULI KADUKACLAIMANT

VERSUS

KAKAMEGA MILLENIUM DIESEL WORKS.....RESPONDENT

JUDGEMENT

In January, 2011 the claimant was employed by the respondent as a general worker and without a written contract of employment. The daily wage was ksh.300 per day and which was increased to Ksh.350 in January, 2016.

In August, 2016 the respondent terminated the claimant's employment. The respondent accused the claimant of theft and was arrested and placed in police custody and then released without any charges. The claimant reported the matter to the labour officer for his terminal dues but the respondent refused to pay.

The respondent underpaid the claimant, there was no due process in the termination of employment and the owing dues were not paid.

The claimant is seeking the following dues;

- a) Underpayments from the year 2012 to 2016 ksh.186,055.04;
- b) Notice pay Ksh.11,623;
- c) Work during public holidays ksh.45,403.60;
- d) Leave days Ksh.43,339.80;
- e) Service pay Ksh.36,322.50; and
- f) Costs.

The claimant testified that he was employed by the respondent on verbal terms in January, 2011 and paid ksh.300 per day all paid each Saturday. This was increased to ksh.350 per day for work from Monday to Friday but his employment was terminated in August, 2016 on a Friday on the grounds that work had reduced and he was paid for the day and told to leave immediately.

The claimant also testified that he had worked for the respondent continuously for 5 years without stoppage. He reported the matter to the labour officer but the respondent refused to attend or pay terminal dues.

In cross-examination the claimant testified that he was issued with letter of employment on 28th May, 2013 to take to NSSF. He had by then started working for the respondent on dates he cannot recall. He was being paid ksh.300 per day and would sign a voucher for 5 days each week.

He claimant also testified that work reduced and his employment was terminated.

The respondent was dealing with charcoal and this stopped.

The respondent would pay for NSSF.

Defence

The defence is that the claimant was employed as a general worker on 28th May, 2013 and worked intermittently. The respondent reported a case of suspected theft to the police and upon investigations the claimant was arrested and later released.

The defence is also that in early 2016 the respondent started experiencing financial difficulties due to prevailing harsh economic time and was compelled to scale down its utilisation of casual labour as a result of which the claimant withdrew his services on his own volition and without communication.

The claims made are without basis, the claimant was registered with NSSF and not entitled to claims made.

The defence is also that the claim is defective as the Verifying Affidavit is not commissioned and violates Rule 4(2) of the Employment and Labour Relations Court Procedure Rules, 2016.

Bernard Kipkemoi Rotich testified that he has worked for the respondent for the last 13 years as manager and supervisor and worked with the claimant who was a casual worker. The respondent was dealing in charcoal and from May, 2013 the claimant was employed when work was available and without continuous service as such work was part time. The claimant was then found to have stolen, he was arrested and did not return to work and the respondent since stopped the charcoal business.

Mr Rotich also testified that the claimant would be paid ksh.00 when at work and this was increased to kh.350 per day and paid weekly and signed a voucher. The claims made are without basis.

At the close of the hearing both parties filed written submissions.

Paragraph 13 of the defence is that the claim is defective as the Verifying Affidavit is not commissioned and contrary to Rule 4(2) of the Court Rules.

This issue ought to have been addressed instantly.

The court record is that the Memorandum of Claim filed on 29th March, 2017 is supported by a Verifying Affidavit of the claimant and commissioned on 23th March, 2017 by Nyamwange Caleb Bichang'a, Advocate & Commissioner for Oaths.

The suit is properly filed.

The respondent has relied on the NSSF statement to support the defence that the claimant was employed from May, 2013. The claimant challenge this fact and on the basis that his employment was from January, 2011.

An NSSF statement is not evidence of employment. It is a statutory requirement for all employer to ensure the employee is deducted and there is remittance of the due statutory dues.

Section 10 of the Employment Act, 2007 (the Act) requires the employer to issue the employee with a written contract of employment and even where such employment is on casual terms to keep a record of such employment so that where there is a dispute with regard to the nature of employment such record is to help the employer in its defence and assist the court in assessing the owing dues. without any work record with regard to when employment commenced the claimant's evidence is taken at true. The NSSF statement cannot confirm employment or replace the contract of employment envisaged under section 10 of the Act.

However, even where there are no work records and the claimant is to be believed that Employment commenced in January, 2011 immediately and upon termination of employment, he made a report to the labour officer and made a claim for work for 3 years and thus the terminal dues assessed by the Labour Officer for leave and underpayments, relate to his employment with the respondent for 3 years.

This shall be the basis for assessment of any terminal dues.

The claim as pleaded is that in August, 2016 the respondent caused a report and arrest of the claimant with the police on the grounds that there was theft. In his evidence the claimant testified that his employment was stopped by the respondent on the grounds that work had reduced.

On these conflicting facts by the claimant, the claim for unfair termination of employment is found without basis. Notice pay is also lost.

These payments relates to;

9th December, 2016 pay for work for 7 days;

2nd December, 2016 pay for work for 5 days;

25th November, 2016 pay for work for 5 days;

In total the claimant was at work for the full month of November, 2016, October, September, and the full year, 2016. This is replicated in the year 2015.

The daily wage paid is inclusive of NSSF payment. Where the claimant is paid ksh.350 each day, the total pay each month is ksh.10,900 on average each month in the year 2016.

In the year 2015 the claimant was paid ksh.300 each day all being Ksh.9,400 each month inclusive of the NSSF. This is replicated in the year 2014 and 2013.

The stated underpayments shall be assessed on this basis.

The first voucher filed by the respondent is the one for 20th July, 2013 for ksh.1,800 for 6 days' pay at ksh.300 each. Under the Regulation of Wages (General) (Amendment) Order, 2013 effective 1st May, 2013 the due minimum wage was ksh.432.40 per day. The claimant was paid ksh.300 per day all ksh.9,000 plus the NSSF total paid ksh.9,400 per month. The underpayment each day is Kshs. 132.40 And each month is kh.3,972 less 400 to NSSF all at ksh.3,572. From July, 2013 to April, 2014 the claimant is entitled to ksh.32,148. From May, 2014 to April, 2015 the minimum wage was ksh.432.30 and the claimant was paid Ksh.300. total underpayment less NSSF remittances is ksh.42,720. For the period of May, 2015 to December, 2015 the claimant was paid ksh.300 per day instead of Ksh.484.40 and the underpayment for 6 months is Ksh.30,792. From January, 2016 the claimant was paid ksh.350 per day instead of Ksh.484.30. For the 7 full months worked in the year 2016 the underpayment is Ksh.25,340.00.

Total underpayments is ksh.131,000. Without a work record filed save for payment vouchers, the same payment vouchers speaking to continuous employment of the claimant continuously and without stoppage for 3 years, the claimant is entitled to leave pay in accordance with section 28 of the Act. the labour officer correctly assessed this to ksh.21,224.90.

Accordingly, judgement is hereby entered for the claimant for the payment of the following dues;

- a) Underpayments Ksh.131,000;**
- b) Leave pay ksh.21,224.90;**
- c) Each party shall bear own costs.**

Delivered at Nakuru this 23rd day of January, 2020.

M. MBARU

JUDGE

In the presence of: