



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.428 OF 2016

MOSES MWANIKI NDERITU.....CLAIMANT

VERSUS

IBRAHIM KINYANJUI

GASHOBE T/A THERASHA GENERAL MERCHANTS.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 23rd November, 2011 as a shop assistant on verbal terms earning ksh.3,200 each month for 2 years and which was increased to ksh.4,500 per month paid up and until termination of employment in December, 2015.

Work hours were 7.30m to 6.30pm a total of 11 hours each day and no payment for overtime hours. The claimant was not allowed a rest day or annual leave. There was no compensation thereof. There was no registration with NSSF.

On 23rd December, 2015 the claimant was sent by the respondent to deliver a box containing glasses to a customer. The claimant was called back by the respondent and called a thief. The police were called and arrested him on allegations of theft where he spent 6 days in custody and charged in court in criminal Case No.3832 of 2015.

There was no warning issued or notice that employment would be terminated.

The claimant claims that he was underpaid and his is claiming the following dues;

- a. Notice pay Ksh.15,693.40;
- b. Underpayments Ksh.593,488.50;
- c. Overtime Ksh.317,734.25;
- d. Leave Ksh.39,357.55;
- e. Gratuity Ksh.31,386.80; and
- f. Compensation.

The claimant testified in support of his case.

The defence is that the claimant was never employed by the respondent and where there was employment, the court cannot be called to rewrite the terms of the contract and what was paid was a stipend not subject to government wage orders. There was no violation of section 27 of the Employment Act as alleged. The claims for underpayment, overtime are without foundation and should be dismissed.

Without prejudice the defence is that the claimant was employed on 11st December, 1995 as a stores clerk and later in stores in charge and whose employment was riddled with minor incidents or lack of diligence. During the audit the respondent discovered that there were goods missing in the stores and the claimant could not give an explanation. The claimant was found to be involved in removing goods from the stores and failed to give an account. A decision to terminate his employment was taken following audit investigations which established the

claimant was culpable.

The defence is also that upon completing the audit the claimant was issued with verbal warning on the gross misconduct but he failed to give satisfactory responses. Employment could not be possible under such circumstances. There was a right to discipline the claimant following gross misconduct. the respondent had lost money through loss of goods involving the claimant.

No evidence was called.

No work records were filed.

The parties agreed to file written submissions. Only the claimant filed.

The respondent's advocates on several occasions asserted that the respondent is since deceased. The court directed the respondent's advocate to address this issue by filing the relevant application but there was no attendance. At the close of the hearing, position remained with the respondent represented by his advocates.

Without the respondent filing the relevant work records with regard to the claimant, the court is left with the claimant's evidence only.

It is trite that the employer is the custodian of work records and these should be produced in court once suit is filed.

The respondent asserted that the claimant was employed on verbal terms on 1st December, 1995 whereas the claimant asserted that he was employed 23rd December, 2011. The claims made relates to the pleaded date of employment. This shall be the commencement date for the assessment of the claims made, the 23rd December, 2011.

The claimant testified that on 23rd December, 2015 his employment was terminated after he was accused of stealing goods at the respondent's business. He was arrested and charged in court, a matter which is on-going. There is criminal Case No.3832 of 2015 on-going.

Despite the respondent not calling any witness, Section 43 (2) of the Employment Act, 2007 allow an employer to terminate employment where there exists a matters that the employer at the time of termination of employment genuinely believes to exist. See **Paul Wachiuri Ndonga versus Keroche Breweries Limited [2018] eKLR** that;

Section 43 and 45 of the Employment Act, 2007 provisions are therefore clear to the extent that;

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

And in **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eKLR** the court held that;

Under subsection 43 (2) of the Employment Act, 2007, the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. ...

Going back to the reason given for the termination, this Court is as under section 43 of the Employment Act bound to look at the validity of the reason or reasons for termination;

...

2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

And the Court of Appeal in the Case of **Kenya Revenue Authority versus Reuvel Waithaka Gitahi & 2 others [2019] eKLR** held that;

The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "**genuinely believed to exist**," causing it to terminate the employee's services. That is a partly subjective test. In the case of **Bamburi Cement Limited vs. William Kilonzi [2016] eKLR** this Court expressed itself on the *nature of proof required as follows*:

"The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds.
...

In this regard, the claimant having been arrested over matters arising from his employment conduct, there being an on-going criminal case, the court finds that at the time employment terminated on 23rd December, 2015 there existed genuine reasons to justify termination of employment.

Notice pay is not due. there is no compensation due to an employee whose employment is terminated for good cause.

On the claims made, even where there exists good basis to terminate employment, the employee is entitled to payment for work done.

Without any work records to challenge the claims for underpayment, overtime accrued for 3 hours each day for 6 days work each week and leave pay due, these shall be assessed by the labour Officer and tabulated accordingly. These dues shall cover the period of 1st December, 2011 to 23rd December, 2015.

Without any work records, the claimant without any written contract, the general wage applicable for a general worker shall apply.

The claimant is also seeking payment of a gratuity. Gratuity is only due under a written contract, private treaty of a collective agreement.

Where the employer has not made statutory remittances, section 35 of the Employment act, 200 allow for a payment of a service pay.

The claimant being represented by an advocate has not claimed for service pay. Gratuity claimed is not due.

Accordingly, the matter is hereby referred to the labour Officer, Nakuru for the tabulation of terminal dues for a general worker from 1st December, 2011 to 23rd December, 2015 for the following;

- a. Underpayment of wages where the claimant was paid Ksh.3,200 per month from 1st December, 2011 to 1st December, 2013 and up and until 23rd December, 2015 when he was paid ksh.4,500 per month;**
- b. Overtime pay for 3 hours for 6 days each week;**
- c. Annual leave pay for the duration of employment; and**
- d. Report to the court within 45 days.**
- e. The claimant shall be paid his costs.**

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

M. MBARU

JUDGE

In the presence of: