



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 194 OF 2017

(Before Hon. Justice Mathews N. Nduma)

BOAZ OTIENO OJENGO.....CLAIMANT

VERSUS

CHANAN AGRICULTURAL CONTRACTORS KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The suit was brought vide a memorandum of claim on 10th May 2017 praying for payment of terminal benefits set out under paragraph 14 of the memorandum of claim to wit underpayments; house allowance and leave allowance and maximum compensation for unlawful and unfair termination of employment. The claimant also seeks provision of certificate of service; interest and costs.
2. The respondent filed a memorandum of response to the claim on 23rd June 2017, in which the claim is denied.
3. The claimant (CW1) testified under oath in support of the particulars of claim and the respondent called RW1 to rebut testimony by CW1.

Determination

4. The issues for determination are:

- (a) Whether the employment of the claimant was for a valid reason following a fair procedure and
- (b) Whether the claimant is entitled to the reliefs sought.

Issue (a)

5. Evidence by CW1 is that he was employed as a tractor driver. That they were involved in building a factory foundation. That it was wet and difficult to fill up the area as it was next to a river. The claimant was dismissed verbally a day after the works started. CW1 testified that he was not given notice, notice to show cause or a hearing. CW1 testified that he earned Kshs. 9,000 per month. That he had no pay slip and NSSF and NHIF was not paid. That he was not paid house allowance. CW1 claims underpayment, house allowance and leave allowance.
6. Under cross examination the claimant testified that he was paid Kshs. 4,500 fortnightly. That Kshs. 9,000 was lower than minimum wage in the wage order. CW1 denied that he was overpaid. CW1 said he worked from 2011 to 2016.
7. RW1 Harman Peters testified that he was a supervisor of the claimant. That claimant and others stole fuel and were dismissed. That those who asked for pardon were reinstated. That claimant started working in 2016. RW1 did not know how the claimant was paid.
8. Under cross examination, RW1 stated that the claimant made a mistake. That claimant was not given a show cause letter. That claimant was not called to a disciplinary hearing. That they were given opportunity to explain but the claimant declined. That those who explained were pardoned and taken back. RW1 stated that he had no records for the claimant.

Determination

9. The issues for determination are:

(a) Whether the dismissal of the claimant was for a valid reason and done following a fair procedure.

(b) Whether the claimant has proved the terminal benefits sought in the memorandum of claim.

Issue (b)

10. The claimant did not provide concrete evidence before court to demonstrate on a balance of probabilities that he was underpaid, was not paid house allowance and was entitled to and was not paid leave allowance. The onus of proof in terms of Section 107 and 108 of the evidence Act, Cap 80 laws of Kenya is on he who alleges.

11. The court finds that the claimant failed to discharge the onus placed on him in that respect. The claim for the aforesaid reliefs is dismissed for want of proof.

Issue (a)

12. With regard to whether the claimant was dismissed from employment for a valid reason and in terms of a fair procedure, the claimant has demonstrated that he was verbally dismissed from work, without notice, notice to show cause and without a disciplinary hearing. The respondent violated *Sections 41, 43 and 45 of the Employment Act 2007*. RW1 failed to discharge onus placed on the respondent in terms of *Section 43 and 47(5) of the Employment Act, 2007*.

13. The court finds that the summary dismissal of the claimant was unlawful and unfair.

14. The claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Employment Act, 2007*.

15. The claimant had served the respondent as a tractor driver for a period of over five years between September 2010 and February 2016. The claimant was not compensated for loss of employment nor was he paid any terminal benefits. The claimant did not contribute to the dismissal. The claimant suffered loss and damage upon sudden loss of employment. The claimant was not given certificate of service to allow him get alternative employment.

16. The court awards the claimant equivalent of six (6) months salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. 54,000 and one month salary in lieu of notice in the sum of Kshs. 9,000. Total Kshs. 63,000.

17. Judgment is entered in favour of the claimant as against the respondent for equivalent of six (6) months salary in compensation for the unlawful and unfair termination of employment and notice pay in the sum of Kshs. 63,000.

18. Interest at court rates from date of judgment till payment in full.

19. Costs of the suit.

Judgment Dated, Signed and delivered this 24th day of October, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Odhiambo for Claimant.

Mr. Olel for Respondent.

Chrispo – Court Clerk