



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.442 OF 2016

BONIFACE KAMAU MACHARIA.....CLAIMANT

VERSUS

ROYAL GROUP INDUSTRIES KENYA LIMITED.....RESPONDENT

JUDGEMENT

The claim is premised on the facts that the claimant was employed by the respondent on 10th March, 2015 and until 15th March, 2016 but in the months of January to February, 2016 the respondent withheld the due wage on alleged misappropriation of funds and that he had failed to collect monies owed by customers. Despite giving an explanation his salary was not paid as due.

On 8th March, 2016 upon the payment of the salary arrears the claimant was served with a 7 days termination notice. There was no hearing or reasons given.

The claimant lodged a complaint with the labour officer where the respondent paid Ksh.28,322.00 alleging this to be for terminal dues and stating that the claimant had an annual performance contract which was not true. The letter was maliciously written to mislead the labour officer.

The claimant had been working as a sales executive earning a gross salary of ksh.42, 960.00 per month and would be at work for 84 hours for 6 days a week.

The claimant is seeking for the payment of his terminal dues;

Notice pay ksh.42, 960.00

Service pay ksh.21, 480.00

Overtime Ksh.126, 897.20;

Compensation;

Public holiday's ksh.55, 517.00;

Annual leave Ksh.42, 960.00

The claimant testified to support his claims that as a sales executive for the respondent he was required to traverse the regions of Nairobi, Kajiado, Kiambu and Machakos forcing him to work for long hours. His salaries for January and February, 2016 were not paid and he felt frustrated in his duties as there was no facilitation of movements. He was paid a salary and not a commission as the respondent has averred.

The claimant also testified that he took his leave days but had a balance of 9 days. He would be in the field from 8am to 6pm for 6 days a week and the overtime hours were not paid for.

The defence is that upon the employment of the claimant his work performance was found wanting and at the end of his probation period was served with 7 days' notice to terminate employment. Despite warnings on his outputs the claimant failed to improve and did not achieve his set targets.

The defence is also that the matter was reported to the labour officer where the respondent received advice and partly paid Ksh.28, 322.00 and which was deposited with the officer. There was no dismissal from employment as notice issued and the claims made are without basis.

No witness was called.

Both parties filed written submission.

Upon filing of a claim with the court, the employer is required to respond and file all the work records. Section 10(6) and (7) of the Employment Act, 2007 places this duty upon the employer as the custodian of the work records.

Where the records filed by the employer do not speak to the employment relationship, the employee has the right to challenge the same. Where these records are not challenged, the court is bound to rely on them unless there is good cause shown that they are a fraud, a forgery, a misrepresentation or used to circumvent the cause of justice.

In this case the defence was filed 3rd December, 2018 and the claimant served. There was no response to challenge the records of employment attached. Court shall rely of these records.

By notice dated 8th March, 2016 the respondent notified the claimant that his employment would terminate within 7 days on his probationary terms of employment and on the reasons that his work performance was inconsistent, he had failed to meet his set targets and alleged negligence in delivering his duties.

To the Memorandum of Claim, the claimant attached an employment contract which is undated and incomplete. At paragraph 14 the claimant avers that the subject contract was drafted with malice and he did not execute it.

It is however not clarified where the claimant sourced this contract if indeed it was *malicious* crafted by the respondent to defeat his rights in employment. What is clear to the court is that clause 7 of the contract related to the claimant being placed on probation for 3 months from January, 2016.

Effectively probation period ended in April, 2016 on a contract that was envisaged to end in January, 2017. Termination of employment was vide notice dated 8th March, 2016 within the probationary period and which allowed 7 days' notice or payment in lieu thereof.

Section 42 of the Employment Act, 2007 allowed employment on probationary terms as follows;

42. Termination of probationary contracts

(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.

(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).

(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.

In **Narry Philemons Onaya-Odeck versus Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR** while addressing the issue of probationary contract, the court held that;

*The emphasis here is that the employer has the right to terminate the employment of an employee during the probation period on short notice or upon payment in lieu thereof. However, such probation period cannot be for more than 6 months or for a period as agreed by the parties and where the employer finds the need to have the probation period extended beyond the agreed period, this must be done with the agreement of the employee. In this regard, the court in **Peris Nyambura Kimani versus Dalbit Petroleum Ltd, Petition No.63 of 2013** held as follows;*

Section 42 therefore becomes one of the most outstanding provisions of the law and part of the new thinking in employment and labour relations in Kenya. That an employee under probation has to ensure good performance at all times as such an employee's employment can be terminated legally within this period without hearing, can be terminated within 7 days or less or be terminated immediately upon payment of 7 days wages. This is exceptional for the law to be couched in this manner.

In this case, without contrary evidence to support the claim that there was employment outside the records submitted by the respondent as the employer, the court finds termination of employment took place within the terms and conditions thereof and within the probationary terms and thus lawful.

The claim for notice pay for one month whereas the claimant received 7 days in accordance with the probationary terms of his contract is without basis. Such is not available.

On the claim for overtime pay, the claimant pleaded under paragraph 19 that he would work for 6 days and 84 hours each week creating an overtime work of 32 hours each week. In his evidence he testified that he would report to work at 8am and depart at 6pm for 6 days each week. Such translates to approximately 3 overtime hours all at 18 hour each week.

The claimant also testified that as a sales executive he would traverse the regions of Nairobi, Machakos, kajiado, Kiambu and environs. He however failed to clarify his time tabulations and the alleged overtime work.

Putting thee maters into perspective, account required to be taken. The pleadings and evidence being at variance, these claims are exaggerated. Such are declined.

On the claims for work during public holidays, noting the period of employment and the probation period covering 2 months and a half taking into account notice dated 8th March, 2016 which the claimant acknowledge receipt, without a chronology of which public holidays are subject to the claim of ksh.55, 517.00 to award under this head would be to visit injustice on the other party.

On the claim for pay for annual leave, the claimant testified that he had taken his annual leave and pending were 9 days. For the period of 4th January, 2016 to 8th March, 2016 the claimant was entitled to 7 days of annual leave under the provisions of section 28 of the Employment Act, 2007 read together with the employment contract at clause 19.

The claimant has since admitted to having been paid ksh.28, 322.00 and although there are no details as to what such payment related to, it must have related to a generous settlement.

Accordingly, the claims hereby are found without merit and are hereby dismissed. Each party shall meet own costs.

Delivered at Nakuru this 14th day of November, 2019.

M. MBARU

JUDGE

In the presence of:

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