



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.144 OF 2018

WELLINGTON MAERO OMWAYACLAIMANT

VERSUS

HYGENIC BUTCHERY TRADING LIMITED RESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 5th January, 2017 as a Cook at the respondent's branch near Eveready within Nakuru. There was no written contract or letter of appointment issued and the claimant was paid ksh.1, 200.00 per month with a deduction of ksh.200.00 to the NSSF but there was no remittance.

The claimant was underpaid contrary to the wage orders which provided for Ksh.12,386.35 per month and a house allowance of Ksh.1,857.80 all being Ksh.14,243.15 gross wage per month.

Work hours were from 5am to 6pm all being 13 hours' work per day without compensation of the overtime hours.

The claimant reported to work daily for 7 days in a week without rest. He worked during public holidays and was not compensated. The annual leave dues was not taken or paid for in lieu thereof.

The claimant was dismissed from his employment by the director, Musa Kimuge on 16th January, 2018. There was no notice, hearing or reasons given for the summary dismissal. Such resulted in unfair termination of employment.

The claimant is seeking the following;

- a) Notice pay Ksh.14,243.15;
- b) Underpayment Ksh.17,945.20;
- c) Overtime Ksh.139,202.65;
- d) Off days Ksh.79,272.60;
- e) Public holidays ksh.14,863.62;
- f) Leave ksh.8,670.40;
- g) Gratuity Ksh.7,121.60;
- h) Salary for 7 days in January, 2018 ksh.4,153.80; and
- i) Compensation Ksh.170, 91780.

The claimant testified that upon employment by the respondent he worked diligently for 13 hours a day and without taking a rest day for the full week. He requested for a salary increase as the respondent had promised him to pay more but instead the respondent opted to dismiss him. The claimant was called to the office and sent away. He made a report to the labour officer but no action was taken.

The claimant also testified that the respondent would deduct from his salary ksh.200.00 each month but only remitted once to the NSSF.

The claimant also testified that the letter attached to the defence is not true as he was never served with such letter. There were no disciplinary proceedings before the summary dismissal. The defence that the claimant tried to steal and to poison the director are not true as such action should have resulted in a criminal case which was not done.

The respondent had two cooks working in shift. The claimant would start at 5am and the other would start at 10am because at lunch hour there was a lot of work. The claimant would leave early and the other cook would leave at 9pm.

The claimant also testified that he would report to work at 5am to prepare for the day but there was no clocking system in provision to note the time. All communications at work were oral.

Defence

The defence is that the claimant was not dismissed by the respondent on 16th January, 2018 as alleged but he deserted duty after the respondent initiated a disciplinary process by issuing the notice to show cause dated 15th January, 2016 on charges of theft and threat. Efforts to convene a disciplinary meeting failed after the claimant failed to report back to work. There was no termination of employment and the claims made are falsified.

The defence is also that the claimant was employed on 1st October, 2017 as a cook on casual basis at a monthly wage of Ksh.12, 000.00 which was mutually agreed upon and there was no underpayment. There was a deduction of Ksh.200.00 to the NSSF. Work hours were 6am to 4pm with a break at 2 to 3pm. There were off days taken at the end of every month and the claim for overtime is not due. There were only 3 public holidays worked and were recovered during the off days taken. The claimant only worked for 2 months and 14 days and then deserted duty.

The claims made should be dismissed.

Francis Baraza the manager with the respondent testified that the claimant was employed on 1st October, 2017 and registered with NSSF on such dates. The salary was agreed at ksh.400.00 per day and there was the option to decline employment.

Work hours related to the office hours where the respondent opens at 6am. The Cooks had a timetable from 6am to 4pm and 10am to 9pm. There were 2 cooks with alternate work hours. In each week the claimant had an off day. It took time to register the claimant with the NSSF when his dues started being remitted. The claimant was paid his wages through Bishara Sacco.

On 16th January, 2018 the claimant did not report to work after he was issued with a notice to show cause the previous day. The CCTV captured him stealing chapatti, flour and when called to the office he was issued with the show cause notice which he failed to address and absconded duty.

The claimant was employed as a casual and was paid weekly. He had 10 days to cover work during public holidays and off days and any overtime work done.

Work records are the fodder for every employer. Without work records, the court must believe the word of the employee.

In this case the respondent filed the notice to show cause allegedly issued to the claimant, the work schedule for cooks, a muster roll for October to December, 2017 and for January, 2018. There are also NSSF deductions schedule.

The claimant is alleged to have been employed in October, 2017 as a casual employee. However the respondent by its own witness and statement confirm the due wages were paid weekly and through the Sacco.

The schedule of payments to the Sacco is not attached. The respondent has opted to only share the muster rolls for the months the claimant was allegedly employed. A register covering the entire period from 5th January, 2017 when the claimant stated he was employed would have resolved the dispute on the period of employment. With the respondent holding back these details, the word of the claimant must be believed.

A casual employee is well defined within the law as one who is paid a daily wage at the end of each day and whose employment ends with each day upon payment of the due wage. Where the claimant was retained for period of over one day and was paid weekly for period over 30 days over work which was not reasonably ending, he became protected under section 37 of the Employment Act, 2007. The rights under the law are due.

An employee who abscond duty commits gross misconduct as held in **Lear Shighadi Sinoya versus Avtech Systems Limited [2017] eKLR**. the employer has the right under section 44(3) and (4) to summarily dismiss such an employee subject to provisions of section 41(2) of the Employment Act, 2007 and which requires that;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The employer must issue notice to the employee and hear his defence as held in **Gilbert Shiangala Injila versus East Global Logistics (K) Limited [2018] eKLR**.

In this case, where the claimant committed gross misconduct by stealing foodstuffs and issuing threats, such are serious criminal acts which warranted a disciplinary action and report with the police. On the alleged notice to show cause and failure by the claimant to attend, there is no effort by the respondent whatsoever in reaching out to the claimant to respond as required. The defence that the claimant absconded duty and failed to respond to the show cause is found lame and leaves the respondent exposed.

The no action by the respondent in addressing work place misconduct and leaving the claimant at large works contrary to what an employee with the right to issue notice of summary dismissal under the law should. Without being proactive on the face of the serious allegations made, the word of the claimant must be believed. He was unfairly dismissed from his employment without notice, hearing or being given the reasons thereof. Had the respondent issued the notice and the claimant failed to attend, nothing stopped the respondent from reporting such misconduct to the police and or the labour officer.

The muster rolls filed by the respondent show the claimant was at work for the entire period of October, November, and December, 2017. The record for January, 2018 where the claimant is marked as absent or present are overwritten and without clarification as to what this meant. Without these details, the court is inclined to believe the claimant that he worked without taking a rest day or public holiday and there is no record that he was compensated for the same.

The claimant protected under section 37 of the Employment Act 2007 was entitled to the minimum wage under the wage orders. Such pay cannot be agreed downwards. The due wage each month was ksh.12, 386.35. The payment of Ksh.12, 000.00 was less by Ksh.386.00 per month and the due underpayment is Ksh.4, 632.00.

On the claim for overtime, the claimant by his testimony stated that there were two cooks working in shifts. From the schedule he would start early and leave before the other cook. Upon cross-examination the claimant could not coherently explain why he was required to report to work at 5am whereas the respondent would only be open at 6am. The defence in this regard and the filed work schedule is found correct that the claimant worked from 6am to 4pm and the claim for overtime is lost.

For the period of employment and rest days claimed, for each week the claimant worked for 7 days he was entitled to a day of rest all being 52 weeks and thus days. On the due wage such 52 days of rest but spent at work amount to ksh.21, 469.00.

The 9 public holidays have not been set out as to how such arose and juxtaposed with the due rest days or the annual leave pay, such is declined.

Leave pay is due under the provisions of section 28 and read together with section 37 of the Employment Act, 2007. The claimant is awarded Ksh.8, 670.40 as claimed.

The claim for gratuity for one year is not premised on any law and such is only due where there is a private treaty or agreement as arising or due. The court finds no justification for the claim.

The claimant has claimed for 7 days worked in January, 2018. The claimant's statement was that he was dismissed on 16th January, 2018 but has opted to claim for 7 days' pay only. The respondent confirmed the claimant was at work 7 days all at ksh.4, 153.00.

Notice pay is due to a case of unfair termination of employment all at ksh.12, 386.35.

The above awards are appropriate compensation to the claimant.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- a) Notice pay Ksh.12.386.35;**
- b) Pay for 7 days in January, 2018 Ksh.4,153.00;**
- c) Leave pay ksh.8,670.40;**
- d) Underpayments Kshs.4,632.00;**
- e) Rest days ksh.21,469.00;**
- f) The above awards shall be subject to provisions of section 49(2) of the Employment Act, 2007.**
- g) Each party to bear own costs.**

Delivered at Nakuru this 28th day of February, 2019.

M. MBARU JUDGE

In the presence of: