



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1231 OF 2016

TRANSPORT WORKERS UNION (K).....CLAIMANT

v

MALEWA T – JUNCTION SERVICE STATION....RESPONDENT

JUDGMENT

1. The Transport Workers Union (K), (Union) instituted legal proceedings against Malewa T – Junction Service Station (Respondent) on 23 June 2016 and it stated the Issue in Dispute as

Unfair termination and refusal to pay terminal benefits to Mr. Samuel Muguku (Grievant).

2. The Respondent filed a *Statement of Defence and Counterclaim* on 5 August 2016.

3. When the Cause came up for hearing on 6 March 2019, Mr. Ndiege, Industrial Relations Officer representing the Union and Mr. Gatore for the Respondent indicated that they would not call any witnesses, and that they would rely on the pleadings and submissions to be filed.

4. It is regrettable that the parties opted to take the course of relying on the record and submissions when they well knew that the record exhibited disputed facts which needed to be interrogated.

5. Similarly, witness statement(s) unless adopted under oath do not have any probative value as evidence and remain just that, unverified and unproved facts.

6. Parties intending to rely on the record should be prudent enough to file affidavits as opposed to witness statements.

7. The Union filed submissions on 10 March 2019 while the Respondent filed its submissions on 1 April 2019.

8. The Court has considered the pleadings and submissions.

Underpayments

9. The Grievant was employed by the Respondent as a petrol station/pump attendant in August 2008.

10. In the *Memorandum of Claim*, it was contended that the Grievant was underpaid for 19 months, from 1 May 2013 to November 2014. The stated wage during the period was disclosed as Kshs 8,100/- per month.

11. According to Legal Notice No. 197 of 2013, the basic minimum wage for a petrol station attendant in all other areas (Gilgil being the place where the contract was performed) was Kshs 9,679/05.

12. The Claimant was therefore being underpaid by Kshs 1,579/05 per month and was thus underpaid by a total of Kshs 30,001/- (the Court has not included the house allowance element because there was no evidence at what rate the same should have been computed).

Leave

13. It was pleaded that the Grievant never went on leave for the 6 years of service and the equivalent thereof was computed as Kshs 58,980/-.

14. Section 28(4) of the Employment Act, 2007 circumscribes the leave which can be carried forward to 18 months.

15. With no evidence that the Grievant sought for and was declined annual leave, or that the leave was carried forward with the approval of the Respondent, the Court finds no breach of contract/statute.

Wages for November 2014

16. The Union sought Kshs 8,425/80 being the wages the Grievant was entitled to up to 18 November 2014, the day of separation.

17. The Respondent's witness statements did not respond to the wage plea, and the Court will find for the Grievant as pleaded.

Severance pay

18. The Union did not anchor the cause of action as redundancy, and therefore severance pay is not applicable.

Unfair termination

19. The *Memorandum of Claim* set the date of separation as 18 November 2014. The said date was also stated in the Grievant's witness statement.

20. The Respondent filed a *Certificate of Service* indicating the date of separation was 10 December 2014.

21. The Respondent's 3 witness statements disclosed the date of separation as 10 December 2014 (when it is alleged Grievant last appeared at work).

22. The parties were all aware of the disputed date of separation, but instead opted not to lead any evidence, which would have been interrogated to enable the Court establish the truth as to the date and circumstances of termination.

23. The Court, is therefore unable to determine whether there was unfair termination of employment.

24. The head of claim fails.

Counterclaim

25. The Respondent *Counterclaimed* for 1 month pay in lieu of notice, and Kshs 33,582/- which was stated, the Grievant had failed to account for.

26. The head of counterclaim for *pay in lieu of notice* fails because the parties failed to lead evidence on the issue despite being aware of the contradictory statements on record.

27. The Kshs 33,582/- which the Respondent pleaded the Claimant failed to account for was in the nature of special damages.

28. The Respondent did not lead any evidence to prove the amount, and the Court will disallow it.

Conclusion and Orders

29. The Grievant was underpaid by Kshs 30,001/- and was also entitled to Kshs 8,425/80 being wages for November 2014, making a total of Kshs 38,426/80.

30. The Respondent has failed in the Counterclaim.

31. The Court therefore enters judgment for the Grievant in the sum of **Kshs 38,426/80**.

32. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 31st day of May 2019.

Radido Stephen

Judge

Appearance

For Union Mr. Ndiege, Industrial Relations Officer

For Respondent Mr. Gatore instructed by Asiani, Ojijo & Co. Advocates

