



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 101 OF 2018

SAMUEL WANJIHIA WANJOHL.....CLAIMANT

VERSUS

HOMAGE SERVICES STORE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking to recover for the unlawful dismissal from employment. He also sought payment of his terminal dues which included salary underpayment, non-payment of house allowance, salary in lieu of notice and compensation for the unfair/unlawful dismissal. He averred that he worked for the Respondent as a tailor from 1st April 1991 till his dismissal on 15th March 2015. He also sought the grant of a certificate of service and the costs of the suit together with interest.

2. The Respondent filed a defence in which it denied that the Claimant was a permanent employee. It averred that if at all the Claimant worked for the Respondent, what the Respondent was paying was weekly wages payable on Saturdays. The Respondent asserts that it used to issue identification badges for security and identification purposes. The Respondent averred that going back to its records it found application letters from the Claimant which showed that around 2012 and 2013 the Claimant applied for employment with the Respondent. It was averred that if the Claimant was its employee the claim was statutorily time barred. It denied owing any dues to the Claimant and sought the dismissal of the claim with costs.

3. In his reply to defence, the Claimant averred that the Respondent was blowing both hot and cold and should not be allowed to approbate and reprobate. The Respondent was accused of intimidating the witnesses for the Claimant against testifying and that the Respondent had failed to keep employment records.

4. The Claimant and the Respondent's witness Hezron Waweru testified. The Claimant stated that he was employed by the Respondent as a tailor and issued with an identification badge. He said that he was dismissed for charging his phone at the workplace. Before the dismissal, he was not given a hearing or opportunity to defend himself. He further testified that he was underpaid and was not given house allowance. He stated that he was often asked to write an application letter every time there was an issue so that he could be considered as an employee. He thus sought the grant of the prayers in his claim.

5. The Respondent's witness stated that the Claimant was unknown to him prior to the dismissal. He said he was one of the directors of the Respondent. He testified that the identification card the Claimant had produced was issued by the Respondent to show the employee was employed by the Respondent. He said it was to help them not get arrested by the Police. He said he only found letters from 2012 and 2013. He denied that there was any socket from where a phone could be charged though there was no bar to having a cell phone. He stated that there was no truth in the allegation that the Claimant was dismissed. He testified that the Claimant had worked for the Respondent previously and because he did not hire the Claimant he did not have a record of his employment.

6. The parties filed submissions in which the Claimant submitted that he was an employee of the Respondent despite the fact that the Respondent's witness had denied knowing him. He argued that the Respondent was not honest as the witness denied knowledge of the Claimant as an employee yet it availed letters he wrote for employment. He submitted that under Section 10(7) of the Employment Act, there was a burden imposed on the employer to provide a contract for an employee whose service was beyond 3 months. He asserts that read with Section 74 of the Employment Act, it was the duty of the Respondent to maintain employment records and produce them when required. The Claimant relied on the cases of **William Obwogo Karani v Modern Distributors Limited [2017] eKLR** and **Peter Odhiambo Angira v Mini Bakers (Nairobi) Limited [2016] eKLR** for the proposition.

7. The Respondent submitted that the Claimant had applied for employment and from the attached letters he sought employment as a tailor. It was submitted that the Claimant stated his qualification as prior work experience and would require minimal supervision. The Respondent submits that the Claimant yet again applied for renewal of employment 6 months later. The Respondent argued that if the Claimant was in employment since 8th May 2012 why would he apply for renewal hardly 6 months later and describe himself as diligent and self driven. The

Respondent asserted that the Claimant wanted the court to believe that he used to make several applications every occasion he would come from off duty or leave. The Respondent stated that with respect, this is not practical. The Respondent urged the dismissal of the claim terming it as baseless.

8. The Respondent employed the Claimant in 1991 as per the card the Claimant produced. The Respondent argues that the Claimant was not its employee and only had 2 letters of application for employment. The Claimant on his part asserts his dismissal was unfair as a result of charging a phone at the workplace. The Respondent as employer should maintain records. The Respondent was mute regarding the outcome of the application by the Claimant for employment. Was it accepted? Was it rejected? If acceptance was made, did the Claimant get an appointment letter? What records were maintained in respect to his employ? It is apparent that the Claimant's version is more plausible. He had been employed by the Respondent for long and occasionally would be compelled to seek re-employment for whatever reason the Respondent would require of him. Section 10, 18 and 74 of the Employment Act relate to records that an employer should keep. If indeed the Claimant was not an employee, it would have been easy for the Respondent to avail its muster roll or employee list and demonstrate the Claimant was not who he claimed to be – a tailor at the Respondent. The claim is proved on a balance of probabilities and the Claimant is entitled to recover for the underpayment and for the unlawful dismissal. The pay for a tailor in Nyeri Municipality inclusive of house allowance is Kshs. 15,259.35 for the period in question since the rates for 2015 applied from May 2015 after he had been dismissed. The Claimant earned Kshs. 7,000/- a month and the underpayment was therefore Kshs. 8,259.35 for 36 months = Kshs 297,336.60. He is entitled to 6 months salary compensation for the dismissal – Kshs. 91,556.10 as well as costs of the suit and interest from date of judgment till payment in full. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. Salary underpayment - Kshs 297,336.60.
- b. 6 months salary compensation – Kshs. 91,556.10
- c. Costs of the suit
- d. Interest on the sums in a) and b) above from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 26th day of February 2019

Nzioki wa Makau

JUDGE