



THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.360 OF 2017

SIMEON CHEPKWONY.....CLAIMANT

VERSUS

GOLDEN CARA INVESTMENT.....RESPONDENT

JUDGEMENT

The claim is premised on the facts that the claimant was in March, 2014 employed by the respondent as an mason (artisan) compressor machine operator until 2nd April, 2017 a period of 3 years. his wage was ksh.30, 000 per month.

Employment was terminated verbally by the supervisor Mr Chami and without any explanations or payment of terminal dues.

The claim is that there was unfair termination of employment and seek the following dues;

- a) 7 days unpaid wages Ksh.8,076;
- b) Notice pay Ksh.30,000;
- c) Annual leave for 3 years ksh.90,000;
- d) Leave travelling allowance Ksh.6,000;
- e) Gratuity for 3 years Ksh.48,461.50;
- f) Underpayments Ksh.82,800;
- g) Unpaid house allowance Ksh.266,000;
- h) Compensation Ksh.360,000; and
- i) Costs.

The claimant testified that on 2nd April, 2017 he reported to work but the respondent foreman kept him aside and proceeded to allocate work to other employees. Juma the foreman said he had instructions from Chami to terminate his employment. There was no explanation given.

In July, 2016 the respondent stopped making wage payments through the bank and would pay cash. The wage was reduced from ksh.30, 000 to ksh.28, and 800 per month without explanation. He made a complaint and was advised there was an anomaly which would be rectified which was not done and the variance was not refunded.

In defence the respondent denied the claims made and that the claimant was not an employee of the respondent as alleged and in the casuals register he was not listed. The claimant as a casual employee was neither dismissed or unlawfully terminated in his employment and not entitled to the claims made.

No evidence was called by the respondent.

Despite a hearing date being allocated by consent of both parties for the 10th of March, 2020.

The respondent filed *Casuals Wages Register* and where the claimant is registered as a casual Mason.

Determination

In the absence of the respondent attending to call any evidence, the court is left with the pleadings, the claimant's evidence and his written submissions.

On the records filed by the respondent, the claimant is listed as a casual working as a mason. The year of these records is not stated.

These records looked at vis-a-vis the claimant's records, In the period of 20th June to 16th July the claimant worked for a total of 21 days;

18th July to 1st August, the claimant worked for 15 days;

19th September to 9th October he worked for 2 days;

12th December to 14th January he worked for 9 days; and

6th March to 26th March he worked for 11 days.

These records are not unique to the claimant. Other employees placed as he was at a mason had a similar record of less than 26 days of work each month.

The work attendance was erratic and staggered in any given month.

The claimant is listed as a casual employee on the register.

On the bank statement filed by the claimant, the record is that;

On 12th March, 2015 the respondent paid the claimant ksh.26, 178; 14th April, 2015 the respondent paid the claimant ksh.26, 178; 9th May, 2015 the respondent paid the claimant ksh.26, 178;

On 6th July, 2015 a salary is paid and replicated up and until 28th October, 2015;

On 11th December, 2015 the respondent paid the claimant ksh.26, 178 and replicated in January, February, March, April, and June, 2016 on the same wage.

The claimant testified that his wages were paid through the bank until July, 2016 and was paid in cash until 2nd April, 2017 when his employment was stopped.

On the records filed and staggered days at work, the claimant was a casual employee. On the claim that he was earning a wage of ksh.30, 000 per month, the payment statement filed for the month of July, 2015 add to a gross wage of ksh.30, 000 and which included statutory deductions and the net salary of ksh.26, 178.

On the applicable wage Orders as of July, 2015 an artisan upgraded minimum wage was ksh.13, 646.40 while artisan grade I minimum wage was ksh.23, 262.

On the last day of work for the claimant that is 2nd April, 2017 the Wage Orders for an artisan were constant.

Where the claimant was then paid ksh.30, 000 per month, such wages were over and above the minimum and well compensated him for his labours each month. To seek for payment of house allowance whereas the respondent paid above the minimum wage is to seek unjust enrichment.

The bank deposits by the respondent as *salary* are all at the amount of Ksh.26, 178 and not 20,800 as alleged. There is no underpayment.

The claimant did not outline the nature of his duties when his wages payments reverted to payment in cash.

As a casual employee, payment of wages paid on a daily rate and above the minimum wage, Notice pay is not due.

On the claim for 7 days wages unpaid, this is premised on the claim that what was due was Ksh.30, 000 per month. Without any witness to challenge these claims, for his labours the claimant is entitled to ksh.8, 076.90.

On the claims for annual leave pay, and house allowances as set out above, a the wage of ksh.30, 000 this was a fair and reasonable compensation for work done for the days set out above.

The claims of payment of gratuity and leave travelling allowance are only due in a case where the employee has an employment contract with agreed upon terms and conditions of service giving such benefits and or there is a private treaty or agreement allowing for the payment of such benefits. There being no contract of service, such benefits are not due in law.

The respondent filed work records which do not assist the court with regard to the year(s) of application. The respondent failed to attend at the hearing to assist the court in analysing the filed records.

Save for the payment for days worked, the claimant is entitled to his costs of the suit.

Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of 7 days wages at ksh.8, 076.90 and costs of the suit.

Dated and delivered electronically this 12th June, 2020.

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 Judgement herein shall be delivered to the parties via e-mails.

M. MBARU

JUDGE