



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO 448 OF 2016

DAVID TEMBA OMBIMA.....CLAIMANT

VERSUS

KENYA AGRICULTURE &

LIVESTOCK RESEARCH ORGANISATION.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent as a herdsman in February, 2001 at a wage of Ksh.159.50 per day. On 23rd March, 2015 the claimant was issued with letter of appointment for the same position at a wage of Ksh.432.40 per day.

On 1st May, 2016 the claimant was verbally dismissed from his employment by the respondent without any good cause, there was no hearing or any disciplinary procedures conducted in accordance with the law.

The claimant had worked for the respondent for 15 years continuously. Within such period the claimant did not take annual leave, was at work during public holidays and worked overtime without compensation. The respondent deducted statutory dues without remittance.

The claimant is seeking the following;

- a) A declaration that there was unfair termination of employment;
- b) Notice pay Ksh.11,242.40;
- c) Underpayments from 2001 Ksh.78,977.20;
- d) Annual leave not taken Ksh.136,206.00;
- e) Pro-rata leave earned Ksh.1,513.40;
- f) Overtime pay Ksh.575,470.35;
- g) Pay for rest days Ksh.667,278.40;
- h) Work during public holidays Ksh.132,14.40;
- i) Gratuity Ksh.60,449.52;
- j) Compensation;
- k) Certificate of service; and
- l) Costs.

The claimant testified that he was employed as a casual with general duties, milking and fencing and paid a daily wage until 1st April, 2015 when he was employed vide letter of appointment and his wage increased from Ksh.159.00 to 480.00 per day. He would be at work for a full week without leave, break or rest. Such was not compensated.

In April, 2016 the claimant was directed by his foreman, John Kinuthia not to report back to work the next day. Kinuthia said he had been sent by the chief officer.

After a week the claimant wrote demand for the payment of his terminal dues.

The claimant also testified that he was paid Ksh.110, 000.00 by the respondent.

In response, the respondent's case is that the claimant was employed and issued with letter of appointment and following events of the night of 14th April, 2016 where he was caught together with others with 8 cows at the gate with the intent of moving them outside for unknown reasons, he was arrested and the matter reported to Lanet Police Post under OB No. 14/04/2056hrs/2016.

The claims made with regard to not taking annual leave, rest days and public holidays are denied and where such work was done there was payment. There was no overtime work allowed and the claims made are without any justification. All statutory dues were accounted for

The defence is also that upon the summary dismissal of the claimant he was paid terminal dues at Ksh.110, 249.80 and an agreement made before the labour officer in settlement of the matter.

The respondent, with approval of the claimant and save for the dates of employment adopted the evidence of the witness in **ELRC Cause No.447 of 2016 – James Korinyang versus Kenya Agricultural & Livestock Research Organisation.**

the witness, Patrick Githui Mwangi testified that he is head of Livestock Department and who closely worked with the claimant testified for the respondent after the demise of the scheduled witness Paul Marutegek.

Mr Mwangi testified that the claimant was employed as a casual employee for herding cows. All the casual employees are not entitled to annual leave but have a rest day. The respondent would give one (1) day off per week. Work hours were 6.30am to 4.30pm. the work hours were distributed from 6.30 am to 6.30pm for all herdsmen.

Later the claimant was issued with letter of appointment dated 25th March, 2015 for a 3 months employment. Such letters would be renewed upon lapse. The claimant was required to work to the satisfaction of the employer and would be subject to termination of employment at end of each day. The claimant failed to do his work well when the respondent's director found him with several cows near the gate with on the night of 14th April, 2017. Such was with intent to remove them from the farm. Such was a criminal act.

Mr Mwangi also testified that the actions of the claimant were reported to the police and a decision taken to dismiss him.

Earlier the respondent found that the claimant had separated the cows and the calves for milking and would sell the milk against the set procedure. Most of the cattle were kept at the farm for research and any interference would not give the required results.

The claimant's conduct warranted summary dismissal. In this case, the claimant was invited for a hearing before his dismissal. He had no satisfactory defence and was paid his dues amounting to ksh.73, 640.40. An agreement was drawn where the claimant accepted his dues with nothing else outstanding.

At the close of the hearing, both parties filed written submissions.

Section 44 of the Employment Act, 2007 allows an employer to dismiss the employee upon a fundamental breach to the employment contract and or upon committing acts of gross misconduct. the procedural requirement in this regard to is endure the compliance with section 41(2) of the Act where the employee must be invited and given a hearing.

Section 10 (3) read together with section 37 of the Employment Act, 2007 allows an employer to issue an employee with a written contract of employment specifying the term and also the law allows the conversion of oral or casual employment into writing with benefits under the Act as held in **Krystalline Salt Limited versus Kwekwe Mwakele & 67 others [2017] eKLR** and restated in the case of **Rashid Mazuri Ramadhani & 10 others versus Doshi & Company (Hardware) Limited & another [2018] eKLR.**

in this case, the claimant was on an on-going letter of appointment and within which, though addressed as 'casual employee' the wages were paid monthly and the letter assigned him specific duties. Such could be terminated upon notice and for good cause.

The claimant does not contest in any material way that on 14th April, 2016 he was arrested and the matter reported to the police where he was booked following acts of gross misconduct when he was found together with others with intent to remove animals from the respondent's premises. The evidence that the claimant was sent away by his foreman without any reasonable cause is therefore not supported with any substantial grounds on the face of the report to the police against him. such gross misconduct and criminal act justified the summary dismissal.

Where employment commenced vide letter of appointment the claims made for underpayments, leave and rest days not taken and the alleged work overtime are without basis. At the end of employment and noting the gross misconduct, the agreement to pay the claimant terminal dues on the basis that the claimant was engaged;

... on casual terms of service that was determined on daily rate basis from 1st September 2009 up and including 30th April 2016, a period of about 6 years, 7 months; (on a need basis hence it was not continuous service period)

That the following termination of his employment on 30th April 2015, he as having outstanding wages amounting to KES110,249.80;

That such to this agreement, the casual worker will be paid his terminal outstanding wages of KES110, 249.80; ...

Such dues assessed in accordance with the position held by the claimant and the reasons leading to his dismissal, the applicable law, it is a generous payment. The addition of full accommodation by the respondent to date and over the period after summary dismissal, these factors put into account, to make any further payment would be to visit an injustice on the other party.

Accordingly, the claims made are hereby found without merit and are hereby dismissed. Each party to bear own costs.

Delivered at Nakuru and dated this 21st day of January, 2019.

M. MBARU JUDGE.

In the presence of

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