



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.282 OF 2017

JOB ONYIKWA NYAMBARORA.....CLAIMANT

VERSUS

LAKE GAS LIMITED.....RESPONDENT

JUDGEMENT

On 31st March, 2015 the claimant was employed by the respondent as a warehouse assistant/loader at ksh.200 per day and payable at Ksh.1, 000 per week and on 31st September, 2016 the amount was enhanced to Ksh.450 per day and payable at ksh.2, 250 per week. The claimant worked until 24th March, 2017 when his employment was terminated.

The claim is that work hours were 8am to 5pm on Tuesday to Friday and on Saturday would work until 2pm.

On 15th April, 2017 on a Saturday when the claimant would be paid, the warehouse manager accused him of stealing gas cylinders. He was not given any details. The claimant was paid ksh.2, 000 instead of Ksh.2, and 250.

On 18th April, 2017 the claimant reported to work as usual and worked until 10am when he was directed to leave the respondent's premises over alleged theft of gas cylinders. The claimant sought the intervention of the regional manager who returned him to work on 19th to 22nd April, 2017 when he was issued with a letter of recommendation and set out of the work premises. On 24th April, 2017 the claimant returned but he was chased away by the respondent.

The claim is that employment was terminated unfairly and without due process. Following allegations of theft there was no disciplinary action taken to allow the claimant defend himself contrary to section 41, 43 and 45 of the Employment Act. there was no payment of terminal dues as for the two years of service the claimant.

was underpaid; he worked during public holidays without compensation and when required to work beyond 8 hours there was no pay or payment of the due house allowance. There was no annual leave allowed or paid in lieu thereof.

The claimant is seeking the following dues;

- a. Compensation for unfair termination;
- b. Notice pay at Ksh.11,633.17;
- c. Underpayment Ksh.145,332.91;
- d. Annual leave ksh.18,775.89; and
- e. Certificate of service.

The claimant testified in support of his claims that he was employed by the respondent to sell LPG gas and as a loader assisting in the warehouse. Upon loading into the lorry he would go to the market supervised by Brian Miruka and paid ksh.1, 000 per week. The pay was increased to ksh.2, 250 per week from 31st September, 2016 paid through petty cash or Mpesa each week. His work hours were 8am to 5pm but when working out of the office he would work until 9pm and in total he worked for 6 days a week.

The claimant also testified that he never went on annual leave save the respondent paid for his NSSF and NHIF.

The claimant also testified that on 15th April, 2017 at the end of day he did not take stock. The supervisor then said one LPG gas was missing; he paid him his daily wages and sent him away. On 22nd April, 2017 the claimant returned to work but was sent away. This resulted in unfair termination of employment. If there was any loss of the LPG gas he was not issued with a notice to show cause and defend his employment.

He worked at the Nakuru depot supervised by Miruka and other employees were the manager, driver, salesmen while security was outsourced. He was issued with letter of recommendation only.

Upon cross-examination, the claimant testified that he was employed by Brian Miruka the manager at Nakuru depot who was dismissed and Dennis Ouma was employed. The respondent would pay him via mpesa.

The defence is that the claimant was not its employee as alleged and the claims made are without basis and should be dismissed with costs.

The defence is also that the respondent had three employees only based at the Nakuru office being the operations and sales coordinator, the sales executive and a driver and the claimant was not one of such employees.

The claimant has attached a documents to his claim purporting it to be a letter of recommendations but such does not come from the respondent to confer employment or support the alleged employment relationship. Evens narrated from 22nd April, 2017 are fictitious and misleading. The allegations that Dennis Ouma instigation termination of employment is unfounded as he only joined the respondent's employment from 27th June, 2016 and could therefore not have known the claimant as alleged.

There is no employment relationship to justify the claims made.

Dennis Odhiambo Ouma testified in support of the defence that he is currently the Kitui operations manager with the respondent and the claimant was never an employee of the respondent. Upon employment of any person, the respondent's practice is to issue letter of employment which was not the case for the claimant. The respondent is an LPG dealer with several offices with head office at Nairobi. In June, 2016 he was employed as the sales coordinator and has no knowledge of the claimant. Sometimes the claimant would be at the respondent's premises when offloading staff were around and would help clean the officer but would not be entrusted with money as alleged. There is no record that claimant had his NSSF and NHIF due paid for by the respondent and there is no such record.

Mr Ouma also testified that he would send the claimant some cash. The claimant would undertake transactions for the respondent and on several occasions made deposits for the respondent which could have been done by anyone. These transactions are not an indication of employment and the claimant may have been undertaking business with the respondent.

The letter of recommendation filed was not issued by the respondent.

Both parties filed written submissions.

From the pleadings, the evidence and written submission by the respondent **[the claimant filed written submissions for a different matter, ELRC No.418 of 2017 paid for under the current suit and thus not relevant herein]** the issues which emerge can be summarised as follows;

Whether there was an employment relationship between the parties;

Whether there was unfair termination of employment; and

Whether the remedies sought are due.

The claimant's case is that he was employed through a verbal contract by the respondent on 31st March, 2015 as a warehouse loader and remained under the supervisor of one Miruka. The defence is that there was no employment relationship between the parties and the records filed by the claimant do not confirm employment.

Whereas the letter of recommendations filed by the claimant does not attest to his employment by the respondent as a certificate of service would what is clear to the court is that the witness called for the defence testified to having worked with the claimant and knew him as one of those assisting at the Nakuru office with cleaning and would be allocated duties and receive payments.

The claimant attached his payment records through the phone, Mpesa transactions of constant payments of Ksh.1, 000 and Ksh.2, 254 between Dennis Ouma and other persons to and through his phone in the month of March and April, 2017; in February, 2017 there are no such payments; in January, 2017 there are no such payments; and an analysis of the transactions show a record of different payments from different persons to the claimant.

There is no common thread of wage or salary payments from the entity of the respondent or persons directly linked to the respondent paying the claimant a wage the averments in the claim that the claimant was earning ksh.200 per day and paid weekly and then increased to Ksh.450 per day and paid weekly is not supported by the records filed on the face of the defence that there was no employment between the parties.

The claimant has attached the NSSF statement to support his claims that he was an employee of the respondent. Such statement is not evidence of employment. The statement attached does not confer employment status as employment is regulated under a different statutory regime separate from the NSSF Act.

Without an employment relationship between the parties, the court is denied authority to assess the claims set out.

The question of there being no employment between the parties was gone into in the defence but the claimant failed to delve into the same and call evidence in this regard. Where he was employed by Mr Miruka and not Mr Ouma, then the duty to call for evidence to support there was employment and that such employment was terminated unfairly was left to him to prove pursuant to section 47(5) of the Employment Act, 2007 that;

5. For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Without proof of employment relationship and that such employment terminated unfairly, the burden to justify the reasons leading to the alleged termination of employment is removed from the respondent.

Even where there was employment relationship between the parties herein, which is not the case, on the claimants evidence that he failed to take stock of the LPG gas cylinders left in his case and one got lost, then there existed a good cause to terminate employment for neglect of duty. In such a case, this issue was brought to the claimant's attention before he was sent away. Notice pay and compensation are claims not due.

On the alleged underpayments without proof of an employment relationship, the work hours being 8am to 5pm for 6 days a week and there being no particularly as to when the claimant would be at work from 8am to 9pm to make general claims for overtime, underpayments and annual leave is without good cause.

A certificate of service only issues where there is an employment relationship, which is not the case here.

Accordingly, without there being any employment relationship between the parties, the suit is hereby struck out. No orders on costs.

Dated and delivered electronically this 4th June, 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 4th June, 2020 at 0900 hours

M MBARU

JUDGE