



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

AT NAKURU

CAUSE NO.152 OF 2018

HEZRON OMBATI BABU.....CLAIMANT

VERSUS

MENENGAI OIL REFINERIES LIMITED.....RESPONDENT

JUDGEMENT

The claim is that the claimant was employed by the respondent as a general worker from 1st August, 2014 and paid ksh.547.00 daily. On 5th March, 2018 the respondent terminated the claimant in his employment without notice or valid reasons.

The claim is that the claimant worked during all public holidays, there was no annual leave taken and no house allowance was paid or compensation.

He claims the following;

- a) Damages for unfair termination of employment Ksh.196,920.00;*
- b) One month notice pay Ksh.16,410.00;*
- c) Work on 48 public holidays ksh.26,256.00;*
- d) Leave ksh.45,948.00;*
- e) House allowance Ksh.118,176.00;*
- f) Less paid Ksh.21, 445.00.*

The claimant testified that upon employment by the respondent, he was not issued with a written contract and was verbally dismissed on 5th March, 2018 without any good cause. He was issued with a cheque for Ksh.21, 445.00 as final dues which were too low. He was registered with the NSSF and which show he had been in the employment of the respondent. He continuously served the respondent. On the NSSF records it shows the claimant was with another company where he would work at night and return to the respondent during the day. He did not abscond duty as alleged. There is no notice to this effect.

The claimant also testified that he was paid daily by the respondent and would thus work for a second company at night.

Defence

The defence is that the claimant would be employed as a casual employee on intermittent basis with general duties from July, 2013 and January, 2018. He left work on his own volition and no notice was required. After a week without reporting for work, the claimant returned and was paid for service rendered and leave. He was not entitled to service as NSSF had been paid for.

The matter was reported to the labour officer where the claimant lodged a complaint and upon attendance and deliberations the respondent agreed to settle the matter upon payment of ksh.21, 445.00 and which the claimant declined to collect and the cheque was left with the labour officer. Later the claimant collected the cheque in January, 2018.

The claims made are malicious. Should be dismissed.

The claimant did not work during public holidays as alleged. The daily wage was ksh.572.00 inclusive of house allowance.

Peter Kanenje Muchibi the human resource assistant with the respondent testified that that the claimant worked with the respondent as a causal employee from the years 2013 to 2018 and left on his own accord. He was paid a daily wage and each end of day. Upon leaving employment he complained to the labour officer and the respondent opted to settle the matter and paid him ksh.21, 445.00 and an agreement was executed.

Both parties filed written submissions.

The court has put into account the written submissions, the pleadings and evidence in analysing the matter herein.

Work records are the staple for any employer. Such records once filed, the employee is at liberty to object before hearing and require the employer to submit any other records required.

In this case the filed records were only challenged at cross-examination and not before.

The court takes the records filed by the respondent at the true records kept with regard to the claimant during his tenure and under the employment of the respondent. Such cannot be faulted at the hearing stage as the claimant had been served well in advance and did not object or require further particulars on the same.

The work sheets outline work attendance that was erratic and not continuous. In the year 2013 July, the claimant attended work with the respondent for a day;

September, 2013 one (1) day;

August, 2014 7 days;

September, 2014 14 days;

And this record is erratic and the most the claimant was at work with the respondent was March, 2016 for 23 days. The last work attendance was December, 2017 for 19 days.

The payment of wages on a daily basis is admitted.

Section 2 of the Employment Act, 2007 defines a daily-worker as a casual employee in the following terms;

“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;

With intermittent work attendance, the claimant’s employment ended with each day at work and upon the payment of his daily wage and nothing more. The wage paid at ksh.572.00 was way above the minimum daily wage.

The claimant being a casual employee was not entitled to a house allowance, annual leave or other work benefits unless he remained at work with the respondent for a full week and where he then earned a one (1) day off.

From the work records there is no work engagement for more than 5 days continuously. There is no work for over 7 days for the claimant to claim off day, leave or other work benefits. The payment of NSSF by the respondent being a legal requirement now under the provisions of National Social Security Fund Act was an additional benefit. Quantified, the claimant was paid way above the required pay.

The claimant admitted to working for two employers at the same time. He was engaged by the respondent as a casual employee and was in the full time employment of Yangguang Property Design and Manufacturers. Even where the respondent made NSSF payments for the claimant monthly, and the second employer made similar payments, such did not confer employment between the claimant and the respondent. Employment is a relationship well defined in law and does not arise due to the payment of the NSSF dues. to the contrary, an employment relationship is one that has an employee employed is engaged with terms and conditions while the employer must be any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company; and not by payment of NSSF dues which payment are regulated in law.

In this case, the claims made for notice pay, work on public holidays, leave and house allowance do not arise on the defined work relationship being causal employment. The payment to the claimant by the respondent of Ksh.21, 445.00 was not necessary. Where such monies have been paid and acknowledged, this was an act of benevolence on the part of the respondent.

Accordingly, the claims are hereby dismissed. Costs to the respondent.

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

M. MBARU

JUDGE

In the presence of:

Court Assistants:.....