



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.146 OF 2015

BENARD ONYANGO OUDU.....CLAIMANT

VERSUS

NAKURU INDUSTRIES LTD..... RESPONDENT

JUDGEMENT

In March, 2002 the claimant was employed by the respondent as a machine operator and paid ksh.311.00 per day and all Ksh.7,051.00 per month.

The claim is that from 1st May, 2010 to 30th November, 2012 the claimant was underpaid and contrary to legal notice No.64 where basic wage as ksh.8,001.00 and legal notice No.71 the wage was Ksh.9,049.10 but the respondent kept on paying him Ksh.7,051.00 per month

Work hours were 2pm to 10pm or 10pm to 6am for 7 days a week contrary to section 27 of the Employment Act. no rest days was allocated or paid for in lieu thereof.

The claimant worked until 31st December, 2014 when the respondent introduced the issue of contract employment. Such was with a view of dismissing the claimant from his employment after 12 years of service. no reason was given as to why the respondent failed to renew the contract.

The claimant is seeking the following dues;

- a) Notice pay at Ksh.13,882.00;
- b) Underpayments ksh.26,118.70;
- c) Off duties Ksh.390,281.20;
- d) Work during public holidays Ksh.80,485.95;
- e) Leave for 7 years Ksh.36,573.60; and
- f) Compensation.

The claimant testified that he was employed as a causal worker by the respondent until the year 2008 when he was confirmed and paid ksh.7,051.00 per month. In the year 2001 he was employed on contract renewed yearly. he got 2 years contract and then reverted back to the yearly contract.

He worked for 8 hours a day for 5 days a week and for half day on Saturday. On Sunday he was on off.

The claimant also testified that in the year 2009 and 2013 he took his annual leave. He would be at work during public holidays and for the period at work he had two (2) sick off days allocated by the doctor.

For 3 years when the claimant was on contract employment he was paid ksh.9,450.00 per month. He took annual leave in January, 2014 and upon return the respondent failed to renew the contract of employment.

It was verbal nonrenewal of contract.

The claimant testified that his claims relates to dues owing from the year 2002 to 2008, service pay, house allowance, overtime and off duties and the underpayments.

Upon cross-examination, the claimant testified that he was unionised under the Textile Workers Union who had a CBA with the respondent. in the year 2011 he resigned from his union and did letter to stop union deductions. He was then issued with a contract and signed in acceptance. Upon the new contract he was paid gratuity and issued with certificate of service for work form the year 2008 to 2011. The last contract was for the period of 1st January, 2013 to 31st December, 2013.

The claimant also testified that his claims relates to underpayment for the period and years 2002 to 2008. In the year 2008 to 2010 he was paid a gratuity of Ksh.32,000.00 but for the period of 2002 to 2008 nothing was paid. During the public holidays the respondent issued a memo closing all departments but his supervisor would require him to be at work.

Defence

The defence is that the claimant was working on terms of piece weavers and his salary depended entirely on the number of pieces of blankets he would stitch per day and the alleged payment of ksh.311.00 per day is not correct. There was no underpayment as the claimant was paid on piece-rate.

There was no underpayment for the period of 1st May, 2010 to 30th November, 2012; 1st May, 2010 to July, 2010 the claimant was paid ksh.7,636.00 per month; August, 2010 to April, 2011 the was paid ksh.8,400.00;

May, 2011 to June, 2012 he was paid ksh.9,450.00;

July, 2012 to December, 2012 paid ksh.10,687.00.

The claimant worked for 45 hours a week and signed the attendance book. There was no work on Sunday. During the public holidays the respondent would be closed and there was notice issued in this regard.

The claimant was employed under different terms and conditions;

From 2002 to 2003 he was a piece-rate weaver; 2003 to 2007 he worked for Texco Services management upon outsourcing; 2008 to November, 2011 worked as a machine operator and then resigned and was paid gratuity;

December, 2011 to November, 2012 the claimant was on one year contract and was paid gratuity; and

His last contract was form January, 2013 to December, 2014.

The claimant applied for leave which was allowed but he failed to return as scheduled on 26th February, 2015. On 10th March, 2015 the respondent wrote to the claimant after failing to report to work and notified that he would be treated as a deserter and henceforth to vacate the allocated staff quarters. The claimant had been paid the due wage and leave travelling allowance of ksh.1,700.00.

The claims made are without basis and should be dismissed with costs.

Paul Oyier Ongala testified that he is a supervisor with the respondent and worked with the claimant since the year 1999. The claimant was employed initially as a causal on piece rate terms, he was then employed by the outsourced company Texco Service and then employed on contract and at the end of each contract gratuity was paid to him. the last contract was form 1st January, 2013 to December, 2014 and the claimant applied for annual leave and was to return on 26th February, 2015 but failed to do so and despite notice being issued to him, he did not attend work. He was paid his gratuity and leave travelling

allowance. There was no dismissal or failure to renew contract. The claimant has since joined another former colleague Omondi in construction business.

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

Determination

In defence, the respondent filed work records and of which, the claimant was on different terms and conditions of employment the last such being his contract of service for the period of 1st January, 2013 to 31st December, 2014. There is a leave application form approved and ending 26th February, 2015.

The claimant did not challenge the evidence that he was allowed to take annual leave in January, 2015 and was to resume duty on 26th February, 2015 which he failed to do. A notice on his work desertion issued and there is no defence or mitigation on work non-attendance.

Failure to attend work as directed is a sufficient ground for summary dismissal under the provisions of section 44(3) and (4) of the Employment Act, 2007 as such is in breach of a fundamental provision of the work terms and a case of gross misconduct. The claimant was lawfully allowed to take his annual leave but failed to return to work. He does not explain why there was this lapse and his evidence that the contract ended and he was unfairly terminated is without good basis.

Even where the above position is challenged, The claimant testified that he was employed under contract by the respondent, the last contract running from 1st January, 2013 to 31st December, 2013. He went on annual leave and upon return, his contract was not renewed.

The claimant also testified that his claims relate to underpayments, unpaid house allowances for the period of 2002 to 2008.

Employment on a fixed term contract is permissible and lawful and in accordance with section 10(3) of the Employment Act, 2007. Upon the end of each contract, there is no requirement for renewal unless the other party has applied for renewal and the same is addressed.

In the claimant's case, his contract ended on 31st December, 2013. There was no renewal. The contract ended on its terms. Such is lawful. That does not amount to unfair termination of employment and the claim for compensation is not justified. Employment ended lawfully. See **Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers versus Office of the Vice Chancellor, Kibabii University [2017] eKLR; Eunice Mwikali Munyao v Elys Chemical Industries Limited [2017] eKLR.**

For the period of December, 2011 to November, 2012 the claimant was under a fixed term contract which ended and there is evidence of payment of gratuity at Ksh.6,412.80. Effectively this ended the employment relationship and a new relationship commenced with the next contract as set out above.

The suit herein was filed on 22nd May, 2015 and in accordance with section 90 of the Employment Act, 2007 only claims going back 3 years and up and until May, 2012 stand. This falls under the contract running from 1st December, 2011 to 30th November, 2012 and for which it ended and a gratuity paid.

The claims going back to the year 2002 are time barred as they fall under different contracts of service and ended on their terms and no cause was raised therefrom within the time limitations.

From the claims made, notice pay is not due in a case where a contract has ended on its terms and in view of the claimant taking leave and failing to report back to work as directed. Despite being recalled back to work by the respondent as the employer, the claimant did not comply.

The claims for underpayment as set out as going back to the November, 2012. Based on the wage orders applicable, the claimant having been allocated living/accommodation quarters by the respondent, his

statutory dues paid, to claim more and outside what was paid is not justified.

From the pleadings, the claimant is seeking payment of off days and work during public holidays. His evidence was that he worked for 8 hours a day for 5 days a week and for half day on Saturday and remained off on Sunday.

This evidence is crucial as the claimant, under oath and open to cross-examination told his case as it were. He enjoyed a rest day every week and on Saturday he worked half day meaning he had each week 4 hours off. Cumulatively these hours translates to 192 hours per year all 24 days.

To claim for leave or work during public holidays without taking the above into account and in the circumstances of such analysis would be an unjust enrichment.

It also emerged from cross-examination of the claimant that during the public holidays, the respondent would issue a public and internal memo closing all departments. The evidence that the claimant was directed by his supervisor to be at work during such public holidays is lost. There was no work during public holidays and the respondent premises remained closed in accordance with the notices and memo issued.

On the claim for payment for leave for 7 years for the period of 2002 and 2009, such period is out of the statutory period set out under section 90 of the Employment Act, 2007. The claimant also testified that he went on annual leave in the year 2011 and 2013 and in January, 2015. The claim for leave due in the year 2012 is therefore without justification. The contract ending November, 2012 was addressed and a gratuity paid. Such is not contested as having been an undeserved payment on the grounds the claimant's statutory dues were also paid.

Accordingly, the claims made are found without basis and are hereby dismissed with costs to the respondent.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU

JUDGE

In the presence of: