



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 14 OF 2017

JOSEPH CHARO KITSAO.....CLAIMANT

VS

MARIA ANGELO DE FABIANS.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between Joseph Charo Kitsao and Maria Angelo De Fabians. The Claimant's case is documented by a Statement of Claim dated 19th May 2017. The Respondent's defence is contained in a Response dated 20th July 2017 and filed in court on even date.
2. When the matter came up for hearing, the parties testified on their own behalf.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a gardener at a monthly salary of Kshs. 5,000 effective 1st April 2008. He adds that he worked from 8.00 am to 1.00 pm without off day or annual leave.
4. The Claimant states that sometime in July 2016, he lost the Respondent's entrance and post office box keys. He reported this to the Caretaker as the Respondent was away. The entrance key was replaced and the Claimant waited for the Respondent's return for guidance on follow up on the post office box key. Upon her return, the Respondent told the Claimant to go home and not to report to work until he found the missing key.
5. On 4th November 2016, having failed to find the missing key, the Claimant went to ask for his terminal dues from the Respondent. On 5th November 2016, the Claimant reported the matter to his Union who wrote a demand letter to the Respondent. Union officials visited the Respondent but the matter was not resolved. Instead, the Respondent reported to the Police that the Claimant has stolen a bicycle. The Police collected the bicycle from the Claimant's house.
6. The Claimant avers that the Respondent unlawfully and unfairly terminated his employment. He now claims the following:
 - a) Notice.....Kshs. 7,264.50
 - b) Underpayment.....81,522.00
 - c) Leave traveling allowance.....6,000.00
 - d) Annual leave for 3 years.....21,793.50
 - e) Off days worked for 3 years.....69,739.20
 - f) Public holidays.....15,918.90
 - g) Service pay.....29,057.20

h) 12 months' salary in compensation.....87,174.00

i) Costs

The Respondent's Case

7. In her Response dated 20th July 2017 and filed in court on even date, the Respondent states that the Claimant was employed as a casual labourer. He worked 5 hours for which he was paid Kshs. 400 per day.

8. The Respondent states that the Claimant was habitually absent from work due to drunkenness. She adds that the Claimant stole her bicycle.

9. The Respondent maintains that being a casual labourer, the Claimant was not entitled to any benefits.

Findings and Determination

10. The first issue for determination in this case is whether the Claimant has made out a case of unlawful termination of employment. In her Response to the Claimant's claim, the Respondent states that the Claimant was a casual employee who did not report to work every day and whenever he did, he would work for not more than 4 hours per day.

11. The Claimant himself told the Court he worked for 5 hours per day after which he was free to go and do some other work of his choice. From this evidence, it seems to me that the Claimant was not a full time regular employee of the Respondent as defined in the Employment Act. He never at any one time did a full day's work and he is therefore not entitled to bring a claim for unlawful termination of employment.

12. The claims for compensation and notice pay are therefore unsupported and are dismissed.

13. Having admitted that he was not a full time employee, the Claimant cannot bring a claim for leave pay, leave travelling allowance and service pay.

14. The claims for underpayment, off days and public holidays were not proved and are dismissed.

15. Ultimately, the Claimant's entire claim fails and is dismissed.

16. Each party will bear their own costs.

17. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF MAY 2019

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JUDGE

Appearance:

Joseph Charo Kitsao (the Claimant in person)

Ms. Chepkwony for the Respondent