



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.386 OF 2016

JOHN ASHIRUNGA MJENGO.....CLAIMANT

VERSUS

ROY COLLINS KAMAU

T/A NEEMA BAKERYRESPONDENT

JUDGEMENT

The claim is that on 14th August, 2013 claimant was employed by the respondent as an oven man at a wage of Ksh.9,100.00 per month and until November, 2015 when the wage was increased to Ksh.12,000.00 per month.

The claim is also that the work hours were 7am to 10pm for 6 days a week. There was no public holidays or annual leave allocated. Employment was terminated on 10th February, 2016 when the claimant asked for his wage arrears at Ksh.4,516.00.

On 9th February, 2016 the respondent told the claimant that his work machine had broken down and should go home until this was addressed. On the next day he called to ask if he should resume duty without a response and upon request for his wage and the arrears these were not paid. The claimant made a report to the labour office.

The claim is for the payment of the following;

- a) Underpayments ksh.210,563.40;
- b) Leave days Ksh.34,304.80;
- c) Notice pay ksh.15,425.40;
- d) 10 days worked Ksh.5,933.10;
- e) Overtime ksh.555,648.00;
- f) Gratuity Ksh.14,599.10;
- g) Public holidays ksh.45,847.20;
- h) Money withheld ksh.24,716.00;
- i) Compensation;
- j) Costs; and
- k) Certificate of service.

The claimant testified in support of his case. Termination of employment followed what the respondent claimed a fair chance to be machine breakdown and when the claimant called to enquire when he should return he was told not to disturb the director. The defence that the claimant was given two days off for the repair of the machine is not true. There was unfair termination of employment.

The defence is made of mere denials save that on 12th February, 2016 there was no production at work and the claimant was given two days off and was to return on 15th February, 2016 which he failed to do. On 15th February, 2016 the claimant called and stated that he had left his employment and thus abandoned his employment by choice.

There is no work record submitted by the respondent.

Julius Kioko testified that he is a shift leader with the respondent and worked with the claimant who was a casual labourer. On 12th February, 2016 the work mixer machine broke down causing low production and the claimant was given time off to return on 15th February, 2016 but he failed to return back to work. The employees work hours are varied from 8am and 9am to 3pm up to 4pm. There was no work until 10pm. The claimant had a part time job as a bodaboda rider which he would engage before reporting to work for the respondent. due to the nature of business where the respondent supplies bread to schools, during the school holidays production would be low and the claimant got annual leave.

Roy Collins Kamau testified that he is a partner in the respondent and had employed the claimant as a casual labourer and on 12th February, 2016 the mixer machine broke down and gave him 2 days off but he never reported back to work as directed. Despite being called over the phone, he never picked his phone. The claimant had a part time job and would be off work during school holidays. The claimant never worked as an oven man, which position is held by Moses Githinji. The claims made should be dismissed.

Mr Kamau also testified that he had a meeting with the claimant after he left his employment and paid to him his dues and by mutual agreement also paid ksh.14,000.00 to settle the matter. The claimant accepted these payments but no written agreement was signed.

At the close of the hearing, both parties filed written submissions.

The respondent as the employer has not produced any work records are required under section 10(3), (6) and (7) of the Employment Act, 2007. The court is only left with the pleadings and the evidence of the parties.

The claimant testified that his last day at work was on 9th February, 2016 when the machine broke down and was advised to go home. The defence is that the machine broke down, the claimant was given 2 days off and was to return on 15th February, 2016 which he failed to do and when called back he did not attend. As noted above, there is no work record to support the defence or the fact that the claimant was sent off for 2 days and when he was recalled back he failed to attend.

The failure by an employer to keep work records leaves the court without any material particulars as to what exactly happened. In such a case, the court is bound to believe the employee as the duty to keep records is upon the employer and upon failure to do so, this cannot be visited upon the employee.

The above put into account, there was no letter of appointment or any written communication with regard to the claimant's duties with the respondent. his case was that he was an oven man and the respondent asserted that he was a casual labourer as Mr Moses Githinji held such position. the allegation that the claimant was on part-time employment is equally without any records. What emerged clearly and was not challenged in cross-examination of the defence witnesses is that the claimant had general duties with the respondent and due to the nature of work, the production of bread for supply to schools, such production would reduce during school holidays.

It is also not in dispute that the mixer machine got damaged and the claimant was given time off. There was no work resumption after the 9th February, 2016. This however does not remove the responsibility from the respondent to keep work records and produce them upon filing of the suit by the employees.

A general labourer employed at Nakuru in the year 2016 under the applicable wage orders, Regulation of Wages (General) (Amendment) Order, 2015, and shall be deemed to have come into operation on the 1st May, 2015 had a minimum wage of Ksh.10, 107.10 per month and previously in the year 2014/2015 the wage due was Ksh.9,024.15 Where the claimant was paid Ksh.9,100.00 per month and Ksh.12,000.00 at the time employment terminated there was no underpayment.

The wages paid were well above the regulations.

Without any records of the claimant having taken leave days, such is due for the 2 ½ years and based on the due wage all being 52 days being Ksh.17,518.80.

Notice pay where the employer fails to abide due process under section 41(1) of the Employment Act, 2007 and where the claimant deserted work as alleged and grossly misconducted himself there was no application of section 41(2) of the Act. notice pay is due at ksh.12,000.00 being the last gross wage paid.

For the 9 days worked the claimant is entitled to ksh.3,600.00.

Overtime claimed is not justified. The claimant was already being overpaid above the minimum wage for the entire period of his employment. To claim outside such overpayment is an unjust enrichment. This position is fortified by the fact of the unchallenged defence that over the school holidays there was reduced work.

Gratuity claim is not supported by any evidence. Where there was no payment of the due statutory dues, the remedy is not in a gratuity claim. such is hereby declined.

There is no record of how the claimant's public holidays were treated. For the 9 listed public holidays and based on the paid gross wage this amounts to ksh.3,600.00.

Money withheld is claimed at ksh.24,716.00 premised on the alleged due wage for the position of an oven man which is not applicable. The claimant had issued notice for the payment of what was owing at Ksh. 4,516.00.

On the failure to ensure due process in the termination of the claimant as required under section 41 and 44 of the Employment Act, 2007 read together with section 43 and 45 the result is that there was unfairness. Such is hereby redressed by compensation under section 49 of the Act at one (1) month gross wage as appropriate and all at Ksh.12,000.00.

Accordingly, judgement is hereby entered for the claimant for the payment of the following;

- (a) Compensation Ksh.12,000.00;**
- (b) Notice pay Ksh.12,000.00;**
- (c) Leave pay Kshs.17,518.80;**
- (d) Pay for days worked Ksh.3,600.00;**
- (e) Public holidays Ksh.3,600.00;**
- (f) Wage arrears Ksh.4,516.00;**
- (g) Certificate of service be issued;**
- (h) the dues above shall be paid less Ksh.14,000.00 received by the claimant.**
- (i) 50% of costs**

Delivered in open court at Nakuru this 29th day of April, 2019.

M. MBARU JUDGE

In the presence of:

.....