



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAKURU
CAUSE NO.81 OF 2014
NICKSON AYWA AMUTSAMA.....CLAIMANT
VERSUS
SIR BROOK (K) LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 1st August, 2010 as a casual worker in loading department earning ksh.379 per day all being ksh.11,370 per month. Employment

The claim is that employment suspended for a week on 2nd colleague. was wrongfully terminated after the claimant was to 11th February, 2013 on alleged speaking to a

On 2nd February, 2013 the claimant was sent away by the manager Ramnik Laih Shah and he was to resume duty on 11th February, 2013 for allegedly talking to a colleague. On 12th February, 2013 he was called by Daniel Osore and advised not to resume duty. The claimant decided to report on duty on 26th February, 2013 but he was summoned by the supervisor and sent away.

The claimant felt he was left in limbo and therefore on 6th September, 2013 he decided to demand for his terminal dues. on 20th September, 2013 the respondent replied and admitted there was no payment of terminal dues. parties engaged in negotiations but there was no agreement.

The claimant is seeking the payment of his dues as follows;

- a. Notice pay ksh.16,860;
- b. Unpaid leave days for the year 2011 at 28 days ksh.13,787.20 Unpaid leave days for the year 2012 at 28 days ksh.15,593.20;
- c. Underpayments
2010 at ksh.7,748.40;
2011 at ksh.35,494.20;
2012 Ksh.55,682.70.
- d. Service gratuity Ksh.13,265;
- e. Service pay Ksh.136,440.

The claimant testified that upon employment as a casual worker in the year 2010 he was paid ksh.315 per day and his last paid wage in February, 2013 was ksh.379 per day which was underpayments.

The manager found him speaking with a colleague on 2nd July, 2013 and sent him home. It was verbal and not written. After a week he returned but was not allowed to resume duty.

On 8th July, 2013 he made effort to return to work but the supervisor Osore told him to go home.

The claimant also testified that the defence is that he was found drunk while at work which is not true. He did not desert work. He was not allowed a hearing, warning or paid his terminal dues.

Upon cross-examination, the claimant testified that he was suspended by the director on 22nd February, 2013 for 7 days. On the muster roll he is recorded as present on 6th February, 2013 similarly on 4th February, 2013. He was also paid. There is no letter terminating employment.

The defence is that the claimant was employed in November, 2010 and placed under probation for 2 months. He was confirmed in January, 2011 as a casual worker and paid a daily wage of ksh.298.15 from January, to April, 2011; Ksh.335.40 from May, 2011 to April, 2012 and ksh.379.30 from May, 2012 to February, 2013. The wages paid were in pursuant to the wage orders.

In January, 2011 the claimant was registered with the NHIF and NSSf and all remittances made.

The claimant reported to work on 8th February, 2013 and opted to walk away. There was no suspension as alleged.

While the claimant was under the employment of the respondent he would be absent from work without permission on the following dates;

9th to 19th August, 2011; and

27th and 28th July, 2012.

The claimant had the habit of reporting to work while drunk on the following dates;

26th July, 2012;

14th January, 2013;

7th February, 2013;

and 8th February, 2013 when he was requested to go home and return the next day as he was found drunk but he never returned to work until he made demand for his terminal dues on 20th September, 2013.

The claims thus made have no justification and should be dismissed with costs.

Daniel Osore testified that he was initially employed by the respondent as a casual employee and then as supervisor for the year 2002 to date. He worked with the claimant who was his friend and neighbour at their places of residence. Through their friendship, he introduced the claimant to the respondent for employment where he was confirmed in January, 2011. The claimant would be paid a daily wage in accordance with the applicable wage orders the pay wage being ksh.379.

Mr Osore also testified that On 7th February 2013 while at work he was sent out to Eldoret and upon return on 8th February, 2013 the director informed him that the claimant had been sent to deliver good the previous day but he did not attend as directed. He thus went out to find out from the claimant what had happened but he found hi drunk and refused to talk to him. he sent him away with instructions to return the next day but he never did .

The claim that there was suspension on 2nd February 2013 is not correct as he was at work and was paid his wages for the day and he signed. There was work on-going and payment for the week until 7th February, 2013.

Mr Osore also testified that the claimant had a poor record of discipline. He was constantly drunk. He tried to advise him as a friend and as the one who had introduced him to the respondent but he failed to take heed.

The claimant lied in his evidence that he was suspended which is not true. The claims made should be dismissed.

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

The respondent also filed work records.

The claim is that the claimant was suspended from his employment by the respondent on 2nd February, 2013 for a week and when he returned on 8th February, 2013 he was sent away by the supervisor Mr Osore.

In his evidence, the claimant testified that;

...on 2nd July, 2013 at 10am the director found me speaking with a colleague and sent me home. No letter was given. ... on 8th July, 2013 the supervisor, Osore was picking newspapers on the road and when I tried to report to work he told me not to resume duty on

8th July, 2013.

I was to return after 7 days.

The supervisor called me on 11th February, 2013 and told me not to return to work.

After a week on 26th February, 2013 I went to work but at the gate I was told there was no work ...

There is an obvious mix and confusion on dates. On the one hand the claimant testified to events taking place in July, 2013 and then on February, 2013.

Whichever the case, the respondent as the employer filed work records and which show the claimant's work attendance from 1st to 7th February, 2013. He was also paid for work on these days. This evidence was not challenged in any material way.

Consequently, there was no work suspension on 2nd to 7th or 8th February, 2013 as alleged. The claimant remained at work with the respondent on these dates.

The alleged wrongful termination of employment is without foundation.

On the claims made, without the claims for wrongful termination of employment having justification, the claimant not seeking any compensation, notice pay is not due.

On the claims for unpaid leave days, the evidence is that the claimant was employed as a casual employee in November, 2010 and confirmed in January, 2011. He thus remained in the continuous and full time employment of the respondent until 7th February, 2013.

Save for the records on work attendance, there is no evidence that the claimant was allocated his annual leave days in accordance with section 28 of the Employment Act where he was entitled to 21 days of leave or payment in lieu thereof. Having worked continuously as a casual employee, the claimant became protected under the provisions of section 37 of the Employment Act, 2007 and the rights and benefits therefrom accrued to his employment as held in the case of **Rashid Mazuri**

Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR;

Our reading of **Section 37** of the **Employment Act** reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month. See this Court's decision in **Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others [2017] eKLR.**

Annual leave pay is due.

In the year 2011 the basic wage was ksh.6,999 and the daily rate was Ksh.335.40. The Court shall apply the higher rate of the daily wage. Upon the application of the daily wage due at Ksh.335.40 for the 21 days due the claimant is entitled to ksh.7,043 for annual leave in the year 2011.

In the year 2012, the daily rate is ksh.379 and for the 21 days of annual leave due the claimant is awarded ksh.7,959.

Total annual leave due is ksh.15,002.

On the claims for underpayment the claim is that in the year 2010 the claimant was being paid Ksh.379 per day under paragraph 1.1 of his Memorandum of Claim. He testified that in the year 2010 he was earning Ksh.315 per day. Mr Osore on his part testified that the claimant was earning Ksh.289 per day.

With these conflicting figures, the work records submitted by the employer show that that the claimant was earning a daily wage of ksh.379 by February, 2013. On his own pleadings, the court takes the wage earned in the year 2010 was as stated, Ksh.379.

Under the Wage orders for 2010 the minimum wage was ksh.339.40 and thus there was an overpayment.

In the year 2012 the due minimum wage was ksh.379 and thus the claimant was paid the exact amount due.

There was no underpayment.

On the claims for service gratuity for two years worked, service pay is only due where there are no statutory dues deduction and remittances to the relevant bodies whereas gratuity pay is only payable under an agreement, contract or private treaty. There exists none between the parties herein for the claimant to justify these claims.

With regard to service pay claims, the claimant was registered with NSSF and NHIF and thus these claims are removed by application of section 35 of the Employment Act, 2007.

Accordingly, the claimant is awarded pay in lieu of taking annual leave all at ksh.15,002 only as other claim stand dismissed. Each party shall bear own costs.

Delivered at Nakuru this 6th day of February, 2020.

M. MBARU

JUDGE

In the presence of: