



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.37 OF 2018

JOHN MWANGI MAINACLAIMANT

VERSUS

GOLDEN CARA INVESTMENT LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent as a Lab Assistant in the plant mechanic department and issued with the employment contract in November, 2014.

The claimant worked until April, 2017 when his employment was unfairly terminated without notice or payment of the terminal dues. The claimant was earning ksh.15, 000 per month working from 6am to 6pm without payment for the overtime. The claimant was not allowed annual leave and the wage paid was less the due house allowance.

The claimant worked for the respondent from July, 2014 to April, 2017.

The claims are for the payment of the following dues;

- a. Notice pay Ksh.17, 250;
- b. Overtime pay ksh.369, 415.38;
- c. Off duties/rest days Ksh.246, 276;
- d. Gratuity Ksh.43, 125;
- e. Annual leave pay ksh.30, 187;
- f. Compensation;
- g. Certificate of service; and
- h. Costs.

The claimant testified that upon employment by the respondent he worked for 12 hours each day for 7 days each week without compensation for the overtime worked. In April, 2017 his employment was terminated verbally without being given any reason, no reasons or a hearing which was unfair as he had been attending to his duties diligently.

The defence filed comprise mere denials that that employment did not commence in July, 2014 and there was no payment of Ksh.15, 000 as alleged. The claim should be dismissed.

No evidence was called by the respondent. There was no attendance on the allocated date despite the hearing date being allocated by consent.

The respondent did not file the work records.

The claimant filed written submissions.

In view of the defence herein, the same comprised of mere denials and without any work records, the claims made shall be assessed on their merits and based on the applicable law.

In employment and labour relations, the employee is only required to abide the provisions of section 47(5) of the Employment Act, 2007 and the burden of discharging the burden of proof that there were genuine and justified grounds of termination or dismissal of employment is placed upon the employer.

Section 43 of the Employment Act, 2007 requires the employer to give the reason(s) leading to termination of employment. In **Kenya Power & Lighting Company Limited versus Aggrey Lukorito Wasike [2017] eKLR** it was held that;

Under **Section 43** of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he **“genuinely believed to exist,”** causing him to terminate the employee’s services.

In the instant case without any reasonable defence and the respondent having failed to attend court to urge its case, the court finds no reasonable cause to justify termination of employment. There was unfair termination of employment contrary to section 45 of the Employment Act, 2007.

Notice pay is due based on the last gross wage due at Ksh.17, 250.

Compensation is due under section 49 of the Employment Act, 2007 at one (1) month all at ksh.17, 250.

Without the respondent filing the work records on the nature of the gross wage paid and what is constituted, the notice pay and compensation is paid inclusive of the house allowance due.

The outstanding house allowances though due were not claimed.

On the claim for overtime worked said to be for 12 hours each day for 7 days each week and for the entire duration of employment, without a rest day or annual leave, these claims stand exaggerated, the court shall refer to the County Labour Officer, Nakuru for investigation with the respondent and submit a report with the court in this regard.

On the claim for gratuity pay, this is only due where there is a private treaty, agreement of a written contract setting out gratuity as a benefit. Where the respondent did not address the payment of the due statutory dues, the remedy is not to claim for gratuity pay. Such is declined.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

a. Compensation awarded at ksh.17,250;

b. Notice pay Ksh.17,250;

c. The above addressed, the matter herein is referred to the County Labour Officer, Nakuru for an investigation at the respondent entity for work records to ascertain the work hours, the due overtime hours, rest days, annual leave and a tabulation thereof within 30 days.

d. The claimant is awarded costs.

e. The costs due to the County Labour Officer shall be met by the respondent.

Mention on 26th March, 2020 for the County Labour Officer report.

Delivered at Nakuru this 27th day of February, 2020.

M. MBARU

JUDGE

In the presence of: