



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 885 OF 2017

BETWEEN

NYAMBWANGA MOENGA DANIFCLAIMANT

VERSUS

SHREEJI ENTERPRISES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munee Katu & Associates, Advocates for the Claimant

Oduor Siminyu & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 24th November 2017. He avers he was employed by the Respondent as a Port Clerk, on 1st June 2016. His contract was terminated on 26th September 2017 by the Respondent. He states, termination was unfair and unlawful. His last salary was Kshs. 14,000 per month. He was not paid the correct salary, in accordance with the prevailing Minimum Wage Orders. He worked excess hours without compensation. He prays for Judgment against the Respondent in the following terms:-

a) Declaration that termination was unfair.

b) Underpayment of salary for the period 1st June 2016 to 30th April 2017 [Kshs. 16,299 – Kshs. 13,000] x 11 months = Kshs. 36,294.

c) Underpayment of salary for the period 1st May 2017 to 30th August 2017 [Kshs. 19,233 – 14,000] x 4 months = Kshs. 20,933.

d) Underpayment of salary for September 2017 at Kshs. 4,535.

e) Underpayment of notice pay at Kshs. 5,233.

f) Compensation for the remainder of the contract period [9 months] at Kshs. 173,101.

g) Overtime of 4 hours daily for 312 days, at Kshs. 150,021

Total... Kshs. 620,922

h) Certificate of Service to issue.

i) Costs and interest.

2. The Respondent filed its Statement of Response on 2nd February 2018. It concedes to have employed the Claimant on 1st June 2016. He

was placed on probation for 3 months. He was employed on a contract of 1 year, as a General Worker, beginning 1st October 2016. The contract was never renewed. He was paid salary in accordance with the applicable Regulation of Wages Order. His contract was not terminated by the Respondent; it terminated upon expiry. The Claim is meritless. The Respondent prays for its dismissal with costs.

3. The Claimant, and Respondent's Human Resource Manager Mark Odhiambo Otieno, both gave evidence on 11th December 2018 for the respective Parties, bringing the hearing to a close.

4. The Claimant adopted in evidence, his Witness Statement and Documents on record. He worked for the Respondent as a Port Clerk. He signed a contract for 1 year. He was not given a copy. He did not know about the contractual contents. He was told by Respondent on 26th September 2017, that his contract would not be renewed. There was another contract from July 2017 to July 2018. The Claimant did not have a copy of this. He worked from 7.00 a.m. to 7.00 p.m. He was not paid for excess hours worked. He was underpaid. He was paid Kshs. 36,000 as terminal dues – comprising leave, service and notice. Details were not stated to him.

5. Cross-examined, he told the Court that he was employed on 1st June 2016. He had not worked for the Respondent before. He was informed there would be probation of 3 months. He knew the contract was for 1 year, because he was told so, by the Respondent. A copy exhibited by the Respondent states the contract was for 1 year, to run until 30th September 2017. He left at the end of the period on 27th September 2017. He did not have any other contract. He received Kshs 36,000 as terminal dues. He signed Petty Cash Voucher. He was paid leave, service and notice. He was described as General Worker in the contract. The monthly rate for a General Worker under the Wage Order for the period of service was Kshs. 10,954. Redirected, the Claimant told the Court that his employment identity card stated he was a Port Clerk. His rate as Port Clerk, under the Wage Order, was Kshs. 16,290, monthly.

6. Mark Odhiambo Otieno affirmed that the Claimant was employed by the Respondent in June 2016. He was under probation of 3 months. He was placed on a contract of 1 year, at the end of probation, in October 2016. He signed the contract as a General Worker. He was paid Kshs. 12,604 all inclusive. He was educated up to form 4. His performance was good, but the Respondent could not renew his contract. He was paid notice, salary for September 2017, leave and service. He was issued Certificate of Service, stating he exited as a Trainee Clerk. He had a copy of the contract signed by the Parties. His exhibit claimed to be employment card, is a port pass, issued by Kenya Ports Authority. The pass does not belong to the Respondent.

7. Cross-examined, the Witness repeated that the Claimant was employed in June 2016. The port pass is a KPA document. The letter of termination refers to a hearing. There are no minutes of a hearing. It refers to appraisal. There are no appraisal documents on record. The letter does not refer to expiry of the contract period. Redirected, the Witness told the Court that hearing was done to explain to the Claimant that there would be no renewal. It was necessary also, to give the Claimant a breakdown of his dues. Appraisal applied to all Employees.

The Court Finds:-

8. Parties agree that they were in a contract of employment. It is not contested that the Claimant was initially employed on 1st June 2016. He was placed on 3 months of probation. Probation ended in October 2016. He was offered a contract of 1 year, beginning 1st October 2016. It was to expire on 30th September 2017. It lasted up to 26th September 2017. The Claimant was issued a letter titled 'Termination of Employment' on this date, signed by Human Resource Manager, Mark Otieno.

9. Parties do not agree on the designation of the Claimant. The Claimant alleges he was employed as a Port Clerk. He exhibits a Port Pass, showing occupation to be 'Port Clerk', and Organization employing him, to be Shreeji Enterprises, the Respondent herein.

10. The Respondent exhibits the actual contract document, signed by the Parties in October 2016. The job title is indicated to be 'General Worker.' The Respondent also relies on the Certificate of Service, which indicates that the Claimant was a General Worker.

11. The designation of the Claimant is important, because it is the ground upon which the prayers for underpayment of salary are based. If he was a Port Clerk, his prayers for underpayment of salary would have justification. If he was a General Worker, his prayers for underpayment of salary would collapse, the rate of Kshs. 12,604 paid monthly to the Claimant, being in conformity to the minimum payable to General Clerks, under the relevant Wage Orders.

12. There is an express clause in the contract, designating the Claimant as a General Clerk. The Port Pass he relies upon is issued by the Kenya Ports Authority, as a tool of controlling Port User Movement. It was not made clear to the Court whether it was the Respondent or the Claimant, who gave the details contained in the Port Pass to KPA. It is not clear from the Claimant's evidence who applied for the Port Pass, to KPA. His description as a Port Clerk does not look in the circumstances, determinative.

13. The contract document and the Certificate of Service are explicit on the designation of the Claimant. These are documents which are clearly owned by the Respondent, unlike the Port Pass. The designation, in them, is to be assigned greater probative weight.

14. The monthly rate paid to the Claimant, as agreed in the contract, was Kshs. 12,604, which is commensurate to the applicable Wage Orders exhibited by both Parties. The Claimant is not shown to have complained at any time during employment, that he was wrongly classified or paid. His prayers for underpayment of salary are rejected.

15. The prayer for overtime pay is not captured in the Statement of Claim, other than only in the prayers to the Claim. It is not in the Claimant's Witness Statement, and is not explained in the evidence given in Court by the Claimant. There are no employment records showing any excess hours worked by the Claimant. This prayer is declined.

16. Certificate of Service is part of the documents availed by the Respondent to the Court. The Claimant is at liberty to retrieve a copy from the Court File, if he has not yet received his copy.

17. The remaining issues are whether termination was unfair; and whether the Claimant merits costs and interest.

18. The Claimant was on a contract for a period of 1 year, beginning 1st October 2016, ending 30th September 2017. He alluded to other contracts without offering proof on the presence of any other such contracts. His contract, contrary to the suggestion made by the Respondent, did not terminate on expiry of the period of 1 year as agreed.

19. It was terminated by the Respondent, 4 days before it was to expire, on 26th September 2017. The letter of termination is explicit that termination followed appraisal of Claimant's performance. There is no evidence of any appraisal adduced by the Respondent. There was no reference made, about expiry of the contract. Reference is about termination at the instance of the Respondent. The Respondent also alludes to a hearing preceding termination. There is no evidence of any hearing. It is not clear from the evidence of the Respondent, what was the nature of the hearing.

20. The Respondent did not show that the Claimant's contract terminated upon expiry; or was terminated for poor performance after an appraisal exercise; or was terminated for any other valid reason after hearing. The Respondent did not meet the requirements of Section 43 and 45 of the Employment Act 2007. Termination was unfair.

21. The Court has taken into account that the Claimant was 4 days away from completing his contractual period when his contract was terminated. There is no evidence adduced by the Claimant, to show that he expected renewal. He was paid Kshs. 36,000 which included leave, service and notice. **He is allowed equivalent of 2 months' salary in compensation for unfair termination, at Kshs. 25,208.**

22. **No order on the costs.**

23. **Interest allowed at 14% per annum from the date of Judgment till payment is made in full.**

IT IS ORDERED: -

a) Termination was unfair.

b) The Respondent shall pay to the Claimant equivalent of 2 months' salary in compensation for unfair termination at Kshs. 25,208.

c) No order on the costs.

d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 21st day of June, 2019.

James Rika

Judge