



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.190 OF 2017

PETER CHERUIYOT SERONEI.....CLAIMANT

VERSUS

BAHATI AGRO PROCESSORS LIMITED.....RESPONDENT

JUDGEMENT

The claimant filed the claim in person and the respondent appointed the firm of Mbatia & Associates to attend and act for them.

On 8th October, 2018 parties attended court for hearing directions. The respondent had not complied with filing of its defence, work records, statement and reports required under Rule 133 of the Employment and Labour Relations Court (Procedure) Rules. The court allowed the respondent 14 days to comply with Rule 13 and to serve the claimant before the hearing date scheduled for 21st November, 2018.

There was no compliance by the respondent. no defence has since been filed.

On the due date, the respondent's advocate applied to cease acting for the respondent on the grounds that there were no instructions. As the respondent required thus to be served, the hearing was adjourned to all the firm of Mbatia & Associates to file a formal application, serve the client and attend hearing for the application and the main claim on the 18th December, 2018. The respondent's advocate were to ensure service of the hearing notice for the main claim upon the respondent directly.

On the due date, 18th December, 2018 the respondent's advocates had filed the application seeking to cease acting for their client and respondent but there was no service. the application was not prosecuted and such firm of Mbatia & Associates remain the representative of the respondent in these proceedings. The respondent were also absent.

The court heard the claimant on his case noting the hearing dates were allocated by consent and the respondent and advocate opted to be absent.

Claim

The claimant was employed by the respondent company which operates a dairy farm with an attendant milk processing plant situated at Bahati within Nakuru County. The claimant was employed as a Farm Manager on 10th March, 2015 and worked diligently until 14th June, 2016 when he was verbally suspended from his employment by the respondent's officer Alice Wambui, the managing director. The claimant had insisted on being issued with a written contract of service and a payment statement which the respondent failed to issue.

During his employment, the claimant's work hours were determined by the milking schedule and would start work at 7am to 12pm and then 5pm to 9pm. He was also required to wake up and supervise milking and data entries from 1am to 4am. Cumulatively the claimant worked for 12 hours per day. Due to the nature of work the claimant had no off day, rest day of take public holidays.

The claim is also that the respondent deducted statutory dues from the claimant but there was no evidence of remittance to the statutory bodies.

On 18th June, 2016 the claimant complained to the labour officer at Nakuru following his suspension and failure to be issued with a contract and payment of statutory dues. the labour officer wrote to the respondent with regard to same but there was no response. The labour officer invited the parties to a meeting on 24th August, 2016 where the respondent failed to attend but wrote through the advocates and claiming the claimant was not an employee.

The claimant was paid his wages by the respondent through the bank at account No.0130100219759 with Equity bank and such payment were made by Alice Wathoni Githu, Emboita Hotels and Bahati agro all associated with the respondent company.

The claimant submitted his periodic reports to the respondent via email to wathonialice@gmail.com and copied to skmbagi@gmail.com as the directors of the respondent.

The matter was not resolved upon report to the labour officer and this has resulted in the unfair termination of employment. The claimant is seeking his terminal dues as follows;

- a) Notice pay at Ksh.84,000.00;
- b) Pay for 14 days worked in June, 2016 Ksh.39,200.00;
- c) 21 leave days ksh.58,200.00;
- d) Service pay Ksh.42,000.00;
- e) Compensation;
- f) Overtime pay Ksh.764,400.00;
- g) 54 off days Ksh.302,400.00; and
- h) Costs.

The claimant testified in support of his claims that upon employment by the respondent he was not issued with any written contract and later he realised there was no payment of statutory dues. he raised these matters with Ms Wathoni for the respondent and who was managing director but these questions led to his suspension.

On 18th June, 2016 the managing director came to the farm where the claimant was working and brought a new employee to take over his duties. The claimant was sent on suspension through verbal, notice and when he asked for a written notice the director got angry and sent him on compulsory leave. It was late into the evening and noting the distances the claimant requested to sleep over in the farm and leave the next day as he had no money for transport. The claimant was allowed to stay overnight but he was kept under security guard all night to ensure he never left his allocated accommodation and who ensured he left the next day.

The claimant also testified that despite seeking payment of his dues and reporting the matter to the labour officer, the respondent has remained adamant and refused to pay.

Defence

As noted above, save for the Memorandum of Appearance through the firm of Mbat

- Associates file don 6th September, 2017 there is no defence, statements or work records required under the provisions of section 10(6) and (7) of the Employment

Act, 2007 (the Act). The respondent also failed to attend at the hearing despite being given ample and sufficient time to attend.

At the close of the claimant's case, there is no challenge to the claims made.

The claims made shall be assessed on their merit, the evidence on record and the applicable law.

Section 8, 9 and 10 of the Employment Act, 2007 requires an employer to issue an employee with a written contract of service. where work commences through a verbal contract of service, the employer has the duty to ensure a written contract is issued to the employee not later than one (1) month and not beyond two (2) months. Where there is no written contract, the employer as the respondent fails to attend court of file any defence of work record, the word of the employee as the claimant is to be believed.

In this case, the court is only left with the pleadings filed by the claimant and his evidence. These pleadings and evidence are not challenged.

Where employment is terminated without notice, for good cause and the employer fails to follow the provisions of section 41 and 43 of the Act, pursuant to the provisions of section 45, this is unfair termination of employment and compensation is due.

Notice pay is due to an employee under the provisions of section 35 of the Act where due process is not followed in effecting termination of employment. The claimant was earning a gross wage of Ksh.60, 000.00 based on the various deposits made by the respondent to his bank account on a monthly basis.

On such gross wage, compensation for unfair termination of employment is awarded at one (1) month pay all at ksh.60, 000.00.

For the 14 days the claimant worked in June, 2016 until he was sent away by the respondent the wage due is awarded at Ksh.30, 000.00.

Leave days due to the claimant for the 15 months at work with the respondent are all assessed under section 28 of the Act at 25 days. Payment in lieu of taking leave is ksh.50, 000.00.

Service pay is due to the claimant under the provisions of section 35 of the Act for the failure by the respondent to issue him with a payment statement and or submit evidence of payment of any statutory dues. the claimant having served for 15 months worked for one (1) full year as service pay due is Ksh.30, 000.00.

Overtime worked by an employee is payable under the Wage Orders. For the 350 overtime hours the claimant served and based on the gross wage of Ksh.60, 000.00 per month the overtime pay is hereby assessed at ksh.87, 500.00.

Each employee is entitled to a rest day per week. Where there is no written contract of service on how such a rest day is to be taken or covered, and the employee is left at work on such a day, payment in lieu is an appropriate compensation. The claimant had 54 such rest days not taken all assessed at ksh.27, 000.00.

In view of proceedings herein, the claimant is entitled to his costs. Such are hereby assessed at ksh.15, 000.00 all inclusive to attendance, and filing of pleadings.

Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of his terminal dues as follows;

- (a) Compensation awarded at ksh.60,000.00;**
- (b) Notice pay Ksh.60,000.00;**
- (c) 14 days worked in June, 2016 Ksh.30,000.00;**
- (d) Leave days Kshs.50,000.00;**
- (e) Service pay kshs.30,000.00;**
- (f) Overtime pay ksh.87,500.00;**
- (g) Pay for work over rest days ksh.27,000.00; and**
- (h) Costs awarded at Ksh.15, 000.00.**

Delivered at Nakuru and dated this 24th day of January, 2019.

M.MBARU JUDGE

In the presence of:

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