



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.447 OF 2016**

**JAMES KORINYANG' LOKWANG' .....CLAIMANT**

**VERSUS**

**KENYA AGRICULTURE &**

**LIVESTOCK RESEARCH ORGANISATION.....RESPONDENT**

**JUDGEMENT**

The claimant is a male adult while the respondent is corporate body established under section 3 of the Kenya Agricultural and Livestock Research Act, 2013 whose functions include establishing and exercising control over the research institute, committee and centres under the Act.

The claimant was employed by the respondent initially on casual terms on or about 20<sup>th</sup> April, 2007 as a herdsman, a position he held until 15<sup>th</sup> April, 2016.

The claimant was paid a daily wage of Ksh.159.50 from 20<sup>th</sup> April, 2007 and which wage was reviewed to Ksh.432.40 from 25<sup>th</sup> March, 2015.

The claimant was in the continuous service of the respondent for 9 years without break, warning or any disciplinary case against him. his work hours were 7.30am to 5pm every day and without payment of overtime. The claimant was not allowed annual leave, rest days, was at work during public holidays and such were taken without compensation.

The respondent made deductions from the claimant's wages without remittance to the NSSF or NHIF for the years, 2014 to 2016.

On 15<sup>th</sup> April, 2016 the respondent, without any justification dismissed the claimant from his employment. Such was without notice, hearing or payment of the terminal dues.

The claimant is seeking payment of the following dues;

- a) Notice pay, Ksh.11,242.40;
- b) Salary underpayment Ksh.78,977.20;
- c) Annual leave Ksh.72,643.20;
- d) Pro-rata leave Ksh.8,323.70;
- e) Overtime pay Ksh.340,50.16;
- f) Rest days Ksh.393,779.20;
- g) Public holidays Ksh.77,832.00;

h) Gratuity Ksh.12,972.00;

i) Compensation; and

j) Costs.

The claimant testified that upon employment he was a herdsman in the year 2007 but later was issued with a written letter dated 27th March, 2013. He does not know how to read and nobody read the letter to him. another letter was issued on 25th March, 2015 stating that he was a casual employee of the respondent.

The claimant worked without break, taking leave or taking rest days. As a herdsman, he was required to attend to the cows for long hours but the overtime was not paid. The respondent allocated him a house and was required to pay Ksh.300.00 per month.

On 15th April, 2016 the claimant did not know what had happened, he was called and advised that there was no work. This was not true as the respondent still required herdsman and had cows. There was no notice or hearing.

The claimant also testified that later he was called by the director and told that he had mixed cows but the respondent had several cows all which belonged to the farm he was working at. Where there was a stray cow, it was not possible to return it as the place was expansive.

In response, the respondent has denied all the claims save that he was dismissed from his employment for reasons that on the night of 14th April, 2016 he was caught alongside 3 others with 8 animals next to one of the respondent's institute's exit with an intention of moving them outside the centre to an undisclosed occasion and following which he was arrested and reported to Lanet Police station under OB No.14/04/2056hours/2016.

The defence is also that the claimant has since been paid his terminal dues at Ksh.73, 640.40 which he accepted and has no other claims against the respondent.

Patrick Githui Mwangi the 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 herdsman.

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.

In analysing the issues herein, the court has taken into account the pleadings, the evidence, the records/documents filed and the written submissions.

It is not in dispute that the claimant has been in the long service of the respondent from the year 2007. However the casual terms were reduced into contract employments the last such contract dated 25th March, 2015.

In the letters the claimant is defined as a casual employee.

Under the Employment Act, 2007 a casual employee is defined as one who is paid a daily wage and such work ends each day. In this regard the claimant had a daily wage but was under a fixed term contract of 3 months the last such contract ending 24th June, 2015.

After such date, no other written contract was issued or has been produced. The claimant testified that he was only issued with two such contracts. He however remained undertaking duties of a herdsman until his dismissal following events taking place on 14th April, 2017.

Save for the term 'casual employee' the claimant remained in the continuous service of the respondent after June, 2015. His employment thus converted under section 37 of the Employment Act, 2007 to an employee protected under the law.

However any claims that arise outside the period contemplated under section 90 and going outside of the contract term last issued on 25th March, 2015 are time barred.

It is common cause that on 14th April, 2017 the claimant and others were found with 8 cows at the respondent's premises and gate and upon suspicion of having intent to remove them therefrom, the matter was reported to the police. Such action arose from the conduct of the claimant which is not denied.

Section 44 of the Employment Act, 2007 allow an employer to summarily dismiss the employee for a fundamental breach of the employment contract and following gross misconduct. section 44(4) of the Act has outlined the various acts of misconduct where committed result in summary dismissal.

The commission of a criminal act, neglecting to attend duty and putting an employer's property into waste are matters once committed, lawfully lead to summary dismissal.

In this case, the conduct of the claimant being criminal and having been reported to the police, he was invited to a hearing, a matter he confirmed in his evidence and whereupon he was dismissed. Subsequently, the claimant entered into an agreement for the payment of his terminal dues.

By accepting payment of terminal dues in a matter where the claimant admitted he was called by the director for a hearing, the claimant cannot turn round and state that he had no knowledge of the reasons leading to his dismissal or that such action was taken with arbitrariness. To the contrary, the court finds the respondent abided the provisions of section 44 read together with section 41(2) of the Employment Act, 2007. The claimant was given a hearing at the shop floor. Such hearing should not be akin to a criminal trial as held in **Beatrice Adhiambo Obiero versus Henkel Polymer Company Limited t/a Henkel Chemical East Africa Cause No.1225 of 2015**.

In **George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR** the court held that;

*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.*

Having met the requisite threshold under section 41(2) of the Employment Act, 2007 the dismissal of the claimant was lawful and followed due process. Such is found justified.

Notice pay is not due in a case where summary dismissal is justified.

On the claims for under payments, such only relate to the period from the last contract dated 25th March, 2015 as analysed above. From the computation of such underpayments, the period covered are outside the requisite threshold of time under section 90 of the Employment Act, 2007. From the payment statement attached to the memorandum of claim, from the last contract the claimant was paid within the Wage Orders.

On the claims for annual leave for 8 years, though the periods are not started, for the last 3 years in service and pursuant to section 37 of the Act, the claimant was entitled to 21 days of annual leave. The leave pay due is assessed at ksh.33, 726.00.

Overtime claimed for the period and years 2015-2016 is due on the basis that where the claimant worked from 6.30am to 4.30pm as Mr Mwangi testified, even where the claimant was considered to be a casual employee, the overtime hours should have been fully compensated. The claimant was protected under the provisions of section 37 of the Act and overtime pay is due. for the applicable period, the claimant is awarded overtime pay at Ksh.36, 605.36.

Pay for work during rest days is due for the applicable period of 2015-2016 to 2017 all being Ksh.41, 510.16.

The claim with regard to work during public holidays is not specified as to which period it covers. Such is declined.

Under the contract last issued to the claimant and under the provisions of section 37 of the Act, gratuity payment is not a right.

The claimant also testified that he was made to pay for rent for being housed by the respondent. he paid Ksh.300.00 per month. However the house was accommodating his family and had water, electricity and other amenities.

The respondent's witness testified that the amounts paid by the claimant was not rent, rather it was for maintenance of the allocated premises. The claimant was allocated a house and since his dismissal he is still resident therein.

Indeed, to equate the amount of Ksh.300.00 for rent is absurd. The defence given in this regard suffices. In any event the claim for house allowance was not pleaded to allow the respondent give a defence and or be able to file and submit the necessary records.

**Accordingly, judgement is hereby entered for the claimant for payment of due annual leave pay at ksh.33,726.00; overtime pay Ksh.36,605.36; pay for rest days Ksh.41,510.16 and from such payments the respondent shall deduct the sum of Ksh.73,640.40 which the claimant has since accepted. Each party shall 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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