



IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.124 OF 2018

JOSPHAT KIBET KIPRUTO.....CLAIMANT

VERSUS

GAJIPARA BUILDERS LIMITED.....RESPONDENT

JUDGEMENT

In July, 2007 the claimant was employed by the respondent as a driver and worked until 1st July, 2017 when he resigned from his employment on the grounds of harsh working conditions and work climate.

The claim is that the claimant was constructively dismissed from employment by the respondent through forced resignation for the reasons that he was involved in work that required him to work for long hours from 7am to 6.30pm with o overtime pay, he was retained on the same level while new employees were promoted and had salaries reviewed and he remained on the same wage, the claimant was abruptly transferred to Eldama Ravine without any allowance or salary review despite the place been hardship, the respondent stopped renting out a house for the claimant at Ravine and instead moved him to the company corrugated iron sheets house placing him at a health risk due to extreme cold temperatures at night.

Other reasons for the resignation are that the claimant was forced to make back and forth trips to visit his family which became extremely expensive as he was not able to move his family to Ravine with his current housing challenges and that he was not paid a house allowances to secure alternative housing and he was retained on casual terms.

Since his resignation, the respondent has failed to pay terminal dues. the claims made are as follows;

- a) *Total underpayments Ksh.681,748.50;*
- b) *Service gratuity Ksh.145,685.50;*
- c) *Compensation for unfair termination of employment; and*
- d) *Costs of the suit.*

The claimant testified that in the year 2007 he was employed by the respondent as a driver and paid a daily wage of ksh.225.00 for 6 days per week. In some occasions he would work for 7 days depending on work availability and which would be from 7am to 6pm. He was required to transport other employees to work sites and then delivered goods and then pick them back and would be the last person to return the vehicle and go home at 6pm.

The claimant also testified that after 3 years his daily wage was increased to ksh.250.00 per day and this progressed by between ksh.5.00 to Ksh.25.00 per year.

In July, 2017 the claimant resigned from his employment as it was hard work without good pay. His work station had been Nakuru but in the year 2015 this was changed to Ravine. The respondent paid his rent and then put him in a mabati house. The claimant had cold allergy and could not work. From the year 2015 the foreman became hard on him and would siphon goods from the respondent and when the claimant complained this was not addressed. This led to huge theft of goods.

The claimant also testified that he had no house allowance paid or able to take annual leave. Each end year he was paid for 21 days but all public holidays he would be at work on the same wage. No overtime was paid.

The claimant was forced to resign from his employment due to the work environment and no terminal dues were paid.

Defence

The respondent had admitted employing the claimant as a driver and that he resigned on his own volition and without prejudice denies the allegation made with regard to constructive dismissal on the grounds that his employment contract was honoured to the full, on several occasions warnings were issued to the claimant for failing to carry out his duties as required, the claimant caused financial loss to the respondent for causing an accident and forcing the respondent to pay for it, there was no work overtime as alleged unless sanctioned and paid for in full which was not the case for the claimant.

The defence is also that the claimant was never employed as a permanent employee of the respondent at any time, he remained a casual employee and was paid weekly, and he was engaged/employed on a needs basis and was paid in lieu of notice as required by the law.

The defence is also that there was no breach of the law or contract as alleged and the suit is filed with intent to embarrass the respondent and should be dismissed with costs.

Duncan Onyango Bonyo testified that he is the site foreman for the respondent and worked with the claimant who was the driver. The claimant was not diligent and caused over three accidents and would report to work while drunk and was issued with several warnings due to his misconduct. The claimant was given day instructions to transport building materials from the yard to the designated construction sites and in most occasions would disobey such instructions and was called for hearing with the managing director. The claimant was then transferred to Ravine where there was work and opted to terminate his employment.

Mr Onyango also testified that the claimant would take breaks when there was no work but there is no record of such breaks. The claimant would be at work for 6 days each week and was paid. The claimant took his annual leave once and was not paid and when he complained he was paid.

The claimant had several cases of misconduct and was invited for hearing by the managing director. He was not taking heed to issued instructions and he was issued with a warning. On one occasion he discovered the claimant had cement in the vehicle and could not account for it and he reported to the director.

The witness also testified that the work hours varied from 7.30am to 5.30pm or latest at 6pm. The claimant would work late as he had to transport other employees after sites closed at 5pm and would be at the office by 5.30pm a duration of over 10 to 20 minutes' drive.

The claimant had a house in the office or at the yard and opted to move out. The respondent kept a labour camp at *blankets* but the claimant opted to stay outside.

On public holidays, only emergency work was allowed.

Stephen Ouma Ogolla testified that he is a storekeeper with the respondent and worked with the claimant. He testified that the claimant had on several occasions refused him to check the materials he was meant to transport to different sites and could not give any reason for such refusal and that the same had been confirmed by the company. The claimant would report to work while drunk and refuse to take instructions which matters were reported to the managing director and he was invited for a disciplinary hearing and issued with warnings.

Mr Ogolla also testified that he was being paid Ksh.550.00 per day and he signed off to such payments. He worked for 6 days a week. It was continuous service from the year 2007 to 2017 when he left on his own volition but there was stoppage of work in the year 2012 but the claimant was kept on pay. In the year 2012 the claimant had misconducted himself due to heavy drinking, the foreman reported these events and he was stopped for a period. The claimant then opted to resign.

At the close of the hearing both parties filed written submissions.

From the pleading, the evidence and written submissions, the issues which emerge for determination can be summarised as follows;

Whether there is a case of constructive dismissal; Whether there is unfair termination of employment; Whether the remedies sought should issue.

The concept of constructive dismissal though not part of the Kenyan law is well founded under the provisions of the Bill of Rights under Article 41 of the Constitution, 2010 which guarantees everyone the right to fair labour practices. Constructive dismissal relates to the situation where an employee is forced to resign from his employment with an employer due to being placed under intolerable working conditions, being put under a hostile work environment.

The employee has to show that the employer had made the continued employment relationship intolerable and that, objectively assessed, the conditions at the workplace has become so intolerable that he had no option but to terminate the employment relationship. where a reasonable alternative to resignation exists, there can be no constructive dismissal.

The Court of Appeal in the case of **Coca-Cola East Central Africa Limited versus Maria Kagai Ligaga (2015) eKLR** held that an employee is entitled to leave when the employer's behaviour towards him is so unreasonable that the employee cannot be expected to stay. The employer's conduct must be so grave that it constitutes a repudiation of the contract of employment. The breach must go to the very root of the contract. This position is reiterated in the case of **Emmanuel Mutisya Solomon versus Agility Logistics Cause No.1448 of 2011**.

In this case the claimant through his letter dated 1st July, 2017 resigned from his employment with the respondent on equal date without giving any reasons for such action but proceeded to thank the respondent for having the pleasure of working with them and that he *will miss*

the company my workmates and the entire fraternity.

The alleged grounds with regard to constructive dismissal are set out in the Memorandum of Claim. Where the claimant wrote his letter of resignation due to being placed under intolerable work conditions and felt obligated to terminate his employment, there is no follow up demand notice setting out the reasons now advanced in the Memorandum of Claim which was filed on 8th May, 2018 a period of over 10 months after employment terminated.

On the allegations made with regard to being placed under intolerable work conditions, the claimant has made a claim for overtime pay for the hours he felt he worked over and above the legal minimum and which shall be assessed on the merits. On the alleged retention on the same position while others were promoted and well remunerated, the claimant has not set out a contradistinction between himself and any other noted employee who was favourably treated as against him for his comparison. On alleged abrupt transfer to Ravine without notice, the defence that such movement was necessary due to availability of work and the fact that the claimant moved to the new location and in his evidence his only challenge was accommodation and the fact that he felt he had allergy to the cold weather and was not able to relocate his family from Nakuru. Otherwise, the movement and transfer would have been well received had housing and family circumstances been addressed. On the alleged stoppage of renting of a house and movement to a corrugated iron sheets house at the workplace, section 31 of the Employment Act, 2007 requires the employer to provide reasonable accommodation to the employee as the minimum. Where the claimant was not happy with the offered accommodation, where he felt the accommodation offered compromised his health and he suffered allergies to the cold night weather, there is nothing in evidence to prove the same and that he brought such matter and information to the attention of the employer.

The claimant also alleges that he was forced to travel back and forth to visit his family in Nakuru from Ravine following his relocation, this is a personal choice as to where his family was located after deployment to a new area and such cannot be visited upon the employer. Where the claimant was placed at a disadvantage with the transfer, this should have been addressed directly with the employer for baggage movement, transfer costs or traveling costs for the movement to the new location. It should not have been made a constant expense for the employer. Provision of housing by the employer removed the respondent from the legal requirement to pay house allowance.

With regard to the claimant being retained as a casual employee from the year 2007 to the year 2017, such is well addressed under section 37 of the Employment Act, 2007. Upon his continuous service with the respondent for a period of over 30 days and by being kept on the same position and continuous duties of a driver, the claimant's employment converted from casual to an employee with benefits outlined under the law. see **Krystalline Salt Limited versus Kwake Mwakele & 67 others [2017] eKLR** which laid the basis between who a casual employee converted to full time employee is and held that;

Casual employment entails engagement for a period not longer than 24 hours at a time and payment made at the end of the day. As a matter of fact the appellant had employees in both categories. Parliament indeed intended to draw this distinction and that is why section 37 [of the Employment Act, 2007] does not make mention of piece work employees.

Also see **Isaac Nyaribo Atero versus Menengai Oil Refineries Limited Cause No.159 of 2018** that a casual employee is one who is paid a daily wage and employment ends each end of day. In this case the claimant was paid a daily wage but on a weekly basis and his employment was continuous and without stoppage.

Mr Ogolla testified that the claimant was stopped from work in the year 2012 but had not details and he further testified that despite the work stoppage the claimant was paid his full wages for the period. Essentially the claimant was in the service of the respondent from the year 2007 to 2017 when he resigned.

The court finds no constructive dismissal of the claimant by the respondent. He resigned from employment on his own accord and cannot claim this was unfair termination of employment from his voluntary termination of employment.

The claimant ought to have paid the respondent for notice not served as the resignation was taking effect on the date of issue. Under paragraph 9(i) of the defence the respondent's case is that the claimant was paid in lieu of notice, though there is no evidence of such payment, on this averment, such payment was not due on the basis that the claimant is the one who resigned from his employment and ought to have served notice following his assertion that he was not a casual employee. As the respondent did not address this aspect, the court shall not dwell on the same.

On the remedies sought, on the claims for underpayment, the court has assessed the wage orders for the period of 2006 to the year 2016 and which apply to the claimant stating with Regulation of Wages (General) (Amendment) Order, 2006, of 1st May, 2006 where a driver in Nakuru had Ksh.311.00 daily minimum wage. Where the claimant was paid ksh.255.00 for 3 years in this period there was an underpayment of Ksh.56.00 per day.

With the conversion of such employment and payment on weekly basis and the claimant thus earning the benefits under the law following his continuous employment with the respondent, he was entitled to a monthly wage of Ksh.6, 471.00 per month. With the offered benefit of housing as required under section 31 of the Act, the claimant was well remunerated for the entire period of his employment with the respondent from the year 2007 to April, 2009.

For the period of May, 2010 to April, 2011 the minimum wage was Kshs. 8,400.00. the claimant was paid a daily wage of Ksh.300.00 all being Ksh.7,800.00 which is less Ksh.600.00 per month due to the claimant and all being ksh.7,200.00 for the period;

For the period May, 2011 to April, 2013 the minimum wage was Ksh.9,450.00. the claimant was paid Ksh.325.00 per day all being Ksh.8,450.00 which less Ksh.1,000.00 per month and for the 20 months the claimant is owed Ksh.20,000.00 for the period;

For the period of May, 2014 to April, 2015 the minimum wage was Ksh.13,646.40. the claimant was paid Ksh.400.00 per day all being

Ksh.10,400.00 per month which is less by Ksh.3,246.00 and is owed Ksh.38,952.00;

For the period of May, 2015 to April, 2017 the minimum wage was Ksh.15,646.00. the claimant was paid Ksh.575 per day all being Ksh.14,950.00 less Ksh.696 and for the period he is owed Ksh.8,352.00.

The claimant resigned on 1st July, 2017 and from May, 2017 to June, 2017 he was paid a daily wage of Ksh.575.00 all being Ksh.14,950.00 per month and the minimum wage was ksh.16,102.72 with the underpayment being Ksh.1,152.00. for this period the underpayment is Ksh.2,304.00.

In total the underpayments are Ksh.76,808.00.

For the claimant, the option to seek alternative employment outside the *blankets* work camp and option to resign for being allocated accommodation of corrugate iron sheets in Ravine does not make him due for underpayment of seek a house allowance. To do so would be to seek a double benefit from the employer who had provided housing and paid above the minimum wage Orders.

With the finding that the claimant's employment converted under the provisions of section 37 of the Employment Act, 2007 he became entitled to the benefits therein. The respondent has not produced any work records as to how the claimant was paid and despite Mr Ogolla testifying that he kept a log of the payments made to the claimant, such was not produced as required under section 10(6) and (7) of the Act. the claim for service pay is therefore justified for an employee treated as a casual employee and his statutory dues not paid.

Under section 49 of the Employment Act, 2007 the service pay due should be tabulated based on the last payable wage of Ksh.16,102.72 in accordance with Regulation of Wages (General) Citation (Amendment) Order, 2017 taking effect from 1st May, 2017. On such wage and for the 9 full years of service the claimant is 72,462.40 in service pay and in accordance with section 35 of the Employment Act, 2007.

The other claims made save for underpayments and service pay are found without merit.

Accordingly, judgement is hereby entered for the claimant for the payment of underpayments of ksh.76,808.00 and service pay at Ksh.72,102.72 and each party shall pay own costs. The payments made to the claimant shall be subject to the provisions of section 49(2) of the Employment Act, 2007.

Delivered at Nakuru this 26th day of September, 2019.

M. MBARU JUDGE

In the presence of:.....