



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1472 OF 2016
(Before Hon. Lady Justice Maureen Onyango)
MOSES MUGIRA RIMBERA.....CLAIMANT
VERSUS
BOSKY INDUSTRIES LIMITED.....RESPONDENT
JUDGMENT

Vide a statement of claim filed on 27th July 2016, the Claimant avers that he was employed by the Respondent as a tailor for 7 years. He avers that he was wrongfully dismissed on 4th February 2016 after he refused to be deducted Kshs.500. He seeks the following prayers:

1. The Claimant herein prays that the Court has jurisdiction to hear and determine this matter.
2. The Court to consider the action taken by respondent against the claimant was unlawful and unjustified dismissal, and make an award in favour of the claimant.
3. The cost of this suit be made by the respondent.
4. Any other order the Court may deem fit to grant.

The Respondent entered appearance but did not file a response to the claim. However, it cross-examined the Claimant and his witness and filed written submissions. At the hearing the Claimant testified on his behalf and also called one witness.

The Claimant, CW1 testified that he was a piece rate worker and was paid Kshs.500 per day. He testified that on 4th February 2016, he was asked to pay for a work card but he did not have any money therefore he was not allowed to work because he did not have a card. He testified that at the time he was sick and had been hospitalised.

In cross-examination, the claimant testified that the staff were issued with cards every month but he did not have any of the cards in court. He testified that there were deductions of house allowance and NSSF.

NYANGWARA EVANS, CW2, testified that he worked with the Claimant for 3 months and that the claimant was dismissed in his presence. He testified the claimant had been diagnosed with diabetes and would often forget his work card at home. He testified that on the very day, management wanted to penalise him Kshs. 500 but the Claimant was against the fine. He testified that the Claimant was sent back home and after that he did not see him again.

In cross-examination, he confirmed that they worked on piece rate. He testified that on 4th February 2016, the Claimant was told to leave for good.

The Claimant submitted that he ought to have been paid pursuant to section 18 of the Employment Act. He submitted that he was entitled to one month notice as provided under section 35 of the Act. He submitted that he was entitled to 24 days' annual leave amounting to Kshs.134,240.48. He submitted that his dismissal was contrary to section 41 of the Employment Act thus he is entitled to compensation. He submitted that the Respondent used to deduct his NSSF contribution but he was not a registered member. He submitted that the rate paid per fabric stitch could not amount to that stipulated in the minimum wage.

The Respondent relied on the case of **Martin Wasonga Obel v Coast Building & General Contractors Ltd [2018] eKLR** where the court held that piece work employment contracts do not create any further rights and obligations except those provided for in the contract. It further relied on the case of **Jowasi Ambundo Kasina & 5 Others v Kenafric Industries Limited [2015] eKLR** and **Bernard Mariita Nyangara v Packaging Industries Limited [2015] eKLR**.

With respect to underpayment, it submitted that the Claimant failed to demonstrate the rate applicable to his position. It submitted that its failure to file a defence should not be a ground to allow the claim.

Determination

The uncontested fact is that the Claimant was employed by the Respondent on a piece rate basis. The issues for determination are whether the claimant was wrongfully dismissed and whether he is entitled to the reliefs sought.

The Respondent did not file a response to the Claim thus the Claimant's averments are uncontroverted. The Claimant avers that he was dismissed for his refusal to pay Kshs.500 for replacement of his work card. Section 10(7) of the Employment Act provides that an employee bears the burden to prove a term of the employment. Further, Section 47(5) of the Employment Act provides that the burden of justifying the grounds for wrongful dismissal or unfair termination rests on the employer.

In **Krystalline Salt Limited v Kwekwe Mwakele & 67 Others [2017] eKLR** the Court of Appeal held:

“A piece rate worker would, in terms of these provisions be entitled to a notice of 28 days before termination of service. These are some of the reforms in employment relationship introduced by the Employment Act. Where an employee alleges that the termination was unfair the evidential burden of proof shifts to the employer to demonstrate the existence of any of the circumstances enumerated under section 45. Relevant to the matter before us, the appellant was expected to prove that the reason for termination was valid, that the reason was fair in so far as it related to the respondents' conduct, capacity or compatibility. The appellant was similarly required to show that the termination was done in accordance with fair procedure.”

In **Mboo Wambua & 29 others v Export Trading Company Limited [2018] eKLR** held that:

“It is the opinion of the Court that as long the work is available, within the piece work arrangement the employer would need to follow due process and show a reasonable justification where the employment is to be terminated. It is the further Court's opinion that if indeed the work becomes genuinely unavailable, then the employer in such arrangement will be entitled to terminate the contract of service within the minimum statutory contractual terms.

The extent to which the Employment Act, 2007 will apply in event of the termination of the contract of service in piece work arrangements will vary from case to case based on the parties agreement, practice and circumstances of the individual cases.”

The Respondent did not dispute the allegations by the claimant that he was wrongfully dismissed. Relying on Section 47(5) of the Act, it is my finding that it neither proved that it complied with the provisions of Sections 41 in dismissing the Claimant nor that the reason for termination was valid. I thus find that the claimant's employment was unfairly terminated.

The Respondent substantively submitted that the Claimant is not entitled to the reliefs sought such as underpayment, annual leave and house allowance. It relied on several decisions by this Court dismissing claims sought in piece rate employment.

Section 2 of the Employment Act defines piece work as:

any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance.

The Claimant testified that he was paid Kshs.500 per day while CW2 testified that they would be paid more than Kshs.1,000 depending on the work done.

In the **Krystalline Salt Limited case** the Court of Appeal further held:

“In a piece work or, as it is sometimes called, piece rate arrangement, the emphasis is on the amount of work and not the time expended in doing it. The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer. An employee under piece work arrangement, though not entitled to all or some of the benefits of the other forms of employment, is at least entitled to minimum wage.”

Considering the circumstances in this case and taking into consideration that the Claimant was paid depending on the work performed, I find that the Claimant is entitled at least payment of the minimum wage. The claimant however did not adduce evidence to prove the amount he was paid as his evidence and that of CW2 were at variance. I find that he has not proved underpayment.

The Claimant submitted that he ought to have been paid at the end of the month and he further submitted that he was entitled to one month notice. I do not find fault in the Claimant being paid at the end of the day. Section 18(1)(a) of the Employment Act provides that:

(1) Where a contract of service entered into under which a task or piece-work is to be performed by an employee, the employee shall be entitled—

(a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task;

Having worked longer than one month, the claimant's terms of employment automatically converted to term contract as provided under Section 37(1)(a) of the Employment Act. He was therefore entitled to one month's notice or pay in lieu.

The prayer for refund of NSSF, house allowance and leave are dismissed for lack of proof. Though the job card provided for deduction of these amounts, the card submitted by the claimant was blank.

Having been unfairly terminated, I award the claimant compensation equivalent to 4 months' salary based on statutory minimum rate of pay at the time of the termination of his employment on February 2015 for a tailor. The minimum wage was Kshs.16,602.85 with 15% house allowance being a total of Kshs.19,093.30 as per General Order for 2013.

Having worked for 7 years and his employment having been terminated because he refused to pay an illegal charge of reissue of the employment card, I award him 3 months' salary as compensation in the sum of **Kshs.57,279.80**.

I further award the claimant **Kshs.10,000** to cover his reasonable expenses and disbursements for this case.

The same shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND 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