



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 172 OF 2014

(Before Hon. Justice Mathews N. Nduma)

STEVEN MELKAU ANDUTHA.....1ST CLAIMANT

KEVIN OMONDI.....2ND CLAIMANT

VERSUS

DELUX FURNITURE LIMITED.....RESPONDENT

JUDGMENT

1. The consolidated suit dates back to 2011. The two claimants Stephen Melkau Andutha and Kevin Omondi were employed by the respondent to make school furniture made of wood and metal including chairs and lockers. The 1st claimant (CW1) was employed on 3rd January 2010 and the 2nd claimant was employed in March 2009.
2. The two worked diligently and continuously until sometimes in July 2013 when, upon reporting to work, the employer asked them to wait outside and they were then told to go away. The employment of the claimants was verbally terminated. They were not given any letter of termination.
3. CW1 testified that both claimants worked daily from 7 am to 6 pm and were not paid overtime. That they were not given any notice of termination or any reason for the termination. That they worked seven (7) days a week and got no rest day in a week. The claimants were not paid any terminal benefits. The two reported the dispute to the ministry of labour but the issue was not resolved.
4. CW1 testified that the two were underpaid in that CW1 was paid a monthly salary of Kshs. 3,600 instead of Kshs. 13,500 for three years whereas the 2nd claimant was also paid the same amount. CW1 testified that they are owed the difference of Kshs. 9,900 per month for three years each. That they were not housed and were not paid house allowance.
5. That they worked even during public holidays and were not paid double pay. That they did not go on leave and were not paid in lieu of leave. That they were not paid in lieu of notice also. The claimants pray for the reliefs set out in their statements of claim including compensation for unlawful and unfair termination of employment.
6. The claimants made a demand letter to the respondent through their advocate but the demand was not heeded by the respondent. CW1 produced exhibits '1' to '4' in support of their respective cases. CW1 withstood very close cross examination. He was candid and came forth as a truthful witness.
7. Despite having filed a statement of defence, counsel for the respondent did not call any witness to counter the testimony by CW1. The suit therefore remained undefended and the testimony of CW1 not controverted at all.

Determination

8. The issues for determination are:

- (i) Whether the employment of the claimants was unlawfully and unfairly terminated by the respondent.
- (ii) Whether the claimants are entitled to the reliefs sought.

9. The testimony by CW1 remain wholly uncontroverted that the two claimants had diligently and continuously served the respondent making chairs and lockers for the respondent. That they both worked for about three years and were paid Kshs. 3,600 monthly salary each.

That being defined Artisans they ought to have been paid minimum wage of Kshs. 13,500 per month in terms of the General Wage Order applicable during the period. That they were not given leave for the entire period and were not paid in lieu of leave. That they worked 7 days a week including public holidays and were not paid overtime and double pay. That they were not given any notice or reason of termination of employment and were not paid any terminal benefits upon termination.

10. The claimants have proved on a balance of probabilities that their employment was terminated for no valid reason and were not given a fair hearing in contravention of *Sections 36, 41, 43 and 45 of the Employment Act, 2007*. The claimants are entitled to compensation for unlawful and unfair termination of employment in terms of *Section 49(1) (c) and 4 of the Employment Act, No. 11 2007*.

11. In this regard the claimants had both served for about three years. They did not contribute to their termination. They were not compensated for the termination of employment nor were they paid any terminal benefits upon termination. The termination was unlawful and unfair and the claimants suffered loss and damage. The claimants were underpaid for the whole period of their employment which is an aggravating factor and they worked 7 days a week without rest. They were also not given any annual leave.

12. The court deems this an appropriate case to award each of the claimants the equivalent of six (6) month salary in compensation for the unlawful and unfair termination of employment.

Terminal benefits

Notice pay

13. The claimants were actually dismissed summarily since the termination was abrupt and without notice nor were they paid in lieu of notice. The claimants are granted one month salary in lieu of notice.

Leave pay

14. The claimants did not go on leave for three years and are awarded equivalent of one month salary for each completed year of service in lieu of leave days not taken.

Underpayments

15. The claimants' were paid Kshs. 3,600 during the period 3rd January 2010 to July 2013 in respect of the 1st claimant and the period March 2009 to July 2013 in respect of the 2nd claimant. Minimum wage for metal work Artisans is provided for in the General Wage Orders for the period July 2009 to July 2010; July 2010 to July 2011; July 2011 to July 2012 and July 2012 to July 2013.

16. The stated amounts in those legal notices is the minimum monthly salary including house allowance the claimants were entitled to for the period they served the respondent. The court awards the claimants accordingly.

Overtime and public holidays

17. The claimants testified that they worked for 7 days every week without any rest day including public holidays and were not paid overtime or double pay during public holidays. The court awards the claimants as prayed.

Severance pay

18. The claimants did not adduce evidence whether they were registered with NSSF and if the respondent paid contributions for them. There is no evidence that the claimants were declared redundant. The claim for payment of severance pay was not proved and is dismissed for lack of merit.

House allowance.

19. The claimants pleaded for payment of the difference of Kshs. 9,900 in underpayments which according to CW1 included house allowance. The separate claim of payment of house allowance is not merited and is dismissed.

Unpaid leave allowance

20. Leave allowance is only paid to facilitate an employee who has been granted annual leave. The claimant did not go on leave for three years and so this claim is not merited.

21. In the final analysis judgment is entered in favour of each claimant separately as against the respondent as follows:

- (a) Six (6) months compensation for unlawful dismissal (13,500x6) Kshs. 81,000 each.
- (b) Kshs. 13,500 in lieu of one month notice.
- (c) Kshs. 40,500 in lieu of three months untaken leave.

- (d) Kshs. 356,400 underpayments for 3 years. Any period above 3 years is time barred.
- (e) Kshs. 26,880 overtime for 3 years.
- (f) Kshs. 6,300 in respect of public holidays not paid double for 3 years.
- (g) Interest at court rates from date of judgment till payment in full.
- (h) Costs of the suit.

Judgment Dated, Signed and delivered at Nairobi this 13th day of May, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

Mr. Anyuor for the Claimants.

Mr. Andiso for the Respondent.

Chrispo – Court Clerk