



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.97 OF 2016

FRANCIS GITHAIGA MBOKO.....CLAIMANT

VERSUS

PETER MBUGUA T/A PEMS LOUNGE & GRILL..... RESPONDENT

JUDGEMENT

The claimant filed the Memorandum of Claim on the 9th March, 2016 and the respondent entered appearance on 3rd August, 2016 but no defence was filed.

Parties attended court on 23rd September, 2016 for hearing directions and the court allowed the respondent until 14th October, 2016 to file defence. There was no compliance and at the close of pleadings, no defence had been filed.

On 4th October, 2018 the claimant attended court, the respondent though served was absent and a hearing date was allocated for the 21st February, 2019. On the due date the respondent was served directly noting the previous non-attendance of the advocates but opted not to attend the hearing. The claimant was heard on his case.

The claimant was employed by the respondent on 1st May, 2014 as a Chef. The terms and conditions of employment were verbal. He was promised a wage of ksh.14, 000.00 per month but was paid ksh.12, 000.00 instead. The claimant was registered with the NHIF.

The claim is that there was underpayment, as a chef the claimant fell under the wage category of a cook and the wage paid was not in tandem with the Wage orders.

Work hours were 6am to 11pm for 6 days a week and the overtime worked was not compensated.

On 6th November, 2015 the claimant reported to work but his manager told him to go back home on the grounds that he had been replaced. There were no reasons given for this decision, the claimant had not been issued with notice and or a hearing as to why his employment should terminate in a summary manner. His terminal dues were not paid and is claiming the following;

- a) Notice pay at Ksh.12,071.40;
- b) Underpayments Kshs.431.40;
- c) Salary for 6 days in November, 2015 Ksh.3,017.40;
- d) Leave due ksh.12,628.25;
- e) Overtime Kshs.291,512.20;
- f) Work during public holidays ksh.23,466.00;
- g) Compensation ksh.144, 856.80.

The claimant testified in support of his claims.

As noted above, the respondent only entered appearance herein and opted not to file any defence. Despite being invited to attend and take hearing directions, there was no attendance. On the directions for service upon the respondent directly and which was done, there was no

attendance. The court is left with the claimant's pleadings, evidence and nothing else. The evidence as it stands is not challenged. This shall be assessed on its merits and the applicable law.

It is the duty of every employer to issue an employee with written terms and conditions of employment pursuant to section 10 of the Employment Act, 2007 (the Act). where a suit is filed with the court, the duty is upon the employer to submit the work records to assist the court in addressing the claims made particularly the terminal dues owing to the employee. Without defence or the relevant work records the court is bound to believe the employee.

Termination of employment even in serious cases of gross misconduct should follow upon the employer following due process and as required under section 41 of the Act. the employee should be given a hearing and allowed to urge his defence. Without adhering to these procedural requirements, the resulting termination of employment is unfair pursuant to the provisions of section 45 of the Act.

Notice pay is due in this case. The claimant as a chef/cook had his wage regulated under the Wage Orders at ksh.12, 071.40 which is due in notice pay as required under section 35 of the Act.

There is no challenged to the claim for underpayments and this is awarded as claimed at ksh.431.40.

For days worked, whatever the reasons leading to termination of employment, such work should be compensated. The claim for ksh.3, 017.40 is confirmed.

Leave is due under the provisions of section 28 of the Act. without any work records to how that the claimant was able to attend his annual leave, payment in lieu thereof is Ksh.12, 628.25.

Overtime work is claimed on the grounds that the claimant work hours were 6am to 11pm when the business closed. The tabulation of such dues is not challenged. It is also the duty of the employer to ensure a record of daily work hours is taken and to take into account any extra hours where an employee is at work beyond the 8 hours required under the regulations. For the overtime hours worked the claimant is awarded Ksh.291, 512.00.

Work on public holidays is regulated in law. without any work record to confirm that the claimant was compensated for working during public holidays the due pay is Ksh.23, 856.00.

With the above dues awarded, this is appropriate compensation to the claimant.

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

- a) Notice pay at Ksh.12,071.40;**
- b) Underpayments Kshs.431.40;**
- c) Salary for 6 days in November, 2015 Ksh.3,017.40;**
- d) Leave due ksh.12,628.25;**
- e) Overtime Kshs.291,512,20; and**
- f) Work during public holidays ksh.23, 466.00.**

Delivered at Nakuru this 28th day of March, 2019

M. MBARU JUDGE

In the presence of: