



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.8 OF 2017

PATRICK OMODICLAIMANT

VERSUS

IBRAHIM HAJI

ZAINAB SHADI T/A JAMIA FOOD MARTRESPONDENT

JUDGEMENT

On 19th September, 2018 both parties attended court for taking hearing directions and the 25th February, 2019 was allocated by consent. On the due date the respondent remained absent. The claimant was heard on his case and hearing closed.

The claim is that the claimant was employed by the respondents in the year 2009 as a cook starting at a wage of Ksh.5, 500.00 and which increased over tie to ksh.13, 000.00 per month.

The claimant fell ill and the respondent gave him time to seek medical attention and continued to pay him for four (4) months. The claimant had initially been given one month but he developed stomach ulcers and went for treatment but when he returned to work he was not allowed to work.

The claimant was directed to write a letter stating that he had been unwell and which he did. He was not allowed back at work and directed to return after a year which he did but upon lapse of one year he was not allowed back at work.

The claimant reported the matter to his union Kenya Union of Domestic, Hotels, Educational institutions and Hospital Workers (KUDHEHA) and which union wrote demand letter to the respondent who declined to respond. Later the respondent alleged that the claimant had been paid all his due.

This resulted in termination of employment which was wrongful and unfair. The claimant is seeking the following dues;

- a) 3 months' notice pay at 13,000 x 3 all ksh.39,000.00;
- b) Work during public holidays ksh.47,667.00;
- c) Off days worked ksh.72,800.00;
- d) Gratuity of 5 years ksh.32,500.00;
- e) Compensation;
- f) Overtime pay Ksh.52,000;
- g) Leave for 4 years ksh.36,400.00; and
- h) Costs.

The claimant testified that upon employment by the respondent he got sick and developed boils and could not work. The respondent allowed him time to seek medical attention and for 4 months he was paid during recuperation. He returned to work on 5th February, 2015 and directed to write a letter stating he had been sick and during such period he was paid his salary. It was a resignation letter and when the claimant noticed the same he reported to the union which summoned the respondent who insisted that they had continued to pay the claimant while he

was away seeking treatment. The terminal dues owing were not paid and are due and owing.

The defence is that the claimant was an employee but started ailing mid-June, 2014 and was away from work for a period of 6 months and within which period he was paid the salaries due. In total he was paid ksh.76, 000.00.

On 5th February, 2015 the claimant resigned from his employment due to continued poor health and could not be allowed to handle food with chronic septic wounds. Upon leaving employment he was paid the full salary for February, 2015 and on 18th February, 2015 he was paid ksh.39, 000.00 being final dues.

There was no arrangement to return to work after a year. The claims made on the basis that there was unfair termination of employment are not true and the claimant volunteered to terminate employment and was paid his terminal dues.

No evidence was called by the respondent. Filed is a witness statement by Ahmed Abdissalam, manager with the respondent and there are work records.

The claimant's case is premised on the facts that by his letter dated 5th February, 2015 he resigned from his employment with the respondent but states the same was directed by the respondent and when he realised it he sought advice from his union. The respondent on the other hand case is that the claimant voluntarily left his employment through resignation following a long period of illness and was paid his terminal dues.

The court reading of the letter done by the claimant on 5th February, 2015 is that this is he was sick for 5 months and the respondent continued to pay his monthly salary. He was still having stomach problems and had opted to resign.

On 10th March, 2015 the KUDHEIHA wrote to the respondent demanding to have a meeting.

This letter is not a revocation of the resignation notice as suggested by the claimant in his evidence. It is also not clear to the court how the intervention of KUDHEIHA arose as this was not a union recognised by the respondent. From the payment statements, there is no deduction of union dues. Where the claimant was paying to KUDHEIHA directly, this is not clarified.

Employment can lawfully terminate through resignation by the employee. An employee who has resigned from his employment, the employer has to accept the same as to keep such an employee in his employment upon such notice would be servitude.

An employee is also lawfully allowed to resign from his employment where the employer has put the employee under intolerable work condition. Where the employee is forced to resign due to the conduct of the employer, such is defined as constructive dismissal and must be pleaded and set out in evidence. This did not come out as such a case of constructive dismissal as the claimant well set out in his notice dated 5th February, 2015 that he had been unwell and had developed stomach problem and wished to resign and would be paid his terminal dues.

The claimant was on 18th February, 2015 paid Ksh.39, 000.00 being pay for one month in lieu of notice and for two months in final remuneration.

Having resigned on his own accord, the claimant cannot seek compensation for unfair termination of employment. In any event under section 35 of the Employment Act, 2007 he ought to have issued notice to the respondent or pay an equivalent of one (1) month wage in lieu of notice thereof. Instead the respondent paid for notice which was not due as the claimant opted to leave employment.

The claimant also resigned from his employment having been out of work for 6 months running from mid-June, 2014 to February, 2015 when he admits that he was paid all the salaries due.

Section 31 of the Employment Act, 2007 allow an employee to proceed on sick leave with full pay for 7 days and thereafter to remain on half salary unless medical evidence is submitted. There is no effort by the claimant to file any medical certificate to confirm he had sick off authorised by a medical practitioner and even where the respondent continued to pay the due salary, by operation of the law that was going beyond the call of duty.

With the claims now made, such paid salaries shall be put into account while assessing the claimant. For the first 7 days on full pay, June, 2014 was covered. For the next 7 months and where the claimant was paid ksh.76,000.00 while out of work, half such amount shall be removed from the final tabulation of his dues all being 38,000.

On the claim for work during public holidays for 5 years at 11 days each year, the claimant fell short of setting out how such public holidays arose and whether he was required to be at work. The court assessment of the published public holidays for the period and years 2009 to 2015, there are different days running from 9 to 11 days of public holidays. Without clarity and despite the respondent being absent to testify, the claim for such pay is lost.

On the claim for due rest days, the claim is that the claimant worked for 7 days a week without taking his rest days. There are no work records filed by the respondent to confirm the claimant was taking the due rest days for each week at work as required under section 27(2) of the Employment Act, 2007. Without any such record to challenge the claims made, such is due at ksh.72, 800.00

On the claim for gratuity, without any contract, private treaty or agreement to confer such benefit as gratuity, this is not lawfully due. The claimant is declined.

Overtime pay is claimed on the basis that the claimant worked for long hours without compensation. He has filed time sheets and testified that he would work from 6am to 3pm and or in the shift of 7pm to 11pm.

The time sheets filed have obliterated parts particularly the dates. The respondent did not file any time sheet to counter what the claimant relied upon. It is also not clear how the claimant obtained such work records. These shall however be used by the court with great caution as to the authenticity and in their veracity to confirm the work hours.

In some instances the claimant is noted as having reported at work at 6.45am and left at 10.50pm;

On the same day an employee reported at 1.30pm and left as 2300hour;

The next day the claimant reported at 6.50am and left at 11.30pm;

The next day at 6.50hours and left at 10.42pm.

What is apparent to the court on all times on the record with regard to the claimant, there is interference. This was either to ensure emphasis or make attempt to change the record in favour of the time in support of overtime claims. This is repeated in all the work sheets filed by the claimant. This was unnecessary as on a good case with honest and well presented evidence, the court has power to award for overtime pay. In this case to award overtime pay as claimed and based on the interfered records would be to sanction a very dangerous trend. For the record, this would have been due save for the interfered records to help urge a case which would have otherwise been good without such records.

On the claim for annual leave not taken for 4 years, without the respondent filing any work records to show that the claimant took his annual leave from the year 2009 to 2015, such is due in accordance with section 28 of the Employment Act, 2007 at 21 days' pay for each year. Where employment started in July, 2009 and the claimant got sick and was allowed tie off on full pay from mid-June, 2014 the claim for leave pay at Ksh.36, 400.00 in reasonable.

The dues owing to the claimant shall be paid less what he received and not lawfully due and being Kshs.

As set out above, judgement is hereby entered for the claimant against the respondent for the payment of rest days at ksh.72, 800.00; annual leave pay ksh.36, 400.00 all total being Kshs.109,200.00.

From these dues, the claimant shall be paid less what is received and acknowledged at ksh.39, 000.00 and half wage paid while on sick leave at Kshs.38, 000.00 and all being 77,000.00.

The paid dues shall be subject to taxation. Each party shall bear own costs.

Delivered in Nakuru this 14th day in March, 2019.

M. MBARU

JUDGE

In the presence: