



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 388 OF 2015

(Before Hon. Justice Mathews N. Nduma)

PAUL OTIENO OGUTU.....CLAIMANT

VERSUS

NDUGU TRANSPORTERS LIMITED..... RESPONDENT

J U D G M E N T

1. Suit was brought vide Memorandum of Claim on 2nd November, 2015 seeking damages for unfair termination of employment; payment in lieu of leave days not taken and underpayments for the period 2006; 2009; 2010; 2011; 2012; 2013 and 2014, as per Regulation of Wages (General Amendment) orders for the specific years. He claims he was employed as a turn boy on 2nd January, 2006 and worked continuously until 16th July, 2014 when the Managing Director of the Respondent summarily dismissed him without notice to show cause or hearing. The Claimant states that the Respondent violated sections 41, 43 and 45 of the Employment Act, 2007 and he is entitled to terminal benefits and compensation in terms of section 49 of the Act. The Claimant testified under oath in support of these particulars of claim and prays for the reliefs set out in the statement of claim.

Defence

2. The Respondent filed a defence to the Memorandum of Claim on 3rd December, 2015 in which, it admits having employed the Claimant as a general labourer on 2nd January, 2006 and not as a turn boy as alleged by the Claimant.

3. The Respondent denies that the Claimant was not granted leave and also denies particulars of under payments. The Respondent further denies that the Claimant was summarily dismissed by the Managing Director and states that the Claimant absconded from work. The Respondent denies that the Claimant earned Kshs.9,380 as at the time he left employment. The Respondent called RW 1 Otieno Albert Oketch who was the transport manager of the Respondent. He told the court that the claimant worked as a General Manager from 2006 and was paid Kshs.9,025 per month by the year 2014. That as a labourer he was paid daily. That the Claimant absconded work and was not summarily dismissed. That he was summarily dismissed on 16th July, 2014 for absconding duty. He produced the letter of dismissal before court. That the claimant did not collect his terminal dues but same were tabulated by the Respondent in the sum of Kshs.13,919. This was for leave days not taken. RW 1 prays that the suit be dismissed with costs.

4. Under cross examination by M/s. Otieno for the Claimant, RW 1 stated that the Claimant was employed as a casual and was not given letter of employment. RW 1 reiterated that the claimant absconded work from 14th July, 2014. RW 1 stated that the claimant was not given show cause letter as he could not be contacted. RW 1 said the Respondent did not have an address for the Claimant. That the Claimant was housed in the company houses. RW 1 said they kept no leave records but he confirmed that the Claimant never went on leave.

Determination

5. The issues for determination are:-

- (a) Whether the Claimant was employed as a turn boy or was he a casual general labourer?
- (b) Whether the Claimant was lawfully summarily dismissed for absconding work or he was simply sent away from work by the Managing Director without following any procedure?
- (c) Whether the Claimant is entitled to the reliefs sought?

Issue (a) & (b)

6. It is not in dispute that the Claimant was employed by the Respondent on 2nd January, 2006 and served continuously until July 2014, a period of eight (8) years. RW 1 admitted that the Claimant was not granted leave for the period because he was a daily paid casual, although he contradicted himself by stating that the Claimant earned a monthly salary of Kshs.9,025 at the time he left employment on 16th July, 2014. The last day of employment is not in dispute. The only issue in dispute is the manner and reason for the separation.

7. The facts of the case place the Claimant within the definition of a permanent employee in terms of section 37 of the Employment Act 2007. It was wrong for the Respondent not to grant him at least 21 days leave for each year served. RW 1 did not sufficiently rebut the evidence by the Claimant that he was a turn boy and ought to be paid as per the guidelines in the General Wage Order for the respective years. The Claimant has proved the claims for payments in lieu of leave and under payments on a balance of probabilities.

8. No reason has been advanced by the Claimant or the Respondent that would support the thesis that he absconded from duty. The court believes the evidence by the Claimant that he was simply summarily dismissed by the Managing Director on 16th July, 2014 without notice to show cause and without a disciplinary hearing. The court therefore finds that the claimant has proved the claim that he was unlawfully and unfairly summarily dismissed by the Respondent and is entitled to compensation in terms of section 49(1)(c) and (4) of the Employment Act.

9. In answer to issue (c) above, the court finds as follows:-

(a) Judgment is entered in favour of the Claimant as against the Respondent in respect of annual leave not taken for six years from 2007 to July 2014 in the sum of Kshs.(9,025 x 6) 54,150. The rest of the claim is time barred.

(b) The claim for underpayments is granted in respect of Regulation of Wages General Amendment order 2009, to 2014. The claim in respect of 2006 is time barred. The Claimant is to compute the claim and file in court for approval.

Compensation

10. The Claimant has served the Respondent for 8 years. No evidence was tendered by RW 1 that the Claimant had bad record at work. The Claimant was not paid any terminal benefits upon dismissal. The Claimant was not paid in lieu of notice nor given any notice to prepare for the loss of employment and income. The Claimant suffered loss and damage. The claimant had also suffered the indignity of being treated as a casual employee even though he was clearly employed on permanent terms. These are aggravating factors. The court grants the Claimant equivalent of ten (10) months' salary in compensation for the unlawful and unfair dismissal in the sum of Kshs.(9,025 x 10) 90,250.

11. In the final analysis judgment is entered in favour of the claimant as against the Respondent as follows:-

(a) Kshs.90,250 in compensation.

(b) Kshs.54,150 in lieu of leave.

(c) Underpayments to be computed and filed with court within 30 days of judgment.

(d) Interest at court rates from date of judgment till payment in full.

(e) Costs of the suit.

Judgment Dated, Signed and delivered this 24th day of January, 2019

Mathews N. Nduma

Judge

Appearances

M. M. Omondi for Claimant

Ondego for Respondent

Chrispo – Court Clerk