



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.139 OF 2017

SIMEON KIPKOECH KOSKEY.....CLAIMANT

VERSUS

ROSOGA INVESTMENT LIMITED.....RESPONDENT

JUDGEMENT

The claimant is based on the facts that the respondent employed the claimant as a clerk from 13th June, 2013 earning Ksh.9, 000 basic and Ksh.1, 200 house allowances per month.

The claimant worked until 10th October, 2016 when his employment was terminated without notice or being given reasons or payment of terminal dues.

The claim is that the summary dismissal of the claimant was unfair; the claimant was wrongly accused of absconding duty which was not true. He was not given a hearing to defend himself contrary to section 41 of the Employment Act.

The claim is also that there was underpayment of wages.

The claimant is seeking the following dues;

- a) Notice pay at ksh.17,739.21;
- b) Compensation ;
- c) Overtime hours Ksh.85,432.89;
- d) Underpayment Ksh.225,429.30;
- e) Service pay/gratuity Ksh.15,425;
- f) Certificate of service; and
- g) Costs.

The claimant testified that upon employment by the respondent on 11th June, 2013 he was paid a gross wage of Ksh.10, 200 which was an underpayment as a clerk.

On 10th October, 2016 the claimant was dismissed from his employment on the grounds that on 8th October, 2016 he had applied for leave and his supervisor Anthony Kiptoo said that since it was on a Saturday this would be processed on Monday the 10th October, 2016 and thus he was to go for his letter of approval and permission.

The claimant also testified that on 10th October, 2016 at 10am he reported to work and was instead issued with letter of summary dismissal on the grounds that he had absconded duty. He was directed to clear but was still in shock at the turn of events which was unexpected as his supervisor had approved the leave in substance. On 31st October, 2016.

The alleged letter dated 13th October, 2016 was never issued and the disciplinary hearing for 16th October, 2016 was not brought to his attention. The alleged summary dismissal notice dated 20th October, 2016 was not issued as his last day at work was 10th October, 2016.

Upon clearance the claimant was paid for 10 days Ksh.6, 900 on the basis that employment terminated on 20th October, 2016 which was not true and the dates had been altered and a forgery and a manipulation.

The claimant also testified that when he applied for leave the human resource manager was not in the office, he was required to sign in approval for the claimant to collect the letter on 10th October, 2016 but he was instead dismissed.

The defence is that the claimant was employed in June, 2013 to the year 2016 when he absconded duty on 10th October, 2016. As a result of the desertion, the claimant was issued with a notice to show cause why his employment should not be terminated on 13th October, 2016 and he failed to respond. He was invited to disciplinary hearing on 16th October, 2016 and he failed to attend. This left the respondent with no option but to issue letter of summary dismissal for continued desertion of duty pursuant to section 44 of the Employment Act.

The terminal dues owing to the claimant were calculated and paid in full and nothing owes. The claim should be dismissed with costs.

The respondent filed work records.

Shadrack Too the manager testified that the claimant was employed in the saw mill as a sales clerk working from 8am to 5pm. Employee would report early at 7am for fellowship and then start work at 8am. Occasionally due to work demands the claimant worked overtime and this would be paid at month end, there would be payment of cash or converted to a day off. Cases of overtime work were very rare. Closing work would be strictly at 5pm to ensure control.

The claimant applied for leave and Kiptoo his supervisor told him it would be approved by the manager but the claimant choose to leave work and from 10th October, 2016 he did not report on duty. Mr Serem the Operations Manager was the final officer to approve leave. Upon application to Kiptoo, he would pass the same to Muya who would in return pass on to Serem.

The claimant opted to abscond duty.

When the claimant was invited to show cause and disciplinary hearing he refused to attend resulting in summary dismissal. Caleb Tanui was sent to serve the claimant with the notice to show cause and the notice for disciplinary hearing. The claimant was issued with a letter of recommendation indicating his employment terminated on 10th October, 2016.

The claimant has since been paid his dues.

The claimant was issued with letter dated 10th October, 2016 terminating his employment through summary dismissal on the grounds of absconding duty on 10th October, 2016 without permission. This followed application to take leave on 8th October, 2016 which had not been approved.

The defence is that from 10th October, 2016 the claimant absented himself from work, he was issued with notice to show cause on 13th October, 2016 and disciplinary hearing for 19th October, 2016 but he failed to attend resulting in summary dismissal on 20th October, 2016. That the letter dated 10th October, 2016 issued to the claimant was in error which was corrected and employment terminated on 20th and not 10th October, 2016.

Absence from work without permission is subject to summary dismissal under the provisions of section 44(3) and 44(4)(a) of the Employment Act, 2007 (the Act) subject to the application of section 41(2) of the Act which requires the employee be issued with notice and allowed a hearing to defend himself.

In this case the claimant applied for leave on 8th October, 2016 and on the reasons that the officer required to approve was absent, he was directed to report on duty on 10th October, 2016 to collect the letter of approval. The court takes it that the claimant took his time and only reported to collect such letter at 10am when he was issued with letter of summary dismissal.

The defence that this letter was dated in error is far-fetched. The letter correcting the error changing the date of summary dismissal from 10th to 20th October, 2016 is not submitted.

The alleged letter and notice to show cause dated 13th October, 2016 and the notice to attend disciplinary hearing dated 17th October, 2016 has no forwarding address to the claimant. The allegations that a Caleb Tanui was sent to serve the claimant with these notices is found without foundation as such person was not called to testify as to where and when he served the claimant with these notices.

The upshot of this is that these notices did not reach the claimant and even where they may have reached him, his employment had since been terminated by the notice dated 10th October, 2016. In an effort to sanitise the process, the respondent wrote the notices after 10th October, 2016 which is evidently an afterthought.

The statement of final dues to the claimant paid on 16th November, 2016 is overwritten, manipulated and not counter-signed particularly with regard to the dates employment terminated.

Similarly the letter of recommendation dated 16th November, 2016 done by the respondent for the benefit of the claimant confirms, employment terminated on 10th October, 2016.

Going back to the summary dismissal of the claimant, where he applied to leave and this was not approved, instead of reporting to work at 8am was the practice, he reported at 10am. Based on his application, the court finds the claimant had a legitimate expectation that his leave would be approved as he had left it with his supervisor, Kiptoo who in turn was to hand it to Muya and eventually to the operations manager, Serem.

The supervisor hence knew the whereabouts of the claimant at all material times. He was aware of the leave application and the directions to collect letter of approval on 10th October, 2016. The resulting summary dismissal on the grounds that the claimant had absented himself from work on 10th October, 2016 is too harsh a sanction to issue in the circumstances. Even where the claimant should have been at work at 8am and only attended at 10am, the lapse in two (2) hours could have reasonably been addressed pursuant to the provisions of section 19(1)(c) of the Act which allow for a wage deduction where;

(c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;

the resulting summary dismissal of the claimant from his employment with the respondent for not being at work for two hours whereas the supervisor was aware of his whereabouts upon applying for leave and with direction to return to collect letter of approval is hence found not based on a genuine reason which assessed lacks validity and thus not justified for the sanction issued. The termination of employment is found unfair pursuant to the provisions of section 45 of the Act, and the claimant is entitled to notice pay and compensation under the provisions of sections 35 and 49 of the Act.

On the claims made, there is no letter of appointment filed by either party save the claimant filed his payment statement which indicate his job title as *Accounts Clerk*. In the letter of recommendation filed by the respondent and dated 16th November, 2016 the respondent describes the claimant as *Clerk* from 11th June, 2013 to 10th October, 2016.

On the claims for underpayment, from June, 2013 to 1st May, 2015 a period of 23 months the minimum wage for a clerk under the Regulation of Wages (General) (Amendment) Order, 2013 applicable from 1st May, 2013 was ksh.13, 772.70 per month. The claimant was paid Ksh.10, 200 per month as evidenced by the payment statement he has filed and attached to the Memorandum of claim. The underpayment each month was ksh.3, 572.70 and for the 23 months all being ksh.82, 172.10.

For the period of May, 2015 to October, 2016 the minimum wage was ksh.15,425.40 and the claimant was paid ksh.10,200 the underpayment being ksh.5,225.40 and for the 18 months total underpayment is Ksh.94,057.20.

Total underpayment is ksh.176, 229.20.

In this regard, notice pay is based on the last due wage at one (1) month awarded as claimed all at Ksh.17, 739.21.

Compensation is also assessed at three (3) months gross wage noting the respondent paid part of the terminal dues without delay and this put into account the 3 months compensation are found appropriate all at ksh.53, 217.63.

On the claim for service/gratuity, on the filed payment statements, the claimant was registered with NSSF and NHIF and this is not due as there is no agreement to pay gratuity.

On the claim for overtime pay, Mr Too testified that the employees would report early for morning devotion and then start work at 8am and for control close at 5pm. This explanation is found plausible and the claim for overtime daily does not arise.

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

- (a) Compensation Ksh.53,217.63;**
- (b) Notice pay ksh.17,793.21;**
- (c) Underpayments ksh.176,229.20;**
- (d) Dues (a), (b), and (c) above shall be subject to section 49(2) of the Act;**
- (e) Costs of the suit.**

Dated and delivered electronically this 21st May, 2020 at 0900 hours

M. MBARU

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 the Order herein shall be delivered to the parties via emails.

this 21st May, 2020 at 0900 hours

M. MBARU

JUDGE