



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.378 OF 2017

PETER LOROT KODEKE.....CLAIMANT

VERSUS

NAIVASHA WATER, SEWERAGE & SANITATION CO. LTD....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent in November, 2007 as a Night Guard up and until December, 2013. In January, 2014 the claimant was appointed sewerage attendant.

While the claimant was working as a night guard he would report to work at 6pm to 6am. Upon appointment as sewerage attendant his work hours were 6am to 6pm. Such work hours were against section 27(2) of the Employment Act as no compensation for overtime was paid. The claimant was also not allowed annual leave or paid in lieu thereof. No housing was allocated or an allowance paid.

On 13th June, 2017 the claimant's employment was terminated for no good cause, notice or payment of terminal dues. The claimant is seeking payment of the following dues;

- a) Notice pay Ksh.14,274.40;
- b) House allowance Ksh.823,124.00;
- c) Off duties Ksh.356,529.20;
- d) Public holidays Ksh.80,743.40;
- e) Leave for 7 years Ksh.52,794.55;
- f) Salary for June, 2017 Ksh.6,185.40;
- g) Compensation; and
- h) Costs.

The claimant testified that his employment was oral, no terms or conditions of service were issued but he started as a night guard and then appointed sewerage attendant from January, 2014 and in which position he worked until unfair termination on 13th June, 2017.

The respondent filed a defence and states that they had issued the claimant with a house but no records have been attached as proof. From the year 2015 to 2017 the claimant was paid a house allowance.

The claims for off duty pay relates to the period he was a night guard. He worked all alone for 7 years and was not allowed time off or annual leave. The defence that he took annual leave is not true. The records filed by the respondent are not signed by him.

The claimant also testified that the allegations that he beat up a colleague is not true as there is no criminal report of such matter. The person alleged to have been beaten was not called or stated. The reasons thus advanced and leading to termination of employment are not valid and competition and terminal dues claimed should be paid.

In response, the respondent has denied all allegations made by the claimant save that the claimant commenced his employment with the respondent from August, 2013 to June, 2017 where he remained on 3 months contract which were renewed upon lapse. The claimant was

granted leave days, rest days and in accordance with the law. the claimant would utilise his leave days or would be paid in lieu of taking leave. Upon termination of employment he claimant had 9 pending leave days which were compensated in cash.

The defence is also that from August, 2013 the claimant was resident in a company house until may, 2015 when he was paid a house allowance.

The claimant grossly miscounted himself contrary to his employment contract and the Employment Act, he was issued with notice and invited to a hearing and for good reasons his employment was terminated. The claimant was found to have endangered the life of a fellow employee and as a result, his employment was not tenable.

All owing dues were paid.

Grace Wangari Njoroge testified for the respondent hat as the Human Resource Officer she is conversant with the claim. The claimant was employed on 3 months contract as a sewerage attendant which contracts have been produced. The last such contract was issued on 1st May, 2017. All due salaries and allowances were paid to the claimant in accordance with his contract and the applicable law. the respondent has company houses where the claimant was accommodated until he applied to move out and was paid a house allowance.

On 7th June, 2017 the claimant assaulted his colleague at work, Mr John Mwangi and the matter was reported to the supervisor. Upon receipt of the complaint the claimant was issued with a notice to show cause on 9th June, 2017 and where the claimant responded. He was invited to a disciplinary hearing on 12th June, 2017 and after a full hearing a decision was taken to dismiss him form employment.

The claimant was paid for 13 days worked in June, 2017, 9 days of leave due, 7 days' notice pay under his contract, and house allowance for 13 days. Such settled his claims.

At the close of the hearing the parties filed Witten submissions.

In analysing the issues emerging the court has put into account the pleadings, the evidence and the written submissions.

The respondent has attached the written contracts of employment relating to the claimant and which confirm that he was employed under fixed term contract for the entire duration of his service to the respondent. the last such contract covered 3 months effective from 1st May, 2017 and ending August, 2017.

Such contract was not covered in full as on 9th June, 2017 the claimant was issued with a notice to show cause why disciplinary action should not be taken against him for alleging assaulting a fellow employee, John Mwangi. The claimant is said to have injured his colleague on his left hand thumb as he was trying to defend himself from assault.

The claimant had made his written response admitting he had an argument with his colleague over work matters but there was no fight.

The claimant was invited to a hearing on 12th June, 2017 and following which, he was issued with a letter dated 13th June, 2017 terminating his employment.

It is therefore not correct from the evidence of the claimant that his employment was oral, he was not given the reason for the termination of employment and that there was no notice or a hearing. By his own handwritten statement and the invitation to attend a hearing on 12th June, 2017 the claimant was given a fair chance to urge his defence over the allegations made against him.

Section 44(3) and (4) of the Employment Act, 200 allow an employer to dismiss an employee for gross misconduct especially is a case where the employee has committed serious acts of a criminal nature like assault to a fellow employee. Even where the matter was not reported to the police to commence criminal sanctions, the fact that the claimant had a quarrel with his work colleague and proceeded to assault and injure him, a mater which was reported to the supervisor and the claimant was invited to a hearing, such due process would suffice to address matters of employment relations at the shop floor.

The claimant was given a fair hearing on the shop floor where the best evidence is to be found as held in the case of **Joseph Onyango Asere versus Brookside Dairy Limited [2016] eKLR** the court held as follows;

*The Claimant confirmed that he was given a hearing as required under section 41(2) of the Employment Act. Though not documented, this is confirmed by the Claimant in his sworn evidence. As submitted in the case of **George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR** indeed internal disciplinary proceedings are not similar as Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably given a hearing to be able to give his defence.*

The hearing at the work place is the best forum to source the best evidence and ensure the employee is given a fair chance to argue his defence. In **Charles Mumo Nyumu versus Bollore Africa Transport & Logistics Kenya Limited [2017] eKLR** the court held that;

- *where the respondent as the employer issued warnings, a show cause notice and there was a hearing that is not challenged, I find internal disciplinary mechanisms were employed and the claimant given his rights at work. He had no good defence. The shop floor being the best place to source primary evidence and noting the work record of the claimant, I find the termination of*

employment was justified.

Accordingly, in this case where the claimant was able to respond to the allegations made against him in writing and was further called to a hearing and upon such hearing the employer found the defences not satisfactory and being true that he had committed serious act of gross misconduct, the resulting termination of employment was justified. Such warranted summary dismissal in accordance with the law and pursuant to the provisions of section 44 of the Employment Act, 2007.

The payment of notice as under the contract subsisting was a generous pay-out as summary this was a case of justified summary dismissal and notice pay was not due.

On the claims made for leave days, off day, work over public holidays and overtime pay when the claimant was a security guard, such period is time barred having occurred outside the contract terms subsisting and being over 3 years old at the time the claim herein was filed. In any event, under the fixed term contracts, the terms therein were specific and applied only under each contract. To claim outside the fixed term contract would not suffice.

At the end of employment the claimant was paid the owing leave days.

The claim for house allowance is on the basis that the claimant was not housed by the respondent. that his house allowance was only paid from May, 2015.

Section 10(6) create a duty upon the employer to submit all work records when a suit has been filed. In this regard the respondent as the employer asserted that they have company houses and the claimant was housed until May, 2015 when he left the allocated housing for his own house. Such evidence is not challenged in any material way and in any event the payment statements submitted indeed confirm that a house allowance was dully paid.

As set out above, each employment contract ended on its terms and when a new contract issued, the previous contract lapsed. Where there are any claims with regards to house allowances outside the provisions of section 90 of the Employment Act, 2007 such cannot stand the test of time. In this case the claimant was paid the owing house allowance at the end of his employment.

On the findings that termination of employment was justified, no compensation is due.

Accordingly, the claims made are without merit and are hereby dismissed with costs to the respondent. such costs are hereby assessed at Ksh.20, 000.00.

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

M. MBARU JUDGE

In the presence of:

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