



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.471 OF 2016

RODGERS NYACHWAYA ONDIEKI.....CLAIMANT

VERSUS

RELIABLE CONCRETE WORKS LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 9th February, 2009 as a Stone Mason and later as Store Keeper on 1st January, 2013 at a wage of Ksh.440.00 per week and then Ksh.550.00 per week from December, 2015.

In October, 2016 the respondent's officer Mr Daniel Kimani called the claimant and informed him that he was to hand over his duties with immediate effect. On 27th October, 2016 reported back to work and was informed by the human resource officer, Ms Joyce that due to the low volume of work, he should not report back to work and would be called later.

The claimant left the respondent's office and since, there has been no communication or payment of his terminal dues. he was unlawfully declared redundant. During employment, the claimant worked for 9 hours instead of 8 and was not paid for he overtime. On the off day taken there was no pay.

The claimant is seeking for the payment of the following;

- a) Compensation Ksh.212,870.52;
- b) Underpayments Ksh.187,492.18;
- c) Pay for off days Ksh.205,912.00;
- d) Public holidays worked Ksh.99,915.59;
- e) Notice pay Ksh.17,739.12;
- f) Annual leave Ksh.108,652.63;
- g) Overtime pay Ksh.234,725.76;
- h) Service pay/severance pay Ksh.75,639.11;
- i) Certificate of service; and
- j) Costs.

The claimant testified that he was employed as a causal employee by the respondent on 9th February, 2009 and in the year 2013 he was made the store keeper effective 1st January, 2013 to October, 2016 when he was laid off following unlawful redundancy. He was not issued with an employment letter but remained as a store keeper where he received goods and also dispatched materials from the stores.

The claimant also testified that he was paid Ksh.400.00 weekly ad upon promotion he was paid Ksh.550.00 per week. Such wages were paid via Mpesa or Airtel money transfer and no payment statement was issued. Such pay was not inclusive of a house allowance and overtime pay where the claimant would report to work at 7am and leave at 5pm each day. The respondent kept the work records where the claimant was

required to clock in and out from the gate. Work during public holidays was not compensated. No annual leave was allocated or payment made in lieu thereof.

The claimant also testified that he was underpaid by the respondent who failed to ensure the minimum wage as in accordance with the Wage Orders was paid to him. Upon termination of employment, the service pay due was not paid and when the claimant checked with NSSF, he was not registered.

Employment was continuous and without a break from the year 2009 to October, 2016. The claimant withdrew claim with regard to off days' pay.

In response, the respondent's case is that the claimant was employed on casual basis whenever work arose and he was paid on a daily basis and not weekly as alleged. The claim that there was termination of employment due to redundancy has no basis as employment ended each end of day. Such employment on casual basis was not continuous and there was no case of underpayment.

The defence is also that work allocation was for 8 hours each day at work and whenever there was work, a rest day was allocated each week. Work was not for a continuous year to justify claim for severance pay or annual leave or pay thereof.

The respondent filed work records and called Joyce Chemtai Ndiema the human resource officer who testified that the claimant was employed as a junior clerk in the stores and worked from 8am to 5pm with a tea and lunch break from 12.30pm to 2pm. Such breaks would lead to closure of the gates and stoppage of work for all employees to take the breaks.

The claimant was paid a daily wage of Ksh.550.00 and on public holidays the respondent did not pay for work. When there was work, such was regulated and paid a double wage.

The claimant would be allowed leave for over two weeks at a time and several off days to cover for annual leave.

The witness also testified that in October, 2016 the respondent had reduced work; the claimant was called on 6th October, 2016 and informed. The work site was to close until November, 2016 and Daniel Kimani was to inform the employees once a new site opened. All workers were informed.

The respondent was to recall the claimant but when he was invited back he had opted to file suit. There was no unfair termination of employment. House allowance was paid together with the daily wage.

Mr Ndiema also testified that in the payment of the due wages, the respondent did not comply with the minimum wage guidelines and owes the claimant the stated underpayments. The records filed do not set out the taking of annual leave or notice pay upon stoppage of work due to reduction. Service pay is due as the claimant was not registered with NSSF and severance pay is due as there was no written notice before work stopped.

In the Certificate of Service, the claimant has been noted as being a Junior Clerk instead of Store Keeper which should be corrected.

Ms Ndiema also testified that the claimant rushed to court before his dues could be computed and paid.

The respondent also called Daniel Esutsa Amulega the production supervisor and who testified that he worked with the claimant and all employees would start work from 8am to 5pm with a tea break at 10am and lunch break at 12.30pm to 2pm. Work would stop at 4.30pm for cleaning and closure. On public holidays and Sundays there was no work.

On the work records filed by the respondent and the admissions made by the respondents' witnesses that the claimant was a Store Keeper and not Junior Clerk and that there were underpayments, upon the reduction of work and the claimant being laid off, the respondent should pay the due underpayments in accordance with the Wage Orders and from 1st January, 2013 to 26th October, 2016 when employment commenced as Store Keeper and terminated following reduction of work.

On this basis, the claimant was not a casual employee of the respondent as correctly identified by Ms Ndiema for the respondent. The Certificate of Service produced, though stated to be in error that the claimant was not a junior clerk but a store keeper, such record removes the claimant from the category of a casual employee to a full time employee of the respondent.

The claimant testified that he was called by Mr Kimani on 6th October, 2016 with regard to reduced work. He was recalled back on 26th October, 2016 when he was informed by the respondent that he should go home to be recalled when a new project opened. Such evidence on the face of the provisions of section 40 of the Employment Act, 2007 and following decision by the Court of Appeal in **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR** is sufficient notice in a redundancy.

On the overtime claim, the courts the evidence by the respondent and its witnesses credible to the extent that employees worked cumulatively for 8 hours and where there was report at work at 8am, there were lawful breaks for tea and lunch and such did not compromise the daily wage. To claim for overtime pay in this regard has no basis.

The claim for off days has since been conceded by the claimant.

Annual leave is due to an employee who is in the full time employment of one employer continuously. The claimant however testified and

admitted that he was on casual employment with the respondent until 1st January, 2013 when he was employed as Store Keeper. On this role, section 35 of the Employment Act, 2007 requires an allocation of 21 days of annual leave or payment in lieu thereof. Annual leave is due from 1st January, 2013 to October, 2016.

Severance pay is due in a redundancy. Such is to be computed at least for 15 days for each full year of service. Noting the above findings and the evidence by Ms Ndiema for the respondent, for the 7 full years of service, the claimant shall be paid the due severance pay.

Service pay is since addressed by the evidence of Ms Ndiema for the respondent that the respondent is not and or was not registered with NSSF for the payment of the due statutory deduction and remittance. Such service pay is addressed under section 35 of the Employment Act, 200 and shall be paid in the minimum for 15 days for the 7 complete years of service.

The claimant was laid off due to reduced work on 26th October, 2016. He was to be recalled back upon the opening of a new site. He made demand on the respondent on 11th November, 2016 giving notice of 7 days for the payment of terminal dues failure to which suit would be lodged with the court. Suit was then filed on 29th November, 2016.

The matters between the parties can well be addressed on the shop floor. Noting the particular evidence by Ms Ndiema for the respondent, the obvious rashness to file suit, taking the above findings into account, parties shall return to the shop floor and compute terminal dues from 1st January, 2013 to October, 2016 for;

- a) Underpayments due;
- b) Annual leave pay;
- c) Severance pay; and
- d) Service pay.

Accordingly, parties referred to the County Labour Officer, Nakuru Noting the above for computation. Each party shall bear own costs.

Delivered at Nakuru this 7th day of February, 2019.

M. MBARU

JUDGE

In the presence of:

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