



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.29 OF 2018

EVANS WANJALA SITATICLAIMANT

VERSUS

TAMIA LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 1st November, 2011 as a general worker in the cleaning department and later as supervisor in the same department from 1st May, 2013. The claimant was paid Ksh.3,965.00 and which was enhanced Ksh.4,465.00 from 1st February, 2012 and the last pay was Ksh.12,600.00 on 1st March, 2016.

Work hours were 8am to 4pm for 6 days each week.

On 1st September, 2017 the claimant received an email notifying him that the respondent's contract with Rift Valley Provincial hospital had ended on 31st August, 2017 and that he had been served with an end of contract notification. On 4th September, 2017 the claimant replied to the respondent that he had no notice issued and asked for clarification. The claimant continued to perform his duties until 14th September, 2017 when the human resource manager told him to clear.

The claim is that there was unfair termination of employment contrary to section 40 of the Employment Act, 2007 but the respondent opted to use the reason of end of contract by a third party. The process applied was unlawful and no terminal dues were paid. The claimant did not take annual leave, no severance pay or pay for the 14 days worked in September, 2017 and there was underpayment contrary to the wage orders.

The claimant is seeking the following;

- a) Pay for 13 days worked in September, 2017 Ksh.7,428.85
- b) Compensation for unfair termination of employment;
- c) Notice pay ksh.13,715.36;
- d) Underpayments ksh.150,369.52;
- e) Annual leave Ksh.11,077.95;
- f) Severance pay ksh.47,476.24;
- g) Certificate of service; and
- h) Costs.

The claimant testified that upon his employment by the respondent on 1st November, 2011 he was under a different company doing cleaning. He was issued with a written contract by the respondent as a cleaner. He was then promoted as a supervisor on 1st May, 2013.

The claimant also testified that his starting wage was Ksh.3, 900.00 in the year 2011;

From 1st February, 2012 was paid Ksh.4, 065;

1st December, 2012 was paid ksh.7, 881.00;

1st may, 2013 was paid Ksh.9, 500.00;

1st February, 2014 was paid Ksh.10, 600.00;

1st March, 2016 was paid Ksh.12, 600.00.

All the wages were paid through the bank account and a pay slip was issued monthly. The wage was less a house allowance. He took annual leave save for the year 2017.

The claimant also testified that on 1st September, 2017 while at home he got a message that his contract had lapsed. The message had been emailed on 31st August, 2017. He sought for clarification and was told not to report to work but he worked until 14th September, 2017 when he was stopped. There was an email on 17th August, 2017 with regard to notice to terminate contract but none directly to him. From 1st to 14th September, 2017 the claimant would go out to survey sites for work. He went to Kenya power and to CGD.

Defence

In response the defence is that there was no unfair termination of employment as the respondent's contract with Rift Valley Provincial Hospital ended and the claimant's employment which was pegged on the contract he was served with notice to end employment. The claimant sent an email seeking clarification on the notice to terminate employment. The notice had been served a month prior to termination of employment, which is lawful. The claims made are not justified and should be dismissed.

Charity Wanjiru Ndungu testified that the claimant was employed as a supervisor at Rift Valley Provincial Hospital with whom the respondent had a contract for cleaning services. The contract ended on 31st August, 2017 and all employees including the clamant were issued with end of contract notice with employment ending on 31st August, 2017.

Both parties filed written submissions.

The court has put into account the pleadings, the evidence and written submissions by the parties and the issues which emerge for determination can be summarised as follows;

Whether there is a case of unfair termination of employment; and Whether the remedies sought are available.

The respondent has only attached few work records being the notification to terminate employment, the payment statement, and email correspondence on termination of employment. The employment records with regard to when the claimant was employed are left bare. The history of employment as set out by the claimant shall suffice in the circumstances.

As submitted by the claimant, section 10(6) of the Employment Act, 2007 requires the employer to submit work records once suit is filed. Such provisions are mandatory. Without such work records, the court must believe the employee.

With regard to termination of employment, the claimant admitted in his evidence that he sent the email dated 1st September, 2017 from his house. He requested for clarification with regard to the notice terminating employment following the contract with Rift Valley Provincial Hospital ending on 31st August, 2017.

The claimant's email followed an email by the respondent sent to him on 9th April, 2017 with regard to *end of contract* and the response to his email on 1st September, 2017 noting that as the supervisor at the facility he had been served with end of contract notification. The respondent attached the Notification dated 18th August, 2017.

However, from the email logs, the only communication from the respondent to the claimant with regard to his employment and contract was on 28th August, 2017 and 4th September, 2017. The alleged notification dated 18th August, 2017 is not stated as to how it was issued, served or emailed to the claimant.

The court reading of the email logs leaves doubt that this notification cannot have issued with the email issued on 17th August, 2017 as this was a day before the notification date and this cannot have been issued on 28th August, 2017 as the effect under the law and as required pursuant to section 35 of the Employment Act, 2007 is lost.

Without a written contract of employment setting out how the parties were to end employment, section 35 of the Employment Act, 2007 required notification of 28 days or payment in lieu of such notice. In this regard, the court finds the claimant was not issued with the requisite notice terminating his employment even where he had been told the client's contract was coming to an end. He is entitled to notice pay equivalent to one (1) month pay. Notice pay Ksh. 11,926.40.

With regard to the claim that there was unfair termination of employment by redundancy, or by unlawful means, the claimant admits he was

made aware that the contract with the client had ended and employment would terminate. Despite his notice not being procedural and in accordance with section 35 of the Employment Act, 2007 the reasons leading to termination of employment were given to him in advance. This is not a case of redundancy as contemplated under section 40 of the Act. The reasons given are valid and genuine. There is no unfairness.

Where the claimant remained in the service of the respondent from the year 2011 to 2017, without any written contract of employment, the wage orders applied to his employment.

The general wage orders applicable to a general worker inclusive of house allowance put into account, the payment statement attached on the basis that there was a consolidated salary is invalid in terms of section 20 of the Employment Act, 2007 which requires an itemised payment statement unless there is a contract of employment setting out the nature of the consolidated payment required under section 10 of the Act.

20. Itemised pay statement

(1) An employer shall give a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.

(2) The statement specified in subsection (1) shall contain particulars of—

(a) the gross amount of the wages or salary of the employee;

(b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and

(c) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

Without an itemised payment statement, setting out how the respondent arrived at the wage of ksh.12, 600.00 consolidated this document cannot pass the legal test above.

In this regard, the assessment of underpayment set out under paragraph 24(e) of the Memorandum of Claim relate to claims which arose from the year 2011 to January, 2014 and then claims from 1st May, to 31st August, 2017. With a break in employment from the year 2014 to the year 2017, and where the claim was filed on 5th February, 2018 and by application of section 90 of the Employment Act, 2007 the only valid claims and within the requisite time period are those arising from 1st May, 2017 to 31st August, 2017 only. The claims which are over three (3) years old and going back to the year 2014 and below are time barred by operation of the law.

In this regard, under the applicable wage orders, the claimant was entitled to a wage of Ksh.11, 926.40 per month and he was paid ksh.12, 600.00 which is over and above the minimum wage due. there is no underpayment.

On the claim for salary for 13 days, the claimant was notified of end of contract while he was at home. There was no requirement for him to report at work or to go out to survey for work with Kenya Power, CGD or any other entity. There is no evidence as to this requirement upon him by the respondent. by his email correspondence with the respondent, the end of contract had already issued and he sought clarification which was done. The alleged work for 13 days does not arise.

The claim for annual leave pay due is conceded by the respondent at ksh.11, 077.95.

Severance pay is not due as this was not a case of redundancy.

Certificate of service should issue under the provisions of section 51 of the Employment Act, 2007.

Accordingly, the claimant is only entitled to notice pay at Ksh. 11,926.40, leave pay ksh.11, 077.95 and Certificate of Service to issue under the provisions of section 51 of the Employment Act, 2007. These dues shall be paid with interest at court rates from the date due, 31st August, 2017 and until paid in full. Each party shall bear own costs.

Delivered in open court at Nakuru this 11th July, 2019.

M. MBARU JUDGE