



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 889 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

**DENNIS MAISIBA..... CLAIMANT
VERSUS**

ECONOMIC INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

Vide memorandum of claim dated 19th May 2015, and filed on 22nd May 2015, the claimant avers that his employment was unfairly terminated by the respondent. He prays for the following remedies:

- (i) Terminal benefits totalling Kshs.551,707.60*
- (ii) Compensation for unlawful termination as specified in paragraph Costs of this suit.*
- (iii) Interest in (i) (ii) and (iii) above.*
- (iv) Any other relief as the court may deem just.*

He particularises his terminal benefits as follows –

- a) *Holidays for 4 years*
..... (12 x 3) x 13,862 x 1/225 x 3)..... Kshs.8,871.68
- b) *Payment in lieu of leave 4 years*
(4 x 13,862)..... Kshs.55,448.00
- c) *Overtime for four years*
3 x 21 x 12) x 13,862 x 1/225 x 3/12 x 4..... Kshs.279,457.92
- d) *Compensatory damages 12 months*
12 x 13,862..... Kshs.166,344.00
- e) *Gratuity 4 years x 15 days x 13,862..... Kshs.27,724.00*
- f) *Payment in lieu of one month's notice..... Kshs.13,862.00*

Total

and 2 being the descriptive paragraphs and paragraph 3 of the claim to the effect that the claimant was employed by the respondent as Machine Operator. The respondent only admits employing the claimant for a period of 6 months from January to June 2015 at a monthly salary of Kshs.12,075 and not 13,862 as pleaded in the claim. It is the averment of the respondent that the claimant absconded duty and the termination of his employment was therefore justified. Further that the claimant was granted an opportunity to be heard and the termination was therefore fair. It prays that the claim be dismissed with costs.

At the hearing the claimant testified that he was employed in 2020 and the official working hours were from 8 am to 4.30 pm. However most of the time they worked up to 6 pm but he was not paid overtime. He worked for 6 or 7 days a week. That his salary was Kshs.13,862.

He testified that on 11th April 2015, he reported to work as usual at 8 am. However, at 10.30 am he was told to leave and go home as there were issues concerning him. He was told he will be given an explanation later. When he reported to work the following week on Monday he was told that the issue had not been resolved and he should report back on 18th April 2015.

On 18th April 2015, he went to the office and found the supervisor with a Director. They had two bundles of envelopes which they told him to admit stealing and the cost will be recovered from his salary or the police will be called. He testified that one bundle of envelopes contains 1,000 pieces.

He testified that the respondent manufactures books and envelopes and he worked on a machine that cuts and feeds paper into another machine that folds the paper into books and envelopes. He testified that he did not deal with folding. He testified that when he refused to admit, the police were called and he was taken to Masai Police Post. The police asked the respondent to avail witnesses to the police post so that charges could be preferred against the claimant. That the respondent failed to avail any witness and he was released without any charges being preferred against him. He left his telephone number with the police but he was never called to be charged.

The claimant testified that he did not go back to work because he had been given only two options, to admit to stealing the envelopes and continue working or be sacked. He testified that he was not paid salary for April 2015.

The claimant testified that during his employment he never went for annual leave. He further testified that he signed contracts but was never issued with any copy. He however had payslips and KRA P9A tax deduction forms to prove that he worked for the respondent. He prayed that the court awards him terminal dues, overtime, damages for defamation and other prayers as prayed in the claim.

Under cross examination, the claimant reiterated that he signed contracts but was never issued with copies, that he never took leave and that he worked overtime and on Sundays but did not see any overtime payments reflected in his payslips.

He testified that the employees were searched by supervisors and directors when entering and leaving the work premises.

He testified that there were machines for cutting paper and different machines for folding the paper into envelopes. He testified that he was accused of stealing envelopes but was never charged nor did he record any statement. He testified that he was called for disciplinary hearing where he was asked to either admit or leave work. He testified that he was not heard, and did not go back after he was arrested because he was afraid. He testified that he did not ask for payment of his dues because he was not welcome at the workplace and there was no way he would have been allowed to go back there. That his only option was to file a suit in court. He testified that the respondent did not communicate with him after the incident. He denied that he went into hiding.

Under re-examination he stated that he did not deal with or get into contact with finished envelopes.

The respondent's witness MARTHA KALONDU MUSAU (RW1) testified that she started working for the respondent in mid-September 2016. She adopted her witness statement and the respondent's bundle of documents as her evidence in chief. She testified that before employees leave work they are subjected to routine search. That on 11th April 2015 there were envelopes in the clothes of the claimant and another employee Luka Mbuvi. That the two were questioned and denied knowledge of the envelopes. That the Supervisor was called and confirmed the envelopes were in the clothes of the claimant and Mbuvi. That the record reflects that after the two were questioned by the Manager and Supervisor they were asked to report to Head Office. That at the Head Office they were questioned by the Operations Manager and Finance Manager. After that they were taken to the police station. That the two did not report back to work after that. RW1 testified that the company works from 8 am to 4.30 pm with a 30 minutes lunch break from Monday to Friday. That on Saturday they work up to 1 pm. That any work outside working hours was paid for as overtime. That Sundays were not working days. That no one works on public holidays and if they did they were paid at double rate and payment made through the payslip with salary.

RW1 testified that she did not see any letter of termination on the respondent's record. That the Operations Manager told her that the claimant and Mbuvi did not go back to work after release from the police station.

Under cross examination RW1 testified that the respondent manufactures stationery. She testified that she was not sure when the claimant started working for the respondent. That she was not sure if there were contracts in 2010 as the ones she had come across were for 2014 and 2015.

She testified that the Supervisor at the time the claimant left service Mr. Douglas Chumba did not record a statement of what had transpired.

She testified that the only document on record filed by the respondent was a payslip. That there was no record to show the claimant went on leave. Further, that there was no notice of termination on record. That there was also no warning letter on record.

Submissions

Only the claimant filed written submissions. The respondent failed to file its submissions even after being granted further opportunity to do so.

It is submitted for the claimant that he was unlawfully terminated. He relied on the decision in **Mary Kitsao Ngowa and 37 Others v Krystalline Salt Limited** and the case of **Mary Chemweno Kiptui v Pipeline Company Limited**.

Determination

The issues arising for determination from the pleadings and evidence on record are:

1. When the claimant was employed
2. Whether the termination of the claimant's employment was by way of absconding duty or unfair termination by the respondent.
3. Whether the claimant is entitled to the prayers sought.

Date of Claimant's Employment

It is the claimant's averment that he was employed in December 2010 while the respondent avers that the claimant was employed in January 2015.

The claimant attached payslips for October 2012, June, September and October 2014 and March 2015. RW1 testified that there were contracts for 2014 and 2015 on record although in her witness statement she states the claimant only worked for the respondent for 6 months from 6th January to 6th June 2015.

In his supplementary list of documents, the claimant produced KRA P9A tax deduction form for 2012 and 2014, and various payslips for 2013 and 2014.

It is evident from the documents filed by the claimant that the respondent was not being truthful when it stated that the claimant only worked from January to June 2015 and that it had on its records contracts for 2014 and 2015. It is the duty of an employer to keep records and to produce such records when there are legal proceedings. Sections 7, 9, 10 and 74 of the Employment Act provide for the detailed records to be kept by employers. Section 10(6) and (7) specifically provide as follows –

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

The Act shifts the burden of proof to the respondent where the respondent fails to produce records in any legal proceedings.

There is thus a presumption that where the respondent fails to prove any fact that it is required to prove through production of records that it is obligated to keep, the court will rely on the evidence of the claimant.

In the present case, the claimant having produced documents confirming that he was in the respondent's employment in 2012, 2013 and 2014 and there being agreement that the claimant's employment was terminated in 2015, I find that the claimant was in employment of the respondent from December 2010 to April 2015.

Whether the Claimant's Employment was terminated or he absconded

RW1 testified that the claimant absconded duty after being taken to the police over alleged attempted theft of two bundles of envelopes. RW1 further stated that she started working for the respondent in mid-September 2016. She was not therefore able to verify the facts around the termination of the claimant's employment.

For an employer to prove that an employee absconded duty, it must demonstrate that it took some action to require the employee to report back to work and the employee failed to do so. It must also show that it terminated the employment of the claimant by a letter of termination for absconding duty. It is not enough for an employer who is obliged by law to keep records of dates of an employee leaving employment, to merely aver that the employee absconded duty.

In this case there is no record at all of any of the averments by the respondent about the search and alleged finding of the envelopes in the claimant's clothing, about his absconding duty, or even the claimant's employment records. I thus make a presumption that the claimant's evidence on the facts surrounding the termination of his employment is the correct version. This being the case I find that the termination of the claimant's employment was unfair by virtue of the respondent's failure to prove that the same was for valid reason and that fair procedure was complied with in terms of Sections 41, 43 and 45 of the Act.

Remedies

The claimant is entitled to salary for days worked in April 2015 as there is no proof that he was paid. He is also entitled to one month's salary in lieu of notice in terms of Section 35 and 49(1) of the Act. There being no proof that he took annual leave, he is entitled to the same for the period worked from December 2010 to April 2015 being 91 days at 21 days per year. There was no proof of overtime and the prayer is rejected.

There was no proof of work on public holidays and that prayer too is rejected. The claimant is not entitled to gratuity as the terms of his employment did not provide for any.

Having been unfairly terminated, I award the claimant 6 months' salary as compensation taking into account length of service, circumstances under which his employment was terminated and all other relevant factors under Section 49(4) of the Act.

Claimant's Salary

The claimant testified that his salary was Kshs.13,862 while the respondent contended he was paid Kshs.12,075. According to his payslip he was paid Kshs.10,500 basic and house allowance of Kshs.1,575. His gross salary was therefore Kshs.12,075.

Conclusion

In conclusion I find the termination of the claimant's employment unfair and award him the following –

1. One month's salary in lieu of notice..... Kshs.12,075
2. 18 days worked in April 2015..... Kshs.8,360
3. Annual leave 91 days..... Kshs.42,263
4. Compensation..... Kshs.72,450

Total Award Kshs.135,148.00

5. The respondent will pay the claimant's costs for this suit.
6. Interest shall accrue on decretal amount from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations

due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE