



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1502 OF 2014
(Before Hon. Lady Justice Hellen S. Wasilwa on 26th September 2019)
WYCLIFFE SHIJEDI JETI.....CLAIMANT
VERSUS
MARTIN GATHUMBI.....RESPONDENT
JUDGMENT

1. The Claimant herein filed an Amended Statement of Claim filed in Court on 9th July, 2018, seeking the following reliefs:

a. A declaration that the Respondent's actions amounted to unfair Labour Practice.

b. The Claimant be and is hereby paid terminal benefits of Kshs. 886,867.21/- comprising of the following:

i. February 2014 Salary 8 days x 10,911.70

26. Working days Kshs. 3,357.45/-

ii. 2 yrs Annual leave x 10,911.70 Kshs. 21,843.40/-

iii. Lave travelling allowance in arrears Kshs. 3,000.00/-

iv. Service for 2 years Kshs. 10,911.70/-

v. Prorata leave 4 months x 3 days x 10,911.70

26 months Kshs. 5,036.17/-

vi. House allowance 10,911 x 15 x 28

100 Kshs. 45,826.20/-

vii. 20 Public Holidays x 2hrs x 12hrs x 24 months x 10,911.70

225hrs worked in 26 days Kshs. 558,679.04/-

viii. Underpayment of wages Kshs. 17,240.48 -

7,000x9 months (May 2013-January 2011) Kshs. 92,164.70/-

ix. Service 2 yrs x 10,911.70 x 18

26 working days Kshs. 15,108.51/-

x. 12 months compensation (12x10,911.70) Ksh.130,940.04/-

Total Amount Kshs. 886,867.21/-

c. The Respondent be and is hereby ordered to pay compensation to the Claimant equivalent to 12 months' gross salary.

d. The Respondent do pay costs of the Claim.

2. The Claimant states that he was employed by the Respondent on or about 29th August, 2011 as a Watchman, earning a monthly salary of Kshs. 7,000/=. The Claimant further contended that his salary was below the gazetted minimum wage and that the amount was never reviewed during the entire period he was under the Respondent's employment.

3. The Claimant further states that his salary was meant to be Kshs. 10,911.70 together with overtime payment of Kshs. 6,328.78 bringing the total to Kshs. 17,240.48 as per the Government Gazette Notice No. 197 of 1st May, 2013.

4. The Claimant avers that he reported to work guarding the Respondent's compound at 6.00 am and worked continuously until 6.30 pm including Saturdays without overtime pay. He further averred that he was housed by the Respondent.

5. It was the Claimant's contention that refusal by the Respondent to adjust his salary despite several requests was in blatant breach of the provisions of Article 41 of the Constitution of Kenya, 2010.

6. The Claimant further contends that poor working conditions and poor pay forced him to resign from his position in March 2014 and reported the matter to the Labour Office.

7. The Claimant further contended that his dismissal was contrary to the principals of natural justice and Section 41 of the Employment Act, 2007.

8. The Claimant however avers that he was terminated by the Respondent and aggrieved by the Respondent's decision to terminate him, he filed the instant claim seeking the aforesaid reliefs. He further urges this Honourable Court to enter Judgment in his favour in terms of the reliefs as sought in his Memorandum of Claim.

9. The Respondent through the firm of Kitheka & Company Advocates filed its Amended Statement of Response filed in Court on 3rd August, 2018 in which the Respondent denied having engaged the Claimant in the manner as alleged by the Claimant herein. The Respondent avers that he did engage the Claimant as a gardener at his premises on a need to need basis.

10. The Respondent further contends that the Claimant was duly paid for all work done at his premises by the Claimant and that he contended that there is no outstanding dues payable to the Claimant. He further avers that the Claimant ceased to present himself for work as a casual worker towards the end of 2013.

11. The Respondent urged this Honourable Court to dismiss the Claim filed herein with costs to the Respondent.

Evidence

12. The matter proceeded for hearing on 1st April, 2019 and 13th July, 2019 where both Claimant and Respondent testified as CW1 and RW1 respectfully.

13. CW1 testified that he worked for the Respondent until 8th February, 2014 when he was forced to resign as the conditions for work was not good as he was forced to work as a watchman, gardener and cleaner for little pay despite his protests to the Respondent herein.

14. CW1 stated that his salary was Kshs. 7,000 despite the fact that he was expecting a pay of over Kshs. 10,000 based on the Gazette Notice of 1st May 2013.

15. CW1 further testified that he was not paid his terminal dues at the time of separation and he urged the Court to allow his Claim as drawn.

16. On cross-examination, CW1 confirmed that he was issued with a job card that indicated his duties as "General Duties" and is dated 31st October, 2011 and that he was introduced to the Respondent by his brother one Samuel Amnabi Jeti. CW1 also confirmed that the Respondent resided in Nairobi's Garden Estate.

17. On further cross-examination, CW1 confirmed that he worked for the Respondent until 28th February, 2014 when he served the Respondent with a notice of resignation. He further confirmed that the Respondent despite the fact that he received the notice he did not sign the same.

18. On re-examination, CW1 stated that he was assigned to do guarding duties at the Respondent's residence from 6.00 am to 6.30 pm in addition to gardening and cleaning duties.

19. CW1 further contended that the Respondent failed to pay his terminal dues at the time of separation despite the fact that he reported the matter to the union.

20. RW1, the Respondent herein testified on 13/6/2019. It was his testimony that he was introduced to the Claimant by Janet (the Claimant's sister in law) and he was given the task of cutting the hedge and clean the compound.

21. RW1 further stated that he would call the Claimant for work when need arose and that when he (the Claimant) was not working for him (the Respondent) he was working at a neighbour's premises.
22. RW1 further testified that he paid the Claimant Kshs. 500/- per day when he worked for him. It was his further evidence that he did not employ a watchman at his compound as he had engaged G4S security to guard his compound and the estate also engaged security guards.
23. RW1 stated that he was never served with any of the Claimant's letters as alleged by the Claimant herein requesting for salary increments. RW1 further confirmed having been visited by members of a union he however stated that they did not serve him with any letter.
24. RW1 urged this Honourable Court to dismiss the instant Claim with costs as it is not true that the Claimant was his employee and therefore he is not entitled to the reliefs as sought in his Claim.
25. On cross-examination, RW1 stated that he had no record of when the Claimant worked for him. He also confirmed having given the Claimant the identification card for purposes of access into the estate.
26. On further cross-examination, RW1 stated that he currently has employed 3 workers whom he has issued with appointment letters. RW1 also stated that he had no record of any monies paid to Wycliffe (the Claimant) for work done. RW1 also confirmed having received the letter of resignation from the Claimant and ignored the same having not employed the Claimant.

Submissions by the parties

27. It is the Claimant's submission that indeed he was verbally employed by the Respondent on 29th August, 2011 as a watchman and did other additional chores as were assigned to him as evidenced by the Job Card attached to his Amended Statement of Claim at page 9.
28. The Claimant further submitted that he was not a casual employee as intimated by the Respondent herein as he was issued a Job Card by the Respondent, which is usually not a way of identification for casual employees and further that he was paid a monthly salary at the end of each completed month of service.
29. In conclusion, the Claimant urged this Honourable Court to allow his Claim as prayed having proved that he was employed by the Respondent herein.
30. The Respondent on the other hand submitted that the Claimant's case is doubtful as to whether he was employed by him and that his evidence is wanting.
31. The Respondent further submitted that the Claimant ought to have called another witness to support his assertion of his employment to the Respondent. The Respondent further contended that the Claimant failed to discharge the onus of establishing that indeed he was employed by the Respondent as a security guard as provided under Section 107 of the Evidence Act.
32. The Respondent further contends that the Claimant has not challenged the assertion that he (the Claimant) was employed as an occasional casual worker as envisaged under Section 18 (2) (a) of the Employment, Act, 2007.
33. The Respondent further submitted having proved that the Claimant was a casual employee engaged on a need to need basis and he is not entitled to the reliefs sought in his Amended Statement of Claim. For emphasis, the Respondent cited and relied on the decision in the case of **Rashid Mazuri Ramadhani & 10 Others Vs Doshi & Company (Hardware) Ltd & Another (2018) eKLR**.
34. The Respondent contended that the Claimant failed to avail evidence of continuous employment for a month despite insisting that his salary was Kshs. 7,000/-.
35. In conclusion, the Respondent urged this Honourable Court in absence of any evidence to support his Claim to dismiss the instant Claim with costs to the Respondent.
36. It is clear that on 1/1/2014, the Claimant tendered his resignation having worked for the Claimant for about 2 years. The Respondent despite employing the Claimant never issued him with any employment letter. They however issued him with a job card, which they have admitted and which is evidence of an employment relationship. The terms of the contract are not know in the absence of the appointment letter.
37. Section 10(7) of Employment Act states as follows:-
- “If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.**
38. In the circumstances, I will solely rely on the averments of the Claimant to deduce the contents of the employment contract. From the Claimant's evidence, his salary was Kshs.7,000/=.
39. The Claimant having resigned on his own volition, he is not entitled to notice pay. He is however entitled to his service pay = $\frac{1}{2} \times 7,000 \times 2 = 7,000/=$

40. I also award him leave for 2 years = $21/30 \times 7,000/= \times 2 = 9,800/=$.

41. The Claimant indicated he was housed by the Respondent and is therefore not entitled to house allowance.

42. The Claimant prayer for damages for unfair termination cannot also stand in view of my finding that the Claimant resigned himself.

43. The total awarded to the Claimant is therefore $7,000 + 9,800 = 16,800/=$

44. The Claimant is also entitled to costs of this case.

Dated and delivered in open Court this 26th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties